BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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OPENING BRIEF OF THE DIVISION OF RATEPAYER ADVOCATES ON THE ADMINISTRATIVE LAW JUDGE'S RULING REGARDING BRIEFS ON JURISDICTION IN THE SETTING OF PRICES FOR A FEED-IN-TARIFF

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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)

OPENING BRIEF OF THE DIVISION OF RATEPAYER ADVOCATES ON THE ADMINISTRATIVE LAW JUDGE'S RULING REGARDING BRIEFS ON JURISDICTION IN THE SETTING OF PRICES FOR A FEED-IN-TARIFF

I. INTRODUCTION

Pursuant to ruling of Administrative Law Judge (ALJ) Mattson inviting parties to submit briefs on the legal issues raised by Southern California Edison (SCE) regarding the Commission's authority to set prices for an expanded Feed-in-Tariff (FIT) program, the Division of Ratepayer Advocates (DRA) submits the following brief. SCE maintains that the Commission's authority to establish prices for a FIT program is a "wholesale price-setting authority" that conflicts with the authority of the Federal Energy Regulatory Commission's (FERC) under the Federal Power Act (FPA).

The ruling presents the issues as follows:

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

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?

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

II. THE SCOPE OF THE COMMISSION'S AUTHORITY TO ESTABLISH THE PRICE LEVEL IN AN EXPANDED FIT PROGRAM

The scope of the Commission's authority to establish the price level in an expanded FIT program is related to but distinctly different from the question of preemption, which asks whether the authority granted the Commission in a State statute conflicts with federal law or regulations. Therefore, they must be addressed separately.

A. SCOPE

The scope of the Commission's authority to establish the price level in an expanded FIT program must be determined from Public Utilities Code § 399.20 alone, until or unless there is a clear provision of a federal statute in conflict with it. Thus, the United States Supreme Court held that, State laws or authority "were not to be superseded [by federal law]... unless that was the clear and manifest purpose of Congress.' " (New York v. F.E.R.C. 535 U.S.1, 17, 122 S.Ct. 1012 (2002), quoting Hillsborough County v. Automated Medical Laboratories, Inc. , 471 U.S. 707, 715, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985)).

The New York v. F.E.R.C. Court referred to this assumption that state authority is not superseded as the "presumption against pre-emption" (Id.) In the case of the FIT program, the Commission must presume that the authority granted in the enabling statute defines the scope of the program and is not in conflict with any federal statutes. SCE has not presented a legitimate basis for rebutting this presumption.

B. PRE-EMPTION

If a provision of a federal statute conflicts with the FIT statute[1], the federal statute supersedes, and therefore displaces, the FIT program entirely; it does not just limit the scope. Thus, a conflicting federal statute does not inform the inquiry on scope, it asks a completely separate question altogether. The Court in New York v. F.E.R.C., supra, alluded to this dichotomy of pre-emption issues and explained it as follows:

> Pre-emption of state law by federal law can raise two quite different legal questions. The Court has most often stated a "presumption against pre-emption" when a controversy concerned not the scope of the Federal Government's authority to displace state action, but rather whether a given state authority conflicts with, and thus has been displaced by, ***18** the existence of Federal Government authority. See, *e.g., Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 715, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985) (citing cases);
>
> …
>
> The other context in which "pre-emption" arises concerns the rule "that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority[,] ... [for] an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986).

(535 U.S. 1, 18-19, 122 S.Ct. 1012, 1023)

Thus, while the question of scope cannot be completely answered without addressing the issue of preemption, the question of preemption is a separate and distinct issue. DRA see no impediment in federal law to a Commission order requiring investor-owned utilities to purchase electricity from retail providers at a rate required in state law. On the contrary, setting rules and rates by which regulated entities must comply is subject to the exclusive jurisdiction of the state.

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[1] Public Utilities Code §399.20

III. DRA DISAGREES WITH SCE'S ARGUMENT REGARDING THE SCOPE OF THE COMMISSION'S PRICE-SETTING AUTHORITY IN AN EXPANDED FIT PROGRAM

ALJ Mattson's ruling properly noted that DRA disagreed with SCE's argument regarding the scope of the Commission's authority in an expanded FIT program. DRA maintained that SCE's arguments are without merit and lack a basis in law.

