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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 THE SOLAR ALLIANCE AND THE VOTE SOLAR INITIATIVE ON JURISDICTION IN THE SETTING OF PRICES FOR A FEED-IN TARIFF

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In accord 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) in the above captioned proceeding, the Solar Alliance and the Vote Solar Initiative (hereinafter the "Joint Solar Parties") submit these comments on the Commission's jurisdiction with respect to the setting of prices in an expanded feed-in tariff (FIT) program.

A. FEED-IN TARIFF JURISDICTIONAL ISSUES

The Joint Solar Parties appreciate the opportunity to address the questions raised in the Ruling regarding the Commission's jurisdiction to set prices for renewable energy in an expanded feed-in tariff program. As explained more fully below, there are multiple approaches to feed-in pricing that would fit squarely within the jurisdictional authority of the Commission. The approaches may, however, deliver different pricing outcomes or have different implications for renewable energy markets in California. We understand that the Commission is planning to conduct further rulemaking expressly on the subject of establishing a pricing methodology. As such, we will restrict our arguments here to responding to the Commission's questions regarding

its jurisdiction and defer discussion of pricing outcomes for the planned next phase of the Commission's FIT proceeding.

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.

The Commission has authority to establish price levels in an expanded feed-in tariff. Although the Federal Power Act (FPA) grants the Federal Energy Regulatory Commission (FERC) jurisdiction over wholesale sales in interstate commerce, including sales made entirely intrastate[1] and sales delivered locally to a distribution system,[2] the Commission has full authority to set wholesale rates consistent with the Public Utility Regulatory Policies Act of 1978 (PURPA).[3] Moreover, as discussed below, states are not preempted by either the FPA or PURPA from setting resource-specific procurement targets, regulating the sale of renewable energy credits (RECs), recognizing distribution costs and benefits and incorporating such values in tariffs, or using market-based methodologies to implement PURPA. With these tools, the Commission has the authority to establish effective feed-in tariff pricing that comports with existing federal/state jurisdictional delineation and promotes the benefits of renewable

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1 *Federal Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205 (1964); *T&E Pastorino Nursery v.* Duke *Energy Trading and Mktg., LLC*, 2003 U.S. Dist. LEXIS 16352 (S.D. Cal Aug. 25, 2003), *aff'd* 2005 U.S. App. LEXIS 3315 (9th Cir. Feb. 25, 2005) ("The fact that a significant portion of the transactions at issue concern sales of electricity generated in California and sold in California does not alter the conclusion that the wholesale transactions are still interstate in nature.")

2 *Detroit Edison Co. v. Federal Energy Regulatory Commission*, 334 F.3d 48, 51 (D.C. Cir. 2003) ("when a local distribution facility is used in a wholesale transaction, FERC has jurisdiction over that transaction pursuant to its wholesale jurisdiction under *FPA § 201(b)(1)*.")

3 Pub. L. No. 95-617, 92 Stat. 3117, 16 U.S.C. § 824a-3 *et. seq.* (2009).

distributed generation, such as the ability to quickly develop projects that deliver clean, on-peak energy close to load.[4]

Federal law has no preemptive effect with respect to setting resource specific procurement goals for regulated utilities.[5] Thus, the Commission acts squarely within its jurisdiction when it establishes procurement targets for jurisdictional utilities, including procurement from specified generation resources such as the Commission is considering in connection with utility-owned solar generation programs.[6] Over 26 states currently have RPS statutes that impose such requirements,[7] some of which include specific procurement targets for solar and distributed generation.[8] State law also provides the Commission wide latitude to establish resource procurement goals and require utilities to purchase renewable generation.[9]

In multiple venues, the Commission and the Legislature have concluded that renewable resources provide additional value to California ratepayers beyond that which might be derived from traditional generation resources including coal or natural gas fired plants.[10] In addition, by

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4 The Joint Solar Parties note that the Waxman-Markey energy bill contains an amendment that may shift the existing federal/state jurisdictional delineation and allow states even greater flexibility in establishing pricing for renewable energy sales. Castor-Inslee amendment to H.R. 2454, May 21, 2009, Ordered to be Reported by House Committee on Energy and Commerce.

5 *Midwest Power Systems, Inc.*, 78 FERC ¶ 61,067, 1997 FERC LEXIS 123 at *16-17 (1997).

