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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 FUELCELL ENERGY INC. AND CALIFORNIA SOLAR ENERGY INDUSTRIES ASSOCIATION REGARDING JURISDICTION IN THE SETTING OF PRICES FOR A FEED-IN TARIFF

In accordance with the May 28, 2009 Administrative Law Judge's Ruling Regarding Briefs on Jurisdiction in the Setting of Prices for a Feed-In Tariff ("Ruling") FuelCell Energy, Inc. ("FCE")[1] and California Solar Energy Industries Association ("CALSEIA")[2] jointly submit the following responses to the five questions raised by the Commission regarding jurisdiction.

I. Introduction

The Commission is in the process of developing a renewable feed-in tariff ("FIT") for generators with a capacity above 1.5 megawatts. In comments filed April 10, 2009, Southern California Edison Company ("SCE") alleged that the Commission's authority to establish FIT prices was preempted under the Federal Power Act ("FPA") and the Public Utility Regulatory Policies Act of 1978 ("PURPA"). The Ruling requests briefing on issues related to SCE's argument.

FCE and CALSEIA welcome this opportunity to respond to issues raised in this proceeding regarding the scope and extent of the California Public Utilities Commission

[1] FCE manufactures large stationary fuel cell power plants ranging in size from 300 kW to 2.8 MW in output. FCE fuel cells operating on renewable fuels are located throughout the state of California.

[2] CALSEIA is a non-profit trade association founded in 1977. Its purpose is to expand the use of all solar technologies in California and establish a sustainable industry for a clean energy future. CALSEIA's membership includes more than 200 companies doing business in photovoltaics (PV), solar thermal (domestic water, pool, space heating, and space cooling), and concentrating solar technologies. The CALSEIA membership is made up of manufacturers, distributors, contractors, engineers, designers, consultants, educational organizations, and utilities.

("Commission") authority to expand the existing renewable feed-in tariff program to include larger facilities. It is important that the Commission resolve any jurisdictional questions as a threshold matter, in order to ensure that the expanded FIT is consistent with federal law and to avoid delays and litigation in the future.

II. Response of FCE and CALSEIA to ALJ Questions on Jurisdiction

A. 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.

The answer to this question depends on the how the commodity or product included in the price is defined. The expanded renewable FIT will compensate the seller for electricity, capacity, and possibly ancillary services. The pricing for these products falls within federal jurisdiction for those sellers that are jurisdictional under the Federal Power Act. The Commission does not have the authority to unilaterally set a price for this transaction unless the transaction involves a qualifying facility ("QF"), but the Commission *can* establish a feed-in tariff that facilitates a sale by eligible generators at a market price. These distinctions are discussed further below.

The FIT will also presumably compensate the seller for other products. These would include the renewable attributes and other environmental attributes delivered as part of the transaction. The FIT could also include additional elements such as a locational adder or technology-specific incentive payments. As discussed further below, these components of the FIT fall within the state's exclusive jurisdiction and regulatory authority. The Commission has plenary authority, unless otherwise limited by statute, to determine prices, terms and conditions for the sale and purchase of these "other" products and attributes.

1. FERC's jurisdiction over wholesale sales under the Federal Power Act.

The Federal Energy Regulatory Commission exercises jurisdiction over wholesale sales of electricity by public utilities in interstate commerce.[3] FERC defines a "sale of electric energy at wholesale" as "a sale of electric energy to any person for resale."[4] A "public utility" is defined as "any person who owns or operates facilities subject to the jurisdiction of the Commission (other than facilities subject to such jurisdiction solely by reason of [enumerated exceptions])."[5]

Section 201(f) of the Federal Power Act specifically exempts the "United States, State, political subdivision of a State, or agency or instrumentality thereof" from the federal wholesale jurisdiction described above.[6] Therefore sales for resale by publicly-owned entities described in Section 201(f) are not subject to FERC jurisdiction.

