Decision 09-04-032 April 16, 2009

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Promote Policy and Program Coordination and Integration in Electric Utility Resource Planning.	Rulemaking 04-04-003 (Filed April 1, 2004) (QF Issues)
Order Instituting Rulemaking to Promote Consistency in Methodology and Input Assumptions in Commission Applications of Short-Run And Long-Run Avoided Costs, Including Pricing for Qualifying Facilities.	Rulemaking 04-04-025 (Filed April 22, 2004) (QF Issues)

DECISION DENYING IN PART, AND GRANTING IN PART, THE JOINT PETITION FOR MODIFICATION OF DECISION 08-07-048 FILED BY QF PARTIES

1. Summary

This decision addresses a joint petition filed by the Independent Energy Producers Association (IEP), the Cogeneration Association of California (CAC), the Energy Producers and Users Coalition (EPUC) and the California Cogeneration Council (CCC) (collectively, QF Parties) to modify Decision (D.) 08-07-048. We deny QF Parties' request to suspend the November 2008 filings for retroactive application of the Market Index Formula (MIF). However, we agree that the procedures for setting an earlier implementation date for any newly-adopted short-run avoided cost (SRAC) formula should be clarified. Accordingly, this decision modifies D.08-07-048 and sets forth the rules for those

rare instances when a newly-adopted short-run avoided cost pricing formula might be subject to an earlier effective date. In particular, we make clear that a previously adopted pricing formula is presumed to remain lawful until it is changed by a subsequent order of this Commission and that this presumption of lawfulness can be rebutted only by a showing, supported by substantial evidence, that the previously adopted formula is resulting in prices that persistently and systematically violate PURPA. Further, this decision establishes requirements in order for an earlier implementation date to be considered and limitations on this earlier date. These modifications provide the regulatory certainty QF Parties maintain is necessary to ensure continued operation of QFs in California.

2. Background

In Decision (D.) 07-09-040, we adopted specific policies and pricing mechanisms applicable to the purchase of energy and capacity from qualifying facilities (QFs) by Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE) and San Diego Gas & Electric Company (SDG&E) (collectively, the utilities or IOUs). Among other things, D.07-09-040 revised the methodology for calculating SRAC prices. This revised formula, the MIF, replaced the Transition Formula adopted in D.96-12-028, as modified by D.01-03-067.[1] The MIF was to be applied prospectively "to ensure that SRAC

[1] D.01-03-067 revised SCE's Transition Formula by replacing the fixed factor with a dynamic factor. It also replaced the Topock gas index used in the Transition Formula for all three utilities with a gas index based on Malin, plus intrastate gas transportation. SCE's revised Transition Formula is more commonly referred to as the Modified Formula.

prices continue to reflect utility avoided cost in the changing electricity markets in California." (D.07-09-040, at p. 9.)

Applications for rehearing of D.07-09-040 were filed by various parties, including a joint application for rehearing filed by PG&E, SCE, SDG&E, The Utility Reform Network and the Division of Ratepayer Advocates (collectively, Joint Parties). Among other challenges, Joint Parties asserted that D.07-09-040 erred by failing to order retroactive application of the MIF. All of the applications for rehearing were addressed in D.08-07-048, which modified D.07-09-040 and denied rehearing of D.07-09-040, as modified. In response to Joint Parties' assertions concerning retroactive application of the MIF, D.07-09-040 was modified to permit the IOUs to seek retroactive application of the MIF. Any requests, however, were to be filed by November 4, 2008. D.08-07-048 also included provisions to permit the IOUs to file an application for retroactive adjustment of SRAC prices on a going forward basis. Such an application would be limited to two years from the beginning of any alleged period of overpayment. (D.08-07-048, at p. 19 [Ordering Paragraph (OP) 1.(f)].)

On October 3, 2008, the QF Parties filed a joint petition (Petition) to modify D.08-07-048.[2] QF Parties request that the Commission eliminate the process adopted in D.08-07-048 that would permit the IOUs to file an application for retroactive review of payments made to the QFs. Responses opposing the Petition were filed by SCE, PG&E and SDG&E.

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[2] On September 3, 2008, CAC and EPUC filed a joint application for rehearing of D.08-07-048. On January 29, 2009, this joint application for rehearing was denied in D.09-01-039.

