FILED
06-18-09
04:59 PM

**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 08-08-009 (Filed August 21, 2008)

**BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY (U 39 E)
ON ADMINISTRATIVE LAW JUDGE'S RULING REGARDING BRIEFS ON
JURISDICTION IN THE SETTING OF PRICES FOR A FEED-IN TARIFF**

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June 18, 2009

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Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.	Rulemaking 08-08-009 (Filed August 21, 2008)

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I. INTRODUCTION

Pursuant to the May 28, 2009 *Administrative Law Judge's Ruling Regarding Briefs on Jurisdiction in the Setting of Prices for a Feed-In Tariff* ("Ruling"), Pacific Gas and Electric Company ("PG&E") hereby responds to the questions set forth in the Ruling regarding the California Public Utilities Commission's ("Commission") jurisdiction to set prices in an expanded feed-in tariff ("FIT") program. PG&E believes that the Commission is precluded by federal law from setting prices for energy sales under an expanded FIT program, except with respect to sales by Qualifying Facilities ("QFs") under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), for which the Commission may direct the investor-owned utilities ("IOUs") to pay a price no greater than avoided costs. The Commission should not overstep its authority by establishing a price level that would apply to all renewable energy sales under an expanded FIT program.

II. RESPONSE TO RULING'S QUESTIONS

A. Question 1: What is the scope of the Commission's authority to establish the price level in an expanded FIT? Please provide the basis for your opinion, including citations to legal authority.

Under the Federal Power Act ("FPA"), the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction over sales of electric energy at wholesale in interstate

commerce.[1] This includes the exclusive authority to set rates for wholesale power sales.[2] There is a narrow exception to this authority under PURPA, which allows states to establish rates for QFs.[3] The states' QF rate-setting authority is limited, however, to implementing FERC's rules governing QF wholesale rates.[4] Thus states may establish rates for QFs "only pursuant to and consistent with [FERC's] regulations under PURPA."[5] PURPA provides that FERC's rules regarding QF wholesale rates may not "provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy."[6] Accordingly, "states cannot, consistent with the express language of PURPA and [FERC's] regulations, require rates that exceed avoided cost for QF sales at wholesale."[7]

FERC explained the parameters of the Commission's authority to establish QF rates under PURPA in *Southern California Edison Company*, 70 FERC ¶ 61,215, *reconsideration denied*, 71 FERC ¶ 61,269 (1995). There, the Commission had determined the prices to be paid for QF power sales under PURPA as part of its Biennial Resource Plan Update ("BRPU"). FERC held that the Commission's process for determining avoided costs under the BRPU did

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1/ *See* 16 U.S.C. § 824(a)-(b) (2008); *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 210, 216 (1964) (FERC jurisdiction under the FPA is plenary and extends to "all sales of electric energy at wholesale in interstate commerce not expressly exempted by the [FPA] itself"); *Transmission Agency of Northern California v. Sierra Pacific Power Company*, 295 F.3d 918, 928 (9th Cir. 2002) (Part II of the FPA delegates to FERC the "'*exclusive* authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce'").

2/ *See* 16 U.S.C. §§ 824d, 824e; *Federal Power Commission*, 376 U.S. at 208 n. 4 ("[FERC] regulation of rates rests on §§ 205(a) and 206(a), 16 U.S.C. §§ 824d, 824e."); *Miss. Power & Light Co. v. Moore*, 487 U.S. 354, 371 (1988) ("FERC has exclusive authority to determine the reasonableness of wholesale rates"); *Barton Village, Inc. v. Citizens Utilities Company*, 100 FERC ¶ 61,244, 61,864 (2002) (FERC has exclusive jurisdiction over wholesale power rates under the FPA); *Midwest Power Systems, Inc.*, 78 FERC ¶ 61,067 (1997) (state utilities board cannot set rates for wholesale power sales); *Connecticut Light & Power Co.*, 70 FERC ¶ 61,012, *reconsideration denied*, 71 FERC ¶ 61,035 (1995) (state statute cannot set rates for wholesale power sales; wholesale power sales within FERC's exclusive jurisdiction).

3/ *Connecticut Light & Power Co.*, 70 FERC ¶ 61,012 at 61,023.

4/ *See* 16 U.S.C. § 824a-3(a), (b), (f); *Connecticut Light & Power Co.*, 70 FERC ¶ 61,012 at 61,027.