FERC has jurisdiction over sales by QFs. However Congress has delegated to the states responsibility under PURPA to establish avoided cost rates in accordance with FERC regulations for wholesale sales by QFs.[7] States have "great latitude" in the procedures used for determining QF avoided cost.[8] States may account for environmental and related costs that are incurred by purchasing utilities in determining QF avoided cost rates.[9]

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[3] 16 U.S.C. § 824(a-b).
[4] 16 U.S.C. § 824(d).
[5] 16 U.S.C. § 824(e). See also *Connecticut Light and Power Company*, 70 FERC ¶ 61,012 (1995) at p. 19.
[6] Section 201(f) reads in its entirety: *(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt*. No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.
[7] 16 U.S.C. § 824a-3 et seq.
[8] *Southern California Edison Co.,* 70 FERC ¶ 61,215 (1995) at p.25.
[9] *Southern California Edison Co.,* 71 FERC ¶ 61,269 (1995) at p. 12.

Sales of electricity, capacity and ancillary services by non-QF wholesale sellers (except for those exempted under Section 201(f) or otherwise) fall within FERC jurisdiction.[10] Under Section 205 of the Federal Power Act, FERC is charged with responsibility for determining that:

> All rates and charges made, demanded, or received by any public utility for or in connection with the … sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.[11]

Historically, FERC exercised its wholesale rate-setting authority over sellers (other than QFs) by reviewing cost-based rates and contracts. This approach has evolved over time, however, into an oversight role that allows jurisdictional sellers more freedom to sell at rates determined in the market. Beginning in 1988, FERC began considering proposals for market-based pricing of wholesale transactions and implemented a methodology for determining whether sellers should be granted market-based rate authority.[12] In 2004 FERC opened a new rulemaking to review and update that methodology, and in 2006 issued a Notice of Proposed Rulemaking that resulted in the issuance of Order 697.[13] Order 697 established new guidelines for policing market power and for granting authority for the sale of electricity at market-based rates. FERC requires a jurisdictional entity (unless it is otherwise exempt) to seek FERC authority as a market seller, to demonstrate lack of market power, and to comply with applicable reporting requirements.[14] In granting market-based rate authority to a jurisdictional seller, FERC

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[10] 16 U.S.C. § 824e. A "seller" under Section 205 of the FPA is defined as "any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act." 18 C.F.R. § 35.36(a)(1).

[11] 16 U.S.C. § 824e(a).

[12] *Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity and Ancillary Services By Public Utilities,* Order 697, 119 FERC ¶ 61,295 (2007) ("Order 697") at ¶ 7.

[13] *Id.* ¶ 8-11.

[14] The Commission's rules governing Wholesale Sales of Electric Energy, Capacity and Ancillary Services at Market-Based Rates are set forth in Subpart H of Part 35. *See* 18 C.F.R. § 35.36 et seq. FERC has incorporated into its process for establishing and maintaining authority to sell at market-based rates certain exemptions and simplified procedures for sellers, reflecting size and assumptions regarding market power. See e.g. 18 CFR § 35.36(2). As

"exercises its statutory responsibility under the FPA to ensure that market-based rates are just and reasonable."[15] This occurs *not* by FERC's review and approval of each specific contract or market transaction, but rather "through the dual requirement of an ex ante finding of the absence of market power and post-approval oversight through reporting requirements and ongoing monitoring."[16]

In setting forth this approach to market-based pricing and in addressing arguments on rehearing of Order 697, FERC repeatedly clarified that there is no one "market price," nor is there a single point of reference for market-based pricing. Rather, FERC found that screening for market power and monitoring through reporting requirements was an adequate means of ensuring that rates will fall "within a zone of reasonableness." FERC explained:

> The FPA does not prescribe any particular ratemaking methodology to be followed in setting rates so long as rates fall within a zone of reasonableness, i.e., the rates are neither less than compensatory to the seller nor excessive to the consumer. Further, the fixing of "just and reasonable" rates involves a balancing of investor and consumer interests and the "zone of reasonableness" may take into account all relevant public interests, both existing and foreseeable. These public interests may appropriately include non-cost factors, such as the need to stimulate additional investment. As we explained in the Final Rule and reiterate here, the Supreme Court has held that "[f]ar from binding the Commission, the 'just and reasonable' requirement accords it broad ratemaking authority….The Court has repeatedly held that the just and reasonable standard does not compel the Commission to use any single pricing formula in general…."[17]