3. Discussion

SCE's comments to the proposed alternate decision of Commissioner Grueneich, which was ultimately adopted as D.07-09-040, requested that the MIF be applied retroactively to at least 2004. In D.07-09-040, the Commission addressed SCE's request by stating:

> "updating the SRAC formula to better reflect changes in the energy market does not, by itself, indicate that SRAC prices under the prior formula were in violation of PURPA. Furthermore, the record in this proceeding does not support a conclusion that the Modified Formula yielded prices that exceed utility avoided costs or systematically violated PURPA." (D.07-09-040, at p. 9.)

Joint Parties' rehearing application alleged that the Commission's rejection of retroactive application of the MIF was both not supported by the administrative record or findings of fact and conclusions of law and contrary to *Southern Cal. Edison Co. v. Public Utilities Com.* (2002)101 Cal.App.4th 982 (*Edison II*) and *Southern Cal. Edison Co. v. Public Utilities Commission* (2005) 128 Cal. App. 4th 1 (*Edison III*). To address this challenge, the Commission, in D.08-07-048, modified D.07-09-040 to provide the IOUs an opportunity to seek retroactive application of the MIF. D.08-07-048 also adopted procedures for future adjustments to SRAC payments. Finally, the decision stated that an application for retroactive true-up must:

> provide both the time period for which [the IOU] believes retroactive adjustment is warranted, and evidence demonstrating that the IOU's method is more accurate than the method the Commission has already reviewed and adopted for determining avoided costs for that particular time period. For any periods already in the past, the IOUs will have until November 4, 2008 to file an application. Going forward, the IOUs will have 2 years from the beginning of any alleged period of overpayment to file an application. (D.08-07-048, at p. 19 (OP 1.f.).)

QF Parties request that the Commission reverse its determinations and modify D.08-07-048 to: (1) suspend the November 2008 IOU filings on retroactive application of the MIF; and (2) revise the procedures for any future IOU filings requesting adjustments to SRAC payments. They contend that retroactive application of the MIF is unwarranted, as the Commission had already made a determination that payments under the Transition Formula did not exceed utility avoided cost. (Petition, p. 5.) The Petition further presents various reasons why QF Parties believe the modifications are inconsistent with *Edison II* and *Edison III*, as well as prior Commission precedent on avoided costs. Finally, the Petition maintains that retaining the provisions adopted in D.08-07-048 concerning future adjustments of SRAC payments would both make development of new QF capacity commercially impossible and impede the ability of existing QFs to continue to operate.

As discussed below, we deny QF Parties' request to suspend the November 2008 IOU filings on retroactive application of the MIF. However, we find that the procedures adopted in D.08-07-048 should be clarified to address the concerns voiced by the QFs about the need for regulatory certainty with respect to SRAC pricing. Accordingly, we shall modify D.08-07-048, as discussed below.

3.1. Retroactive Application of the MIF

Under the Federal Energy Regulatory Commission's (FERC) rules implementing the Public Utilities Regulatory Policies Act[3] (PURPA), state regulatory commissions are given broad authority to establish the avoided cost

[3] 16 U.S.C. § 824a-3.

payments to be paid by the IOUs to QFs. (18 C.F.R. §§ 292.301-292.304.) This payment, however, "may not exceed the incremental cost to the electric utility of alternative electric energy." (D.07-09-040, at p. 13 (citation omitted).) Further, if an IOU requests retroactive adjustment of SRAC payments, the Commission must consider this request and make a determination on the evidence presented. (*See Edison II*, *supra*, 101 Cal.App.4th, at p. 999.)

In D.07-09-040, we found that "SRAC energy payments under the Transition Formula have exceeded market prices, and potentially avoided costs, on occasion." (D.07-09-040, at p. 144 (Finding of Fact (FOF) 11).) Nonetheless, the record did not support a conclusion that there was a persistent, systematic violation of PURPA. (*Id.* at p. 9.) Joint Parties' rehearing application maintained that SRAC payments under the Transition Formula systematically exceeded the IOU's avoided costs as of 2004. Accordingly, Joint Parties asserted that the MIF should be applied retroactively. (Joint Parties' Rehearing Application, pp. 14-15.) We believe that Joint Parties should be provided the opportunity to present evidence to support their request for retroactive application of the MIF, and that this Commission should consider and make a final determination based on the evidence.

