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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 SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) ON JURISDICTION IN THE SETTING OF PRICES AND A FEED-IN TARIFF

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Dated: June 18, 2009

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE

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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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Pursuant to the Administrative Law Judge's Ruling Regarding Briefs on Jurisdiction in the Setting of Prices for a Feed-In Tariff ("Ruling") issued May 28, 2009, in this proceeding, Southern California Edison Company ("SCE") respectfully submits these comments.

I. INTRODUCTION

SCE appreciates the opportunity to examine the California Public Utilities Commission's ("Commission" or "CPUC") authority to set prices for an expanded feed-in tariff ("FIT") program prior to defining specific terms and conditions for such a program. As set forth in the comments of several parties on Administrative Law Judge's Ruling on Additional Commission Consideration of a Feed-In Tariff issued March 27, 2009, the parameters of an effective FIT program must be evaluated in conjunction with pricing.[1]

[1] *See* Pacific Gas and Electric Company's Comments, at p. 9 ("price and other contract terms in a PPA are inexorably linked"); *see also* Division of Ratepayer Advocates' Comments, at p. 6 and FuelCell Energy, Inc's Comments, at p. 4.

As SCE has previously noted, the Federal Power Act ("FPA") grants exclusive jurisdiction to the Federal Energy Regulatory Commission ("FERC") to regulate wholesale sales of electricity in interstate commerce. A sale of renewable energy output by an electric generation facility to an electrical corporation such as SCE would be a sale for resale of electric energy at wholesale in interstate commerce because SCE resells such power to its retail customers.[2] The only exception to FERC's authority over wholesale rates is established by the Public Utility Regulatory Policies Act of 1978 ("PURPA"). PURPA allows state public utilities commissions, such as the CPUC, to establish an avoided cost price for utilities' purchases from Qualifying Facilities ("QFs").[3] QFs are alternative energy power production facilities that are primarily renewable or gas-fired cogeneration units.[4]

In light of this jurisdictional limitation, there are two obvious lawful options for how to price an expanded FIT program: (1) require eligible FIT projects to register as QFs and set pricing at the utility's avoided cost pursuant to the CPUC's authority under PURPA, or (2) allow the FERC-jurisdictional California Independent System Operator ("CAISO") market to govern prices for power purchased pursuant to the FIT program.

Additionally, as SCE has previously emphasized, rather than mandate a FIT the CPUC should consider voluntary standard contract programs. Voluntary programs such as SCE's Renewable Standard Contracts ("RSC") program can harness many of the goals parties seem to be seeking in an expanded FIT program. For example, RSC-type programs allow contract flexibility between buyers and sellers, incorporation of technology-specific nuances, and adaptation to market conditions without imposition of unnecessary administrative burden on buyers, sellers, and CPUC staff. RSC-type programs also avoid the legal issues associated with CPUC-setting of the FIT price as they do not require the CPUC to set prices.

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[2] Electric energy is deemed to be sold in interstate commerce if it is transmitted in interstate commerce or is commingled with electric energy that is transmitted in interstate commerce. *FPC v. Florida Power & Light Co.*, 404 U.S. 453 (1972).

[3] *See* 16 U.S.C. §824a-3(b); 18 C.F.R. §292.304(a)(2).

[4] *See* 18 C.F.R. §292.303(a)

II. DISCUSSION

Below SCE responds to the specific questions set out by the Ruling.

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.

Only FERC may set rates for wholesale power sales by public utilities.[5] Part II of the FPA, codified at 16 U.S.C. §§ 824-824m, delegates to FERC "'*exclusive* authority to regulate the . . . sale at wholesale of electric energy in interstate commerce.'"[6] In cases dealing with FERC's regulatory authority over transactions and services, courts have held that FERC's regulation of wholesale power sales and interstate transmission pursuant to FPA Section 201(b) is plenary and preempts State regulation in these areas.[7] The "scope of this authority is not amenable to case-by-case analysis, but rather represents a bright-line rule."[8] The sole exception to this rule is that states do have authority to establish an avoided cost price when utilities purchase power from QFs pursuant to PURPA.[9]