SCE claims that the FPA's grant of jurisdiction over wholesale power to the Federal Energy Regulatory Commission (FERC) preempts Public Util. Code §399.20. In making this claim, SCE uses broad assertions to suggest that the Commission's implementation of the FIT program constitutes a wholesale price setting activity.

> "…a sale of renewable energy output by an electric generation facility to an electric corporation such as SCE would be a sale for resale of electric energy at wholesale in interstate commerce …The Commission lacks wholesale price-setting authority, as the Congress and the Federal Energy Regulatory Commission ("FERC") have preempted the State from asserting such authority under the regulatory scheme reflected in the Federal Power Act ("FPA"), the Public Utilities Regulatory Act of 1978 ("PURA"), and associated FERC regulations."

(SCE's Comments at 2.)

This statement has no bearing on whether Commission implementation of the FIT statute would interfere with FERC's wholesale authority. The FIT is not a "wholesale price setting authority" because it does not set a price at which a generator must sell its power to the utilities. The FIT statute does not require electric generators to offer their energy at any price, or to do anything else for that matter. It simply requires California utilities to establish a set of standard tariffs for the purchase of electricity, corresponding to the market price as determined by the Commission (Public Util. Code §399.20(4)(d)) and to file standard tariffs with the Commission (Public Util. Code §399.20(4)(c)). Only upon request by a wholesale electric generator, are those tariffs made available to them, leaving it to the wholesale generators' discretion whether they wish to accept the tariffs or engage in negotiations that may yield a different price for their resources. (Public Util. Code §399.20(4)(e)). In short, the FIT is a must-take price for the public utilities, and not

a limitation on wholesale generators, which are free to sell their power at FERC set prices.

DRA notes that SCE does not claim that the Commission is preempted from setting a price at which an electric utility within the state must accept an offer by a wholesale generator for the sale of renewable energy. Rather, SCE bundles the Commission's regulation of the electric utilities' right to reject an offer price with the setting of that offer price by the electricity generator as though they were one and the same act constituting "wholesale price-setting authority". This generalization is misleading and unfounded.

In Decision (D.) 07-01-039[2], the Commission addressed a similar issue while explaining that the Emissions Performance Standard (EPS) is not a regulation of wholesale generators or marketers. (D.07-01-039, p. 202.) In D.07-01-039, the Commission noted that Congress preserved the States' authority over retail sales services and the public utilities which provide those services, in Section 201(b) of the Federal Power Act, 16 U.S.C.§824(b). The Commission then noted that part of its regulation of the retail sales services includes the imposition of EPS limits on purchases of electric energy consumption in California. (Id.) Similarly, the requirement that California utilities establish standard tariffs to be made available to renewable energy generators who are also their customers, seeks to regulate aspects of the purchase, not the sale, of renewable energy resources for consumption in California.

D.07-01-039 also noted that:

> "FERC does not have jurisdiction over retail sellers of electric energy, including their procurement decisions … because FERC does not view its "responsibilities under the Federal Power Act as including a determination that the purchaser has purchased wisely or has made the best deal available."

(American Energy Marketing Company (2001) 96 FERC ¶61,306 at 62,189 & n.18.)

[2] Interim Opinion on Phase 1 Issues: Greenhouse Gas Emissions Performance Standard.

SCE cannot dispute the fact that when electric utilities purchase long-term electricity resources with terms, such as those required by the FIT statute, the Commission must approve the reasonableness of the purchases before they may be allowed in rates. It is this practice of approving the reasonableness of energy purchases that will be placed in rates that the FIT statutes seeks to expand by determining a price that the Commission would automatically accept as reasonable, so as to give generators the opportunity to accept those prices and avoid the time and uncertainty of negotiation and regulatory approval.

The U.S. Supreme Court has clearly noted that there is "the presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause." (Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., supra, 471 U.S. at 715.) The California Legislature has consistently described and justified the Renewable Portfolio Standard (RPS) program as a state regulation of matters related to health and safety, not just energy. Public Util. Code Section 399.11(a) in part found and declared that RPS was necessary "for the purpose of increasing the diversity, reliability, public health and environmental benefits of the energy mix [in California] to address global warming and climate change, and to protect endangered sierra snowpack…" (See also Public Util. §399.20(a) invoking the findings in Section 399(11)(a).)