QF Parties argue that the Commission in D.07-09-040 already reached a determination that the MIF should not be applied retroactively based on evidence in the record. On this basis, the QF Parties in their Petition ask the Commission to reaffirm this earlier determination and vacate the provisions of D.08-07-048 that gave the utilities an opportunity to file applications seeking retroactive application of the MIF. We decline to do so. However, we agree with the QF Parties that D.08-07-048 in other respects should be modified. These modifications are described below.

QF Parties contend that the Commission has a policy of not ordering retroactive true-up of SRAC payments, and that allowing consideration of retroactive true-up is both a departure from this policy and unsupported by any authority. Specifically, they allege retroactive application of the MIF is unlawful under *Edison II* and *Edison III*. (Petition, p. 6.) We disagree.

Edison II and *Edison III* are clear that if the Commission, in the process of adopting a new SRAC formula, finds that prices paid under the previously-adopted formula resulted in payments to QFs that persistently and systematically violated PURPA, the Commission in these circumstances has both the authority and the responsibility under PURPA to consider retroactive application of the new formula. To that end, *Edison II* states:

> One of the reasons for the dramatic growth of the QF industry was the Commission's policy decision in 1980 to set the maximum rate permissible under PURPA section 210(b), i.e., a full avoided cost rate. While such rates do not result in direct benefits to ratepayers, they nevertheless are fully consistent with PURPA section 210(b)'s requirement that the rates be just and reasonable to ratepayers and in the public interest. Nevertheless, PURPA does not permit either the Commission, or the States in their implementation of PURPA, to require a purchase rate that exceeds avoided cost. (citation omitted). *Here by failing to make a decision as to whether the SRAC prices should be applied retroactively, the Commission ran afoul of the Congressional mandate that public utilities not pay QFs more than the avoided cost.*
>
> It may be that the evidence will show the SRAC prices were correct for the period of December 2000 through March of 2001. If the Commission makes this determination and it is based on substantial evidence, that will end the matter. However, if the evidence shows that the formula…should have been applied retroactively to arrive at a more accurate SRAC, then it is the Commission's duty to apply it retroactively. The Commission does not have the power to thwart Congressional intent by having a policy inconsistent

> with that set forth in PURPA. (Citation omitted.) (*Edison II*, *supra*, 101 Cal.App.4th at p. 998-999 (emphasis added).)

In *Edison III,* the Court reiterated this requirement and also noted:

> To the extent that Edison's avoided costs are exceeded in the SO1 contracts being required of Edison under the current SRAC formula, the CPUC attempted to ameliorate the impact by pronouncing that if a decision in D.04-04-025 shows a systematic violation of PURPA, then Edison is to be given credit for any PURPA violations by reason of Edison being required to enter into SO1 contracts with QFs for such violations. (*Edison III*, *supra*, 128 Cal.App.4th at p. 12.)

Consistent with *Edison II* and *Edison III,* if a party alleges that there has been a persistent and systematic a violation of PURPA under a previously approved pricing formula and provides evidence to support its allegations, then the Commission is obligated to consider not only prospective changes to the existing SRAC formula, but also to apply any newly-adopted SRAC formula retrospectively, if warranted.

We emphasize, however, that adoption of a pricing formula which we believe better approximates avoided cost does *not* prove that the application of the then-existing formula had resulted in prices that persistently and systematically violated PURPA. On the contrary, the then-existing pricing formula is presumed to remain lawful until such time as it is changed. This is a rebuttable presumption, and can only be rebutted by a factual showing that application of the then-existing formula had resulted in SRAC prices that persistently and systematically violated PURPA. Only if the proponent can make this substantial showing, and rebut the presumption, would the Commission consider applying a newly-adopted SRAC formula retrospectively.

While IOUs in the present docket have been given the opportunity to seek retroactive application of the MIF, they bear the burden of demonstrating that retroactive true-up is warranted. They must produce evidence that the

Transition Formula resulted in payments to the QFs that persistently and systematically violated PURPA, in order to overcome the presumption that this formula remained lawful until it was changed. They cannot satisfy this burden simply by showing "the magnitude in reduction in SRAC energy payments that would have resulted if the new MIF pricing formula were applied retroactively." (Joint Parties' Rehearing Application, p. 16.) Rather, the IOUs must state the time period for which the MIF should be applied retroactively, and submit evidence which demonstrates that prior application of the Transition Formula resulted in SRAC payments that persistently and systematically exceed its avoided costs. Absent evidence to overcome the presumption and meet this standard, an application seeking retroactive application of the MIF shall be dismissed with prejudice.

We previously recognized that the IOUs should have an opportunity to seek retroactive application of the MIF for periods prior to September 20, 2007, (the date D.07-09-040 was voted out). To provide certainty and closure on this matter, in D.08-07-048, we allowed the IOUs to file any applications by November 4, 2008.

On November 4, 2008, SCE filed an application seeking retroactive application of the MIF between July 2003 and July 2008. This request is being considered in Application (A.) 08-11-001. SCE's application was filed under the process authorized in D.07-08-048. In light of the clarifications we have made here concerning the evidentiary showing required to justify a retroactive application of the MIF, SCE may file an amended application, if it wishes, no later than 20 days after this decision is issued.

3.2. Procedure for Future Adjustments to SRAC Payments

QF Parties contend that the procedures adopted in D.07-08-048 to consider future adjustments to the then-existing SRAC methodology will produce regulatory uncertainty by creating an endless cycle of continuous re-consideration of any adopted SRAC methodology. This, they contend, will frustrate finality of any SRAC determination and jeopardize the ability of QFs to obtain financing and to continue operations. (Petition, pp. 2 and 12.) Therefore, QF Parties request that the procedures be clarified and propose procedural requirements for any future IOU filings requesting adjustments to previous SRAC payments. (Petition, p. 12 and Attachment B.)

We believe the procedures adopted in D.08-07-048 for future requests seeking adjustment of prior SRAC payments reflect our obligation to ensure compliance with PURPA and are consistent with FERC Regulations and our existing policy. (*See, generally*, 18 C.F.R. § 292.305.) However, we are sympathetic to the QF Parties' concerns, and agree certain modifications are warranted to achieve the effective use of Commission resources and provide regulatory certainty to both QFs and IOUs that we intended in D.08-07-048. (D.08-07-048, p. 19 (OP 1.f.).)

We shall modify D.08-07-048 to provide more clarity and certainty concerning future proceedings to consider adjustments of prior SRAC payments. However, we decline to adopt the procedures proposed in the QF Parties' Attachment B. Certain proposed procedures are problematic. For example, the QF Parties propose that the IOUs' burden of proof meet a "clear and convincing" evidentiary standard. The correct evidentiary standard applied to applications before this Commission is "substantial evidence in light of the whole record."

(*See,* Pub. Util. Code, § 1757, subd. (a).) Similarly, the Court in *Edison II* and *Edison III* also note that the Commission's determination should be made based on "substantial evidence." (*Edison II, supra.,* 101 Cal.App.4th at p. 999; *Edison III, supra*., 128 Cal.App.4th, at p. 12.)

In addition, Attachment B proposes that "the established avoided cost shall not be modified until full implementation of any order establishing a new avoided cost." (Petition, Attachment B, p. 2.) This issue is under consideration in the outstanding petition for modification filed by CCC concerning the effective date of the MIF. Thus, we will not address that issue here. The QF Parties also fail to fully explain why the proposed procedures are reasonable and should be adopted.

The modifications adopted in this decision balance the California Court of Appeal, Second Appellate District's requirement that requests for retroactive implementation of a newly adopted avoided cost formula must be considered, with the need to provide regulatory certainty to QFs operating in California. We are mindful that, in order to ensure stability in California's electricity market, it is critical that prices paid for electricity in price-regulated wholesale transactions as a general rule should not be subject to after-the-fact changes imposed by the regulatory authority. QFs should be able to expect that, when they sell their product at prices this Commission has duly fixed after a full regulatory process, absent extraordinary circumstances there should be no after-the-fact adjustments made to such prices. In the unusual case in which the prices might be subject to retroactive adjustment, moreover, it is essential that the seller be on notice of this prospect at the time the sale is made.

The modifications to D.08-07-048 adopted in this decision shall apply to: (1) future IOU applications seeking adjustments to the then-existing SRAC

formula and an earlier implementation date of any newly-adopted SRAC formula; and (2) future rulemakings which result in the adoption of a new SRAC formula. These procedures establish the process for adjusting prior SRAC payments by allowing the implementation date of any newly-adopted SRAC formula to be set earlier than the date the formula is adopted, subject to the following restrictions:

1. Presumption of Lawfulness of Existing SRAC Formula.

   The existing SRAC formula adopted by the Commission shall be presumed to remain lawful until such time as it is changed by a Commission decision. Accordingly, unless this presumption is rebutted by substantial evidence, any newly-adopted formula will be effective no earlier than the date of the decision adopting the new formula.

2. Requests for an Earlier Implementation Date.

   The Commission will entertain requests that the implementation date of a newly-adopted SRAC formula be earlier than the date it is adopted. For applications, the request for an earlier implementation date must be made at the time the application is filed. For rulemakings, the request must be made as part of comments to the Order Instituting Rulemaking. (See Rule 6.2 of the Commission's Rules of Practice and Procedure.) This requirement shall ensure that commercial parties have notice during the pendency of the proceeding that any prices being paid may be subject to after-the-fact adjustment.

3. The Proponent's Showing: Prima Facie Case.

   A party seeking an earlier implementation date for any newly-adopted SRAC formula must submit, along with its request, evidence demonstrating that current use of the then-existing SRAC formula has resulted in payments to QFs that persistently and systematically violate PURPA. A mere request, unaccompanied by substantial evidence, will result in any newly-adopted SRAC formula being effective no earlier than the date it is implemented.

4. Earliest Implementation Date for Any Newly-Adopted SRAC Formula.

   The earliest effective date the Commission will consider for any newly-adopted SRAC methodology will be the date the request for an earlier implementation date is made. In the case of an application by one of the IOUs, this will be the date the IOU's application is filed, or the date another party to the application makes the request. In the case of a rulemaking, this will be the date that a request for early implementation is made in comments to the Order Instituting Rulemaking.

5. Notice: Inclusion of Earlier Implementation Date in Scoping Memo.

   Assuming a party makes a timely request for an earlier implementation date of a newly-adopted SRAC formula and provides evidence to support its request, then consideration of an earlier implementation date will be included in the Scoping Memo. If consideration of an earlier implementation date is not included as an issue in the Scoping Memo, any newly-adopted SRAC formula will be implemented no earlier than the date it is adopted.

6. 18-Month Limitation.

   A newly-adopted formula will be implemented no earlier than eighteen (18) months prior to the date a decision adopting the new formula is issued, or the date a party makes a timely request for an earlier implementation date, whichever comes first. This limitation shall not apply where the party opposing an earlier implementation date is shown to have engaged in malfeasance or dilatory conduct that results in prolonging the proceedings unnecessarily.

In adopting these procedures, we are guided by Section 206 of the Federal Power Act (FPA), which limits the earliest refund effective date for a complaint alleging unreasonable rates as the date the complaint is filed and limits the refund period to fifteen (15) months. (16 U.S.C. § 824e, subd. (b) & (e).) Although these principles do not apply directly to QFs, we believe that adoption of similar limitations when considering an earlier implementation date for any

newly-adopted SRAC methodology is both reasonable and consistent with PURPA.

We find that the clarifications and modifications explained above balance our concerns with respect to Commission resources and the need to provide regulatory certainty to the QFs and IOUs. These procedures should also ensure all parties have adequate notice and similar expectations regarding the evidentiary requirements and true-up periods.

In comments to the ALJ's Proposed Decision (PD), the IOUs assert that such procedures may effectively foreclose their ability to seek application of the MIF for the time period between the effective date of D.07-09-040 and the date a resolution approving the joint IOU Tier 3 advice letter is issued. PG&E and SDG&E state that they had relied on the two-year statute of limitations provided in D.08-07-048 when deciding to not file an application seeking application of the MIF between September 20, 2007, and November 8, 2008. Accordingly, they maintain that the clarifications in the PD change the rules "after-the-fact" and violate their due process rights.

We agree that if the utilities had relied on the two-year limitation provided in D.08-07-048, it would be unfair to now foreclose their ability to seek retroactive application of the MIF for the time period between the implementation date of D.07-09-040 and the implementation date of the MIF. However, there is a pending petition for modification of D.07-09-040 filed by CCC concerning the implementation date of the MIF, and our resolution of that petition could result in this unintended consequence. Without prejudging the outcome of that petition, we shall provide the IOUs the opportunity to file an application to apply the MIF as of September 20, 2007 (the effective date of D.07-09-040) if it is determined that the implementation date of the MIF is some date

other than September 20, 2007. Accordingly, if it is ultimately determined that the implementation date of the MIF is some date other than September 20, 2007, the IOUs may file an application seeking application of the MIF back to September 20, 2007 within 45 days after that decision is issued. We remind the IOUs that the Transition Formula is presumed to be valid until the implementation date of the MIF. Therefore, if an application is filed, it must include evidence which demonstrates that application of the Transition Formula had resulted in SRAC payments that persistently and systematically exceed its avoided costs. Absent evidence to overcome the presumption and meet this standard, such application shall be dismissed with prejudice.

4. Comments on Proposed Decision

The proposed decision of the ALJ was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on January 6, 2009, and reply comments were filed on January 12, 2009, by PG&E, SCE, SDG&E, IEP and jointly by CAC/EPUC and CCC. The decision has been revised, as appropriate, to reflect the comments and reply comments received.

5. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Amy C. Yip-Kikugawa is the assigned ALJ in both proceedings.

Findings of Fact

1. The MIF adopted in D.07-09-040 replaced the Transition Formula adopted in D.96-12-028, as modified by D.01-03-067, as the methodology for calculating the SRAC energy price that the IOUs pay QFs.

2. D.08-07-048 modified D.07-09-040 to permit the IOUs to seek retroactive application of the MIF and established procedures to permit the IOUs to file an application for retroactive true-up of SRAC prices on a going forward basis.

3. The IEP, the Cogeneration Association of California, the Energy Producers and Users Coalition and the QF Parties filed a joint petition (Petition) to modify D.08-07-048.

4. PURPA and the FERC rules implementing PURPA require state commissions to ensure that SRAC payments do not exceed a utility's avoided cost.

5. The procedures adopted in D.08-07-048 were intended to provide regulatory certainty to both QFs and IOUs and to address our concerns with respect to Commission resources.

6. The procedures adopted in D.08-07-048 concerning retroactive adjustment of SRAC prices are unclear and should be modified.

7. Under Section 206 of the Federal Power Act, the earliest refund effective date for a complaint alleging unreasonable rates is the date the complaint is filed.

8. Under Section 206 of the Federal Power Act, refund periods are generally limited to 15 months.

9. Pub. Util. Code § 1701.5(a) requires ratesetting cases to be resolved within 18 months after the scoping memo is issued.

Conclusions of Law

1. QF Parties' petition for modification should be denied in part and granted in part.

2. In connection with its obligations under PURPA, the Commission must order retroactive true-up of SRAC prices if it determines that it is warranted to ensure compliance with PURPA.

3. A party seeking an earlier implementation date of the MIF bears the burden of proving that SRAC payments prior to the MIF's implementation date had resulted in a persistent and systematic violation of PURPA.

4. It would be reasonable to require IOUs seeking retroactive application of the MIF to file their request by November 4, 2008.

5. It would be unreasonable to adopt QF Parties' proposed procedures for future adjustments to SRAC payments.

6. The scoping memo in any proceeding considering adjustments to the then-existing SRAC methodology should state whether an earlier implementation date of any newly-adopted SRAC methodology will be an issue to be considered further in the proceeding.

7. It would be reasonable to set the earliest implementation date of any newly adopted SRAC methodology to be the date a request is made for early implementation of any new formula, so that parties to commercial transactions are on notice that early implementation is being considered.

8. It would be reasonable to set the maximum period for retroactive implementation of a newly-adopted SRAC methodology to not exceed 18 months, unless parties opposing the earlier implementation date are found to have unnecessarily delayed the proceeding.

9. There is a rebuttable presumption that the then-existing SRAC methodology is valid until a new methodology is implemented.

10. It would be reasonable to allow SCE to amend A.08-11-001 in light of the clarifications adopted in this decision.

11. The clarifications in this decision could unfairly foreclose the IOUs from seeking application of the MIF from the implementation date of D.07-09-040 to the implementation date of the MIF.

O R D E R

IT IS ORDERED that:

1. The joint Petition for Modification of Decision (D.) 08-07-048 filed on October 3, 2008, by the Independent Energy Producers Association, the Cogeneration Association of California, the Energy Producers and Users Coalition and the California Cogeneration Council is denied in part and granted in part, as discussed herein.

2. D.08-07-048 is modified as follows:

   a. On page 7, Section II.D., "Retroactive true-up of SRAC energy payments" is deleted and replaced with the following:

      D. Retroactive true-up of SRAC energy payments

      The Joint Parties next allege that we erred in failing to order a retroactive true-up of SRAC energy prices in D.07-09-040. The Joint Parties point to page 9 of D.07-09-040, where the Commission states that the Decision "updates the methodology for calculating SRAC energy prices on a prospective basis only, to ensure that SRAC prices continue to reflect utility avoided cost in the changing electricity markets in California." (Joint Parties' Reh. App., p. 14.) The Joint Parties also refer to our statement that "the record in this proceeding does not support a conclusion that the [SRAC transition formula] yielded prices that exceed

utility avoided costs or systematically violated PURPA," and allege that this determination is not supported by record evidence and is not reflected in sufficient findings and conclusions as required by Section 1705. (Joint Parties Reh. App., pp. 14-15.)

We address this argument by modifying D.07-09-040 to permit an IOU to request application of the MIF for periods prior to the effective date of the Decision. An IOU seeking retroactive application of the MIF will have until November 4, 2008 to file its application. In its application, the IOU must state the time period for which the MIF should applied retroactively and demonstrate that application of the Transition Formula during that time period had resulted in SRAC payments that persistently and systematically exceed its avoided costs in violation of PURPA. We remind the IOUs that prior to adoption of D.07-09-040, SRAC prices under the Transition Formula are presumed to properly reflect utility avoided cost. Therefore, the IOUs bear the burden of presenting evidence to the contrary. This burden is not met by simply showing "the magnitude in reduction in SRAC energy payments that would have resulted if the new MIF pricing formula were applied retroactively." (Joint Parties' Rehearing Application, p. 16.)

Consistent with our obligation under PURPA to ensure that SRAC payments reflect utility avoided cost, we also modify D.07-09-040 to include procedures for future applications and rulemakings considering changes to the then-effective SRAC methodology. Going forward, the following procedures shall be followed:

1. For applications seeking adjustment of the SRAC methodology, the earliest implementation date for any newly adopted SRAC methodology shall be the date the application is filed. The applicant (in its application), or a party (in response to the application) must specifically request that an earlier implementation date be applied to any revised SRAC methodology adopted in the proceeding, and include substantial evidence demonstrating that current application of the ten-existing SRAC methodology has resulted in a persistent and

systematic violation of the PURPA. The maximum period for retroactive implementation of a newly-adopted SRAC price will be eighteen (18) months from the date the request is made, except where the party opposing the earlier implementation date is shown to have engaged in malfeasance or dilatory conduct that results in prolonging the proceeding unnecessarily. Unless an earlier implementation date is requested and supporting evidence provided at the time the application is filed, any newly-adopted SRAC methodology shall only be effective prospectively. Any proceeding considering an earlier implementation date of a newly-adopted SRAC methodology shall include this issue in the scoping memo.

2. For Commission rulemakings that address the then-existing SRAC methodology, a request for an earlier implementation date must be made as part of comments to the Order Instituting Rulemaking and supported by substantial evidence demonstrating that current application of the then-existing SRAC methodology has resulted in a persistent and systematic violation of PURPA. If such a request is made, the earliest implementation date for any newly-adopted SRAC methodology would be the date the request is filed. The maximum period for retroactive implementation of a newly-adopted SRAC price will eighteen (18) months from the date the request is made, except where the party opposing the earlier implementation date is shown to have engaged in malfeasance or dilatory conduct that results in prolonging the proceeding unnecessarily. Any rulemaking addressing the then-existing SRAC methodology shall state in the scoping memo whether an earlier implementation date of any newly-adopted SRAC methodology is an issue to be considered further in the proceeding. Unless consideration of an earlier implementation date is in the scope of the rulemaking, any newly-adopted SRAC methodology shall only be implemented prospectively.

We remind parties that it is presumed that the then-existing SRAC methodology is valid until a new methodology is approved and implemented. Accordingly, an earlier implementation date for any newly-adopted SRAC

methodology shall only be applied if evidence in the record demonstrates that the then-existing SRAC pricing methodology has systematically and persistently violated PURPA.

b. On page 19, Ordering Paragraph 1.f. is deleted and replaced with the following:

> The contract terms and pricing in this decision apply specifically to expired, expiring and new QF contracts. Other than updating the SRAC formula and posted capacity prices, we do not change existing QF contracts. Furthermore, this decision updates the methodology for calculating SRAC energy prices on a prospective basis only, to ensure that SRAC prices continue to reflect utility avoided cost in the changing electricity markets in California. In comments, SCE has requested that the adopted MIF be applied retroactively. However, updating the SRAC formula to better reflect changes in the energy market does not, by itself, indicate that SRAC prices under the prior formula were in violation of PURPA. Furthermore, the Modified Formula is presumed valid for all periods prior to the implementation of the MIF and the record in this proceeding does not contain evidence rebutting this presumption. Nonetheless, consistent with *Edison II* and *Edison III,* should a party believe retroactive review of the Modified Formula is necessary to ensure compliance with PURPA, it should file an application. In the application, the IOU must specify the time period for which the IOU believes SRAC payments under the Modified Formula exceeded its avoided costs and substantial evidence demonstrating that application of the Modified Formula had resulted in SRAC payments that persistently and systematically over time exceed the IOU's avoided costs in violation of PURPA. If this showing is not made, the application shall be dismissed with prejudice. An IOU seeking retroactive application of the MIF will have until November 4, 2008 to file its application.

Going forward, we adopt the following procedures for applications and rulemakings considering adjustments to the then-effective SRAC methodology:

1. For applications seeking adjustment of the SRAC methodology, the earliest implementation date for any newly adopted SRAC methodology shall be the date the application is filed. The application must specifically request that an earlier implementation date be applied to any revised SRAC methodology adopted in the proceeding, and include substantial evidence demonstrating that current application of the then-existing SRAC methodology has resulted in a persistent and systematic violation of PURPA. The maximum period for retroactive implementation of a newly-adopted SRAC price will be eighteen (18) months from the date the request is made, except where the party opposing the earlier implementation date is shown to have engaged in malfeasance or dilatory conduct that results in prolonging the proceeding unnecessarily. Unless an earlier implementation date is requested and supporting evidence provided at the time the application is filed, any newly-adopted SRAC methodology shall only be effective prospectively. Any proceeding considering an earlier implementation date of a newly-adopted SRAC methodology shall include this issue in the scoping memo.

2. For Commission rulemakings that address the then-existing SRAC methodology, a request for an earlier implementation date must be made as part of comments to the Order Instituting Rulemaking and supported by evidence demonstrating that current application of the then-existing SRAC methodology has resulted in a persistent and systematic violation of PURPA. If such a request is made, the earliest implementation date for any newly-adopted SRAC methodology would be the date the request is made. The maximum period for retroactive implementation of a newly-adopted SRAC price will be eighteen (18) months from the date the request is made, except where the party opposing the earlier implementation date is shown to have engaged in malfeasance or dilatory conduct that results in prolonging the proceeding unnecessarily. Any rulemaking addressing the then-existing SRAC methodology shall state in the scoping memo whether an earlier implementation date of any newly-adopted SRAC methodology is an issue to be considered in the proceeding. Unless consideration of an earlier implementation date is in the scope of the rulemaking, any newly-adopted SRAC methodology shall only be implemented prospectively.

We believe that these procedures are reasonable given our legitimate concerns about Commission resources and the need for regulatory certainty for both QFs and IOUs.

3. Southern California Edison Company may amend Application 08-11-001 to reflect the clarifications adopted herein within 20 days after this decision is issued.

4. Southern California Edison Company, Pacific Gas and Electric Company, and San Diego Gas & Electric Company may file applications seeking application of the MIF as of September 20, 2007 if a decision addressing the California Cogeneration Council's petition to modify D.07-09-040 concerning the implementation date of the MIF adopts a date other than September 20, 2007. These applications shall be filed within 45 days after the date the decision resolving the implementation date of the MIF is issued.

5. Rulemaking (R.) 04-04-003 and R.04-04-025 remain open.

This order is effective today.

Dated April 16, 2009, at San Francisco, California.

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