An expanded FIT program will encroach on FERC's jurisdiction in violation of the FPA to the extent it requires the investor-owned utilities ("IOUs") to purchase wholesale power from certain eligible facilities, regardless of whether those facilities have obtained QF status, and sets prices for sales by QFs to the IOUs that are different from avoided cost. What the State has

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5 *See, e.g.*, *Barton Village Inc.*, 100 FERC ¶ 61,244 at P 12 (2002) (footnote omitted) ("Under the Federal Power Act . . . the Commission has exclusive jurisdiction over . . . wholesale power sales rates . . . [t]hus, we have no legal obligation to review, much less rely upon, the findings by the [state]."); *Midwest Indep. Transmission Sys. Op., Inc.*, 111 FERC ¶ 61,448 at P 41 (2005) ("We disagree . . . that state commissions can serve as co-regulators with regard to wholesale energy markets").

6 *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 928 (9th Cir. 2002) (quoting *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982)).

7 *See, e.g.*, *FPC v. Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964); *Public Util. Dist. No. 1 of Gray's Harbor County Washington v. IDACORP, Inc.*, 379 F.3d 641, 646-47 (9th Cir. 2004).

8 *Lockyer v. Dynegy, Inc.,* 375 F.3d 831, 850 (9th Cir. 2003).

9 16 USC §824a-3 et.seq.

authority to do, under PURPA, is to set prices for QFs at the IOU's avoided cost.[10] In light of this legal framework over prices, any Commission order that sets the price for power under the FIT must comply with PURPA.[11]

The case of *Midwest Power Systems, Inc.*[12] addresses whether the state has the authority to mandate the purchase of electricity from alternative providers. In *Midwest Power Systems*, FERC found that orders of the Iowa Utilities Board, implementing an Iowa alternative energy statute, were preempted in part by federal law. The Iowa Board had ordered Iowa electric utilities to enter into long-term contracts for the purchase of power from alternative facilities, which might or might not be QFs, at a specified six-cent rate. FERC found that:

> [T]he Iowa statute and the implementing orders of the Iowa Board are consistent with federal law to the extent that they require electric utilities located in Iowa to purchase from certain types of generating facilities. Nevertheless, the orders of the Iowa Board are preempted to the extent that they require rates to QFs in excess of the purchasing utilities' avoided cost, and to the extent that they set rates for the wholesale sales of electric energy by public utilities.[13]

FERC also explained that the Iowa alternative facilities that sold energy at wholesale in interstate commerce did not have to be QFs, but could be exempt wholesale generators (under the Energy Policy Act of 1992), in which case FERC would evaluate their rates on a cost-of-service or market basis. FERC stated that "[u]nder the FPA, [FERC] cannot delegate this wholesale ratemaking authority to the states."[14] Similarly, in *Southern California Edison Co.,* FERC explained that a state "may not set avoided cost rates or otherwise adjust the bids of potential suppliers by imposing environmental adders or subtractors that are not based on real

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10 *Southern California Edison Co.*, 70 FERC ¶ 61,215, *reconsideration denied*, 71 FERC ¶ 61,269 (1995) ("PURPA does not permit either [FERC], or the States in their implementation of PURPA, to require a purchase rate that exceeds [the utility purchaser's] avoided cost."); *Connecticut Light and Power Co.,* 70 FERC ¶ 61,012, *rehearing denied* 71 FERC ¶ 61,035 (1995) (same).

11 Some entities that sell wholesale power, such as state and federal instrumentalities, are exempted from FERC regulation.

12 78 FERC ¶ 61,067 (1997).

13 *Id.* at 61,246.

14 *Id.* at 61,247.

costs that would be incurred by utilities. Such practices would result in rates which exceed the incremental cost to the electric utility and are prohibited by PURPA."[15]

As FERC determined in *Midwest Power Systems, Inc.*, the State encroaches on FERC's jurisdiction in violation of the FPA to the extent the CPUC requires the IOUs to purchase wholesale power from eligible FIT program facilities and sets a rate that exceeds avoided cost for those purchases. To the extent the Commission seeks to set the price for power sold by FIT-eligible facilities, those facilities must obtain QF status, and the Commission must set the price at the IOU's avoided cost.[16]

Another option available to the Commission is to allow the FERC-jurisdictional CAISO market to govern prices for power sold by generating facilities. In this way, the Commission would not itself set the price, but instead the FERC-jurisdictional CAISO day-ahead Integrated Forward Market would govern what eligible program generators are paid. Participating facilities would still need to receive market-based rate authority and/or QF status from FERC, as well as comply with applicable FERC rules (or receive waivers of those mandates). SCE supports allowing the CAISO market to govern prices for power purchased by the IOUs from FIT-eligible generators because a market-based pricing methodology best represents SCE's avoided cost.

PURPA defines avoided costs as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source."[17] PURPA's avoided cost limitation was designed to ensure that utility customers do not pay more for power produced by QFs than they would have if the utility had purchased it from another source or generated the power itself.[18] Thus, customers should be indifferent to the source of power given

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15 71 FERC ¶ 61,269 at 62,080 (1995).

16 *See supra* note 9.

17 18 C.F.R. 292.101(b)(6).

18 *See* 16 U.S.C. § 824a-3(b), (d); *Independent Energy Producers Ass'n, Inc. v. CPUC*, 36 F.3d 848, 858 (9th Cir. 1994) ("ratepayers should be indifferent to the source of power and . . . if rates are set at the utility's avoided costs, ratepayers will pay neither more nor less than they otherwise would have"); H.R. Rep. No. 1750, 95th Cong., 2d Sess. at 98, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 7832 ("The provisions of this

Continued on the next page

that customers should pay the same for QF power as for utility-owned power or power purchased elsewhere.[19] A market-based price for the FIT would hold customers indifferent.

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.

For the reasons explained above, SCE continues to maintain that only FERC may set rates for non-PURPA wholesale power sales. The State may require FIT program projects to register as QFs and set pricing at the utility's avoided cost pursuant to its authority under PURPA.

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)?

As discussed above, the Commission may only set the wholesale price of energy in accordance with its authority under PURPA. That is, it may only set prices for QFs and it may only set such prices at avoided cost, which can be a market-based price. Accordingly, whether or not the Commission takes the PURPA route, SCE supports allowing the CAISO market to govern prices for power purchased by the IOUs from FIT-eligible generators because SCE anticipates that a market-based pricing methodology will better reflect the measure of ratepayer indifference.

Continued from the previous page
section are not intended to require the rate payers of a utility to subsidize cogenerators or small power producers").

[19] *See Independent Energy Producers Ass'n, Inc.*, 36 F.3d at 858.

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?

Yes. The Commission may establish appropriate eligibility criteria including, but not limited to, requiring that a participating generator be either a QF or an exempt wholesale generator. As provided above, to the extent the Commission wishes to establish a price for power under the FIT program, it must require that eligible generators obtain QF status. To the extent the Commission does not want to establish the FIT program with an avoided cost price for power pursuant to its authority under PURPA and require generators to obtain QF status, participating generators, in order to abide by FERC rate regulation requirements, would still need to either: 1) receive market-based rate authority from FERC; 2) file cost-based rates at FERC; or 3) self-certify as a QF (and report a net capacity under 20 MW). In all cases, such generators also must abide by any other applicable FERC regulations unless they have obtained a waiver of such regulation.

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

SCE may respond to additional issues in its reply comments to the extent they are raised in opening comments on the Ruling.

III. CONCLUSION

For the foregoing reasons, SCE respectfully requests that the CPUC incorporate the above recommendations into a decision on its legal authority to set pricing for an expanded FIT program.

Respectfully submitted,

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June 18, 2009

VERIFICATION

I am a manager in the Renewable and Alternative Power Department of Southern California Edison Company and am authorized to make this verification on its behalf. I am informed and believe that the matters stated in the foregoing pleading are true.

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

Executed this **18th day of June, 2009**, at Rosemead, California.

/s/LAURA GENAO
By: Laura Genao

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the Commission's Rules of Practice and Procedure, I have this day served a true copy of the **BRIEF OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) ON JURISDICTION IN THE SETTING OF PRICES AND A FEED-IN TARIFF** on all parties identified on the attached service list(s). Service was effected by one or more means indicated below:

Transmitting the copies via e-mail to all parties who have provided an e-mail address. First class mail will be used if electronic service cannot be effectuated.

Executed this 22nd **day of June, 2009**, at Rosemead, California.

/s/CHRISTINE M. SANCHEZ
By: Christine M. Sanchez

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