Thus, FERC policy does not define market pricing in a narrow or prescriptive manner. FERC has acknowledged that market prices may be established many different ways -- through bilateral negotiation, through the operation of centralized markets, through publicly administered

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noted above, publicly-owned generators are non-jurisdictional and have no obligation to file for market-based rate authority.

[15] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities,* Order 697-A, 123 FERC ¶ 61,055 (2008) ("Order 697-A") at ¶ 414.

[16] *Id*. In *Californians for Renewable Energy,* 119 FERC ¶ 61,058 (2007) at ¶ 42, FERC reaffirmed that prior review of power purchase agreements is not required, and that FERC's policy of ex ante review plus reporting and oversight satisfy the notice and filing requirements of FPA section 205.

[17] Order 697-A, 123 FERC ¶ 61,055 (2008) at ¶ 407 (citations omitted).

solicitations and auction processes, and any number of other mechanisms. FERC does not police each of these processes and mechanisms, but rather presumes that as long as a seller lacks (or has mitigated) market power, the prices set by that market seller will be just and reasonable. In light of this federal construct, there appears to be no reason the Commission cannot establish a renewable FIT that incorporates market pricing for electricity, capacity and ancillary services (and Commission-determined prices for additional tariff elements such as renewable and environmental attributes). This conclusion is discussed further below.

2. The State's jurisdiction over sales and purchase of non-energy products, environmental attributes and incentives.

In contrast to prices for electricity, capacity and ancillary services, wholesale transactions involving other products and attributes fall completely within the jurisdiction of the state. FERC has stated that states may seek to encourage renewable or other types of resources through the state's tax structure, or by giving direct subsidies to generators.[18] As discussed above, FERC has clarified that its jurisdiction over wholesale sales extends only to electricity, capacity and ancillary services. FERC has concluded that its jurisdiction over the sale of wholesale energy does not include the sale of renewable attributes associated with that energy, and that states have exclusive jurisdiction over the creation, ownership, sales and trading of renewable energy credits ("RECs") or similar instruments monetizing renewable attributes.[19]

This Commission has the authority to regulate and set prices for environmental attributes and any other monetized benefits or attributes created under state law. This Commission has acknowledged its authority to regulate and determine prices for RECs and other renewable

[18] *Midwest Power Systems, Inc.*, 78 FERC ¶ 61,067 (1997) at p. 8, citing *Southern California Edison Company*, 71 FERC ¶ 61,269 (1995) at ¶ 62,080.
[19] *American Ref-Fuel Co.*, 105 FERC ¶ 61,004 (2003) at p. 6, *reh'g denied,* 107 FERC ¶ 61,016 (2004) (RECs are created by the states, which have power to determine how RECs may be sold or traded).

attributes.[20] This Commission has also recognized its authority to regulate other environmental attributes such as avoided greenhouse gas ("GHG") emissions, adders, and offsets.[21] The Commission has administered programs that provide technology-specific incentives to generators.[22] The Commission has also exercised its authority to administer charges and exemptions in order to encourage technologies or applications that are environmentally beneficial or that benefit the operation of the grid.[23]

Thus, to the extent that the Commission's question above refers to any product or attribute other than electricity, capacity or ancillary services, the answer is that the Commission has plenary authority to establish prices, terms and conditions.

3. The Commission is not preempted from establishing an expanded renewable FIT based on market prices for energy and appropriate payment for renewable and other attributes delivered by the seller.