FERC agrees that its enforcement of the FPA is not intended to encroach on State regulatory Commissions' authority to develop social and environmental programs suited to the circumstances of their states. (D.07-01-039, p. 203, citing FERC Order No. 888, FERC Stats. & Regs., Regs. Preambles, Jan. 1991-June 1996, ¶31,036, p. 31,782 (1996).)

IV. ON WHAT BASIS SHOULD THE COMMISSION SET THE PURCHASE PRICE OF THE EXPANDED FIT PROGRAM

In light of the discussions showing that the scope of the Commission's authority under the FIT statute is not limited by the FPA, DRA finds that the Commission is not bound to any particular methodology for setting the price under the FIT program, except

that the prices set must be reasonable as provided by other provisions of the FIT. The only necessary basis for setting those purchase prices are those stated in the State statute.

DRA asserts that a reasonable price for a renewable FIT would be the market price for renewable power from cost-effective, efficient, proven renewable technologies. These prices, for the most part, are informed by the State's implementation of the RPS program. Therefore, ratepayers are protected to the extent that the RPS goals are pursued in a cost-effective and consistent manner with meeting those goals.

V. THE COMMISSION MAY NOT 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 not require an RPS eligible generator to be an exempt wholesale generator or meet other specific conditions in order to be eligible for the expanded FIT program because such a requirement may constitute regulation of a wholesale generator or interference with interstate commerce. Such a requirement may interfere with federal jurisdiction.

However, to trigger federal authority electricity must be transmitted in interstate commerce and transmission in interstate commerce "ends at local distribution."[3] Distributed generation programs such as FIT substantially satisfy FERC's seven factor test for determining what constitutes local distribution. Moreover, to the extent that any potential FIT customers might be interconnected to the transmission system this, by itself, would be insufficient to trigger federal preemption (of those transactions) as the Supreme Court has emphasized "mere interconnection means nothing."[4][5] Thus, the vast majority, if not all, of the FIT customers will only be selling electricity in intrastate commerce and will therefore be insulated from federal authority.

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[3] *People's Electric Cooperative*, 60 FERC ¶ 63,004 at 58 (1992) (*citing Connecticut Light and Power Co.*, 324 U.S. 515, 531 (1945))

[4] *Jersey Central Power & Light Co.*, 319 U.S. 61, 72 (1943).

[5] Additional findings would be required that the electricity actually flowed in interstate commerce. *See*,

(continued on next page)

While the proposed FIT is aimed primarily at bringing distributed generation on-line that will interconnect to the investor owned utilities' distribution systems, setting rules wholesale generators' participation in the program should be avoided.

VI. CONCLUSION

For all the reasons stated in these comments, DRA urges the Commission to adopt its recommendations.

Respectfully submitted,

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(continued from previous page)
e.g., *City of Centralia v. FERC*, 661 F.2d 787 (9th Cir. 1981).

VERIFICATION

I, Noel A. Obiora, am counsel of record for the Division of Ratepayer Advocates in proceeding R.08-08-009 authorized to make this verification on the organization's behalf. I hereby verify that the statements made in **"OPENING BRIEF OF THE DIVISION OF RATEPAYER ADVOCATES ON THE ADMINISTRATIVE LAW JUDGE'S RULING REGARDING BRIEFS ON JURISDICTION IN THE SETTING OF PRICES FOR A FEED-IN-TARIFF"** filed on June 18, 2009, are true and correct to the best of my knowledge, except for those matters which are stated on information and belief, and as those matters, I believe them to be true.

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

Executed on June 18, 2009 at San Francisco, California.

/s/ NOEL A. OBIORA

Noel A. Obiora

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **"OPENING BRIEF OF THE DIVISION OF RATEPAYER ADVOCATES ON THE ADMINISTRATIVE LAW JUDGE'S RULING REGARDING BRIEFS ON JURISDICTION IN THE SETTING OF PRICES FOR A FEED-IN-TARIFF"** in R.08-08-009 by using the following service:

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Executed on June 18, 2009 at San Francisco, California.

/s/ NELLY SARMIENTO

Nelly Sarmiento

N O T I C E

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