5/ *Connecticut Light & Power Co.*, 70 FERC ¶ 61,012 at 61,023.

6/ 16 U.S.C. § 824a-3(b).

7/ *Connecticut Light & Power Co.*, 71 FERC ¶ 61,035 at 61,151; *see also Southern California Edison Company*, 70 FERC ¶ 61,215, *reconsideration denied*, 71 FERC ¶ 61,269 (1995), 61,675 ("PURPA does not permit either [FERC], or the States in their implementation of PURPA, to require a purchase rate that exceeds avoided cost").

not comply with PURPA and FERC's regulations because it failed to consider prices from all sources able to sell to the utilities.[8/] In so holding, FERC stated that:

> PURPA expressly directed [FERC], and not the states, to prescribe rules governing QF rates. PURPA gave the states responsibility for "implementing" the statute and [FERC's] rules. As a result, a state may prescribe a particular per unit charge *only* if the process it uses to establish the per unit charge is in accordance with [FERC's] rules.[9/]

FERC has thus made clear that in determining avoided costs, the Commission must employ a procedure that complies with the requirements set forth in PURPA and in FERC's regulations.

Under an expanded FIT program, sales of renewable energy by eligible facilities to the IOUs would constitute sales of electric energy at wholesale in interstate commerce. The scope of the Commission and the state's authority to establish a price level under such a program therefore depends upon the nature of the facility. To the extent the eligible facility under the FIT program is also a QF under PURPA, the Commission and the state may set a price no greater than avoided costs through a process that comports with PURPA and with FERC's regulations. If the eligible facility is not a QF, the Commission and the state do not have authority under federal law to establish a price for sales under the FIT program.

The *Midwest Power Systems, Inc.* case, 78 FERC ¶ 61,067 (1997), cited by Southern California Edison Company ("SCE") in its April 10, 2009 comments submitted in this proceeding is instructive here. In that case, the Iowa Utilities Board required Iowa utilities to enter into long-term power purchase contracts with alternative facilities at a set rate, pursuant to an Iowa alternative energy statute. Midwest Power, an electric utility, argued that: (1) the rate set by the Iowa Board was above Midwest Power's avoided cost for QF purchases and was therefore inconsistent with PURPA; (2) to the extent Midwest Power was required to contract with non-QFs, the Iowa statute was inconsistent with the FPA by directing the state to set a price

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8/ 70 FERC ¶ 61,215 at 61,677.

9/ *Id.* at 61,676-61,677 (footnotes omitted).

for such purchases, as setting wholesale power rates is within FERC's exclusive jurisdiction.[10/] FERC found that "to the extent that the Iowa Board, acting pursuant to the Iowa statute, has ordered Midwest Power to purchase from QFs at rates exceeding avoided cost, or has set rates for wholesale sales by FPA jurisdictional public utilities, its actions are preempted by federal law."[11/] FERC further explained that the statute and the Iowa Board's orders were consistent with federal law to the extent they required electric utilities to purchase energy from alternative energy facilities, and recognized states' "'broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction.'"[12/]

Thus, while the Commission may have authority to require the IOUs to purchase energy from eligible renewable facilities under a FIT program, its authority to set prices is limited in scope. As in *Midwest Power*, the Commission may only set prices for QF sales under an expanded FIT program at a level that does not exceed avoided costs. The Commission has no jurisdiction to set rates for non-QF purchases under an expanded FIT program.

B. Question 2: Do you agree or disagree with SCE's argument regarding the scope of the Commission's price-setting authority in an expanded FIT program? Please explain your position.

PG&E agrees with SCE that sales of renewable energy by an electric generation facility to an electrical corporation like SCE under an expanded FIT would be sales of electric energy at wholesale in interstate commerce.[13/] PG&E also agrees with SCE that FERC has the exclusive authority to regulate wholesale power sales in interstate commerce.[14/] As PG&E understands, SCE's argument regarding the scope of the Commission's price-setting authority is that the Commission only has authority, under PURPA, to set prices for QFs at the utility's avoided cost,

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10/ 78 FERC ¶ 61,067 at 61,245.

11/ *Id.* at 61,248.