The Commission's authority to establish a feed-in tariff is clear. The Commission has the right to direct the utilities to purchase renewable energy from eligible renewable generators as part of the State of California's effort to achieve ambitious environmental goals and other policy objectives. FERC has acknowledged that this and other powers fall squarely within the state's jurisdiction:

> As a general matter, states have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction. States may, for example, order utilities to build renewable generators themselves, or deny certification of other types of facilities if state law so permits. They also, assuming state law permits, may order utilities to purchase renewable

[20] *See e.g.* D.05-05-011 (Acknowledging that owner of generating facility owns RECs); D.08-08-028 (establishing definition and attributes of renewable energy credits for compliance with the California Renewables Portfolio Standard).
[21] *See e.g.* D.04-12-048 (Recognizing state authority to include GHG adder in RPS auction process); D.06-02-032 (discussing incorporation of GHG in procurement incentives).
[22] *See e.g.* D.01-03-073 (Authorizing Self-Generation Incentive Program incentive payments); D.06-08-028 (Authorizing creation of the California Solar Initiative incentive program); D.06-12-033 (Modifying the California Solar Initiative program in conformance with Senate Bill 1).
[23] *See e.g.* D.03-04-039 and D.07-05-006 (Authorizing exemption from departing load charges for customer generation).

> generation….States also may seek to encourage renewable or other types of resources through their tax structure, or by giving direct subsidies.[24]

With respect to pricing under the FIT, the Commission cannot itself "set" the price for energy, capacity and ancillary services. However, it appears the Commission can incorporate a market-based price for these products into the FIT pricing structure. The Commission can also include in the FIT pricing structure an appropriate payment for any additional products, attributes and benefits provided by the seller.

B. 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.

FCE and CALSEIA do not agree with SCE's argument. The scope of the Commission's authority is discussed generally above. SCE states correctly that FERC has jurisdiction over wholesale sales of electricity in interstate commerce. However it does not follow that this Commission cannot establish a renewable feed-in tariff that incorporates QF or market rates established in accordance with federal law.

One specific statement from SCE's April 10 comments requires clarification. SCE asserts at page 11 of its April 10, 2009 comments that "[a]n expanded FIT program will encroach on the jurisdiction of FERC in violation of the FPA to the extent it requires the IOUs to purchase wholesale power from certain eligible facilities and sets a rate for those purchases that exceeds avoided cost." There are two problems with this statement. It presumes without any supporting explanation that a FIT rate for energy and capacity and ancillary services will exceed "avoided cost." It also muddles QF avoided cost rates established under PURPA and market-based rates, which may apply to entities that are not QFs. This distinction is important. FERC policy does

[24] *Midwest Power Systems, Inc.*, 78 FERC ¶ 61,067 (1997) at p. 7-8, citing *Southern California Edison Company,* 71 FERC 61,269 (1995) at ¶62,080). In *Southern California Edison Company*, FERC discusses at some length the broad authority states have to incorporate state environmental objectives into planning, and to reflect such costs in pricing.

not say that a market price must be equal to a QF avoided cost price. Indeed, FERC has clarified that a QF may be engaged in both market-priced sales and exempt QF sales as long as it conforms to applicable regulatory requirements.[25]

C. 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 cost, seller's cost of service, market price, market price referent, other)?

FCE and CALSEIA do not believe there is one single correct basis for establishing the price for energy, capacity and ancillary services under the FIT. As discussed above, FERC policy defines market pricing broadly, and it appears that there are a number of market-based reference points the Commission could use.[26] What is crucial to the success of the FIT, is establishing a price that compensates the seller fairly for all products and attributes delivered to the buyer at a price that will encourage participation in the FIT.

In addition, if the Commission wants to encourage participation by a broad range of renewable generation, the Commission needs to establish size-differentiated technology-specific payments, as recommended in the California Energy Commission's *California Feed-In Tariff Design and Policy Options Final Consultant Report* (May 2009).[27] Given that different technologies are at different stages of development and commercialization, the Commission may need to authorize a technology-specific incentive payment or adder to ensure that the all-in price for each technology is at a level that "allows it to be viably developed."[28] As discussed above, the Commission clearly has the authority to do this.