6 Docket Nos. A.08-03-015 (SCE), A.08-07-017 (SDG&E) and A.09-02-019 (PG&E).

7 *See* DSIRE database of state renewable energy incentives, current as of June 2009, and available at http://www.dsireusa.org/documents/SummaryMaps/RPS_map.ppt

8 New Jersey requires a minimum percentage of solar generation in its RPS. N.J.A.C. § 14:8-2.3. Arizona's RPS has a requirement that 30% of the portfolio target be derived from distributed generation sources by 2012, AAC R-14-2-1805. Colorado also has a carve-out. 4 Code of Colorado Regulations 723-3-3654(d).

9 CA Public Utilities Code §§ 399.14 - 399.15.

10 *See, e.g.,* CA Public Utilities Code § 399.11(a)-(c); CA Pulic Resources Code § 25780 (b); Final Opinion on Greenhouse Gas Regulatory Strategies, Docket No. R.06-04-009, Decision 08-10-037 § 4.1.2.2 (October 16, 2008); Opinion Adopting . . . Long Term Procurement Plans, Docket No. R.06-02-013, Decision 07-12-52 § 2.3.3.5 (December 20, 2007).

targeting feed-in tariff eligibility at smaller generators, the program creates potential for building projects on existing structures, minimizing environmental impacts including local emission impacts, avoiding transmission and distribution system upgrades, and encouraging delivery of on-peak energy close to load. These benefits provide significant value, and it is important and justifiable to capture them in a differentiated tariff.[11]

Although the market-price referent (MPR) provides an established basis for feed-in tariff pricing,[12] the MPR was not intended to serve as a calculation of the avoided cost of purchasing renewable power.[13] Rather, the MPR reflects an all-in cost of natural gas-fired generation that a utility avoids in the long-term by purchasing power from a renewable energy generator. It serves as a benchmark against which to compare the cost of renewable generation; it does not serve as a cap on the price that may be paid for RPS-eligible renewable power. Moreover, the MPR is a price for generation calculated at the generator's busbar;[14] as a result, it does not consider the costs of delivering generation to load. Accordingly, the Commission is well within its authority to establish feed-in tariff pricing above the MPR by recognizing avoided transmission and distribution line losses and congestion costs, avoided or deferred transmission and distribution upgrades, avoided environmental compliance costs, and avoided RPS non-compliance penalties.

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11 This approach would mirror that taken by the Commission in establishing MPR time of delivery factors.

12 Ruling Regarding Briefs on Jurisdition in Setting of Prices for a Feed-In Tariff, p. 1, Docket No. R. 08-08-009 (May 28, 2009); Public Utilities Code § 399.20(d); Decisions 07-07-027, 08-02-010 and 08-09-033.

13 Opinion Adopting Market Price Referent Methodology, Docket No. R. 04-04-026, Decision 04-06-015, p. 7, fn. 10 (June 9, 2004).

14 Decision 08-10-026, pp. 25-26.

Recognition of these benefits is fully consistent with PURPA.[15] PURPA gives states significant flexibility to determine rates and conditions for qualifying facility purchases as long as such rates do not exceed the "incremental cost to the electric utility of alternative electric energy."[16] FERC regulations provide a list of factors to be taken into account in establishing incremental costs, but this list is not exhaustive.[17] FERC affords the Commission "a great deal of flexibility" in making pricing determinations.[18]

Although the benefits of renewable distributed generation may be justifiably taken into account in setting a feed-in tariff power price above the MPR, the Commission may reach the same result by establishing a price for procuring environmental attributes. To the extent feed-in tariff purchases include an acquisition of renewable energy attributes, compensation for those attributes via the purchase of RECs would come within the Commission's exclusive jurisdiction.[19] Accordingly, the Commission may establish market rules for the purchase of feed-in tariff RECs such as the Commission is currently doing through its tradable REC docket for unbundled REC purchases.[20] The Commission may also establish differentiated REC pricing

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15 *See*, *e.g.*, concurrence of Commissioner Massey, *Southern California Edison Co*., 70 FERC ¶ 61,215, 61,678 (1995) ("The consideration of environmental costs and other non-price factors under PURPA is consistent with a recent amendment to PURPA.")

16 16 U.S.C. § 824a-3(b).

17 18 C.F.R. 292.304(e).

18 *Independent Energy Producers Association, Inc. v. CPUC*, 36 F.3d 848, 856 (9th Cir. 1994); *Southern California Edison Co*., 70 FERC ¶ 61,215, 61,675 (1995) ("the Commission gives great latitude to state commissions as to procedures selected to determine avoided costs.")

19 *American* Ref-*Fuel Co*., 105 FERC 61,004, 61,007 (2003), *reh'g denied*, 107 FERC ¶ 61,016 ("RECs are created by the States… They exist outside the confines of PURPA.").

20 Docket No. R.06-02-012.

that is targeted to meeting specific program goals. New Jersey and Arizona have taken this approach in providing compensation for RECs.[21]

The Commission also has options available for recognizing avoided or deferred transmission and distribution costs, including line losses, congestion, and the cost of upgrades. Similar to the Commission's time of delivery adjustments to the MPR, the Joint Solar Parties believe it would be appropriate to recognize the locational benefits of certain generation in setting a feed-in tariff power price above the MPR. The Joint Solar Parties note that FERC's regulations expressly allow the Commission to "differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies."[22] However, as an alternative, the Commission may consider compensation for locational benefits a distribution cost that may be folded into a utility's distribution system revenue requirements. This approach raises no preemption concerns as the Commission has exclusive jurisdiction over "facilities used in local distribution."[23] Either approach would represent a reasonable extension of compensation to categories of sellers that relieve infrastructure costs by either deferring new distribution and transmission system costs or obviating them altogether.

The Commission also has options with respect to the mechanism used for establishing feed-in tariff pricing. In addition to the administrative means discussed above, the Commission may also make use of market-based approaches such as competitive bidding.[24] Although

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21 *See* N.J.A.C. § 14:8-2.3 (creating differentiated solar REC); AAC R-14-2-1805 (creating differentiated distributed generation REC).

22 18 C.F.R. § 292.304(c)(3)(ii).

23 *Detroit Edison Co.*, 334 F.3d at 53-54 ("Section 201(b)(1) of the FPA denies FERC jurisdiction over local distribution facilities… .")

24 *See*, *e.g.*, *Cogen Lyondell, Inc.*, 95 FERC ¶ 61,243, 61,838 (2001); Southern California Edison Co., 70 FERC ¶ 61,215 (1995), *reconsideration denied,* 71 FERC ¶ 61,269, 62,080 (1995); *Cf. Jersey Central Power & Light Co.*, 73 FERC ¶ 61,092 (1995).

avoided costs established through competitive bidding must include all sources of generation available to sell to a utility,[25] the Joint Solar Parties are not aware of any precedent that prohibits the Commission from recognizing identifiable differences in procurement costs for a defined market segment.

A Renewable Portfolio Standard, or resource specific procurement target, creates a distinct and separate framework whereby a utility with a specified procurement target may have a separate avoided cost for satisfying that requirement. In *Southern California Edison Co.*, 70 FERC ¶ 61,215 (1995), FERC determined that all sources of generation and types of sellers must be able to bid where a competitive bidding process is used to establish avoided cost.[26] In context of an RPS, non-renewable resources are simply not able to sell to the utility to meet procurement target requirements and thus are logically excluded from the determination of the avoided cost of meeting the procurement target. Accordingly, the Commission may establish a requirement to purchase specific resources, and as fulfillment of that requirement, establish an avoided cost for such purchases through a market mechanism.

As noted above, FERC's regulations expressly allow the Commission to differentiate among technologies on the basis of the supply characteristics.[27] Moreover, the Energy Policy Act of 1992 amended PURPA to require consideration of "integrated resource planning."[28] The amendment of PURPA to include this requirement supports construing PURPA as allowing consideration of the non-price factors essential to accomplishing resource procurement goals.[29]

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25 *Southern California Edison Co*., 70 FERC ¶ 61,215 (1995).

26 *Id.*

27 18 C.F.R. § 292.304(c)(3)(ii).

28 16 U.S.C. § 2621(d)(7).

29 *Southern* California *Edison Co*., 70 FERC ¶ 61,215 at 61,678.

In conclusion, it should be stressed that these approaches are not mutually exclusive. They may be combined to provide the Commission with even greater flexibility in establishing feed-in tariff pricing.

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.

SCE argues that "[a]n expanded FIT 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*." (italics added)[30] As discussed above, the Joint Solar Parties do not believe successful implementation of a FIT requires the Commission to set a rate for wholesale power that exceeds avoided cost. Moreover, as the Joint Solar Parties stated in their April 17, 2009 reply comments in this docket, SCE's concerns are mistimed and misplaced.[31] SCE's arguments are based on pricing of tariffs, which the ALJ Ruling explicitly stated was to be considered during a future phase. Although parties should be mindful of jurisdictional issues as we enter the pricing phase of this proceeding, the Joint