12/ *Id.*; *see also Southern California Edison Company*, 71 FERC ¶ 61,269 at 62,079-62,080 (describing various ways for states to encourage renewable resources outside of PURPA).

13/ *See Southern California Edison Company's (U 338-E) Response to ALJ's Ruling on Additional Commission Consideration of a Feed-In Tariff*, submitted on April 10, 2009 in R.08-08-009, at 2.

14/ *Id.* at 10-11.

and may not set prices for non-QF transactions under an expanded FIT program.[15] If PG&E has correctly characterized SCE's position regarding the scope of the Commission's price-setting authority, then PG&E agrees with SCE on this issue. Please see PG&E's response to Question 1 for an explanation of PG&E's support for SCE's arguments.

C. Question 3: If the Commission expands the FIT program, on what basis should the Commission set the purchase price for the electricity (e.g., buyer's avoided costs, seller's cost of service, market price, market price referent, other)?

As PG&E explained in response to Question 1 above, the Commission may only set the purchase price for electricity under an expanded FIT program for sales by QFs. For such sales, the Commission can direct the utilities to pay avoided costs, but may not require any rate above avoided costs. The Commission may not set the purchase price for electricity sales by non-QFs under an expanded FIT program. This is exclusively within FERC's jurisdiction.

D. Question 4: May the Commission require an RPS-eligible generator, in order to be eligible for the expanded FIT program, to be an exempt wholesale generator or to meet other specific conditions?

FERC has exclusive jurisdiction over wholesale sales of energy in interstate commerce, as explained in response to Question 1 above. RPS-eligible generators interested in selling power under an expanded FIT program must therefore comply with any relevant FERC rules and regulations for engaging in wholesale power sales. The Commission could require such generators to satisfy any applicable FERC requirements in order to be eligible for an expanded FIT program. The Commission may not, however, require a generator to meet other conditions above and beyond what is required by FERC.

E. Question 5: Please state any other arguments on this issue that the Commission must or should consider at this time.

PG&E firmly believes in reasonable programs designed to encourage renewable resource development and to address state renewable and climate change goals. PG&E recognizes that an

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15/ *Id.* at 2, 10-12.

expanded FIT may help to achieve these goals. As PG&E has explained in previous comments submitted in this proceeding, however, PG&E believes that any expanded program must incorporate certain components to ensure that the program results in deliveries of renewable power and fairly allocates risk between generators, the IOUs, and customers. The Commission should also respect the jurisdictional limits on its ability to set prices under any expanded FIT.

III. CONCLUSION

PG&E appreciates this opportunity to address the issue of the Commission's jurisdiction to set prices under an expanded FIT program.

Respectfully submitted,

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By: /s/
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June 18, 2009

VERIFICATION

I am an employee of PACIFIC GAS AND ELECTRIC COMPANY, a corporation, and am authorized to make this verification on its behalf. I have read the foregoing "Brief of Pacific Gas and Electric Company (U 39 E) on Administrative Law Judge's Ruling Regarding Briefs on Jurisdiction in the Setting of Prices for a Feed-In Tariff" dated June 18, 2009. The statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18th day of June, 2009 at San Francisco, California.

/s/

Valerie J. Winn
Manager
Pacific Gas and Electric Company

CERTIFICATE OF SERVICE BY ELECTRONIC MAIL OR U.S. MAIL

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; and that my business address is Pacific Gas and Electric Company, Law Department B30A, 77 Beale Street, San Francisco, CA 94105.

I am readily familiar with the business practice of Pacific Gas and Electric Company for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service the same day it is submitted for mailing.

On the 18th day of June 2009, I served a true copy of:

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[XX] By Electronic Mail – serving the enclosed via e-mail transmission to each of the parties listed on the official service list for R.08-08-009 with an e-mail address.

[XX] By U.S. Mail – by placing the enclosed for collection and mailing, in the course of ordinary business practice, with other correspondence of Pacific Gas and Electric Company, enclosed in a sealed envelope, with postage fully prepaid, addressed to those parties listed on the official service list for R.08-08-009 without an e-mail address.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 18th day of June 2009 at San Francisco, California.

/s/

AMY S. YU

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CPUC DOCKET NO. R0808009 CPUC REV 06-16-09

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Downloaded June 18, 2009; last updated: June 16, 2009

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CPUC DOCKET NO. R0808009 CPUC REV 06-16-09

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