[25] Order 697, 119 FERC ¶ 61,295 at ¶¶ 523-526.
[26] The Commission has used the Market Price Referent, which is based on the predicted annual average cost of production for a baseload non-renewable proxy plant, for pricing sales under the existing FIT. *See* Resolution E-4137 (February 14, 2008).
[27] http://www.energy.ca.gov/2008publications/CEC-300-2008-009/CEC-300-2008-009-F.PDF.
[28] Id. at 68.

D. 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?

The Commission may, but should not require an RPS-eligible generator to be an exempt wholesale generator in order to be eligible for the expanded FIT program. If the Commission were to limit the FIT program to include only exempt wholesale generators, the Commission would prevent or at least discourage participation by entities that are not subject to FERC's jurisdiction under the FPA.

It would be appropriate for the Commission to require that each participant, as a condition for eligibility for the FIT, comply with all applicable requirements (if any) under the FPA. The Commission should do this without stipulating specifically what a particular participant must do, since participants may have varying regulatory obligations under the FPA or none at all. The reference to this general obligation to comply with federal law may appropriately be referenced as a condition precedent in the feed-in tariff or power purchase agreement. However, the Commission should avoid authorizing contract provisions that would impose an additional reporting burden on the seller or confer policing responsibilities on the purchasing utility. FERC has a complete and carefully designed regulatory process for establishing jurisdictional sellers' right to sell electricity at market rates and monitoring compliance with applicable requirements. It would undermine and potentially contradict that process to incorporate additional obligations or penalties in the FIT or PPA.

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

FCE and CALSEIA have no further arguments at this time.

III. Conclusion

FCE and CALSEIA support the Commission's effort to address clearly and definitively any questions regarding the scope of the Commission's authority to establish a renewable FIT that incorporates market pricing for electricity, capacity and ancillary services. Upon resolution of the jurisdiction issues in this phase of the proceeding, the Commission should move forward expeditiously to establish a renewable FIT that will help the state reach its renewable energy procurement goals.

Dated: June 18, 2009

Respectfully submitted,

By: _____/s/___ _____

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VERIFICATION

I am the attorney representing FuelCell Energy, Inc. (FCE) in this proceeding. FCE is absent from Sacramento County, where my office is located, and under Rule 1.11(d) of the Commission's Rules of Practice and Procedure, I am submitting this verification on behalf of FCE for that reason. I have read the attached Brief Of FuelCell Energy Inc. And California Solar Energy Industries Association Regarding Jurisdiction In The Setting Of Prices For A Feed-In Tariff, dated June 18, 2009. I am informed and believe, and on that ground allege, that the matters stated in this document are true.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on this 18th day of June, 2009, at Sacramento, California.

/s/

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VERIFICATION

I am the attorney representing California Solar Energy Industries Association (CALSEIA) in this proceeding. CALSEIA is absent from Sacramento County, where my office is located, and under Rule 1.11(d) of the Commission's Rules of Practice and Procedure, I am submitting this verification on behalf of CALSEIA for that reason. I have read the attached Brief Of FuelCell Energy Inc. And California Solar Energy Industries Association Regarding Jurisdiction In The Setting Of Prices For A Feed-In Tariff, dated June 18, 2009. I am informed and believe, and on that ground allege, that the matters stated in this document are true.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on this 18th day of June, 2009, at Sacramento, California.

/s/

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PROOF OF SERVICE

I declare that:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and am not a party to the within action. My business address is ELLISON, SCHNEIDER & HARRIS; 2600 Capitol Avenue, Suite 400; Sacramento, California 95816; telephone (916) 447-2166.

On June 18, 2009, I served the attached *Brief of FuelCell Energy Inc. and California Solar Energy Industries Association Regarding Jurisdiction in the Setting of Prices for a Feed-In Tariff* by electronic mail or, if no e-mail address was provided, by United States mail at Sacramento, California, addressed to each person shown on the attached service list.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on June 18, 2009, at Sacramento, California.

/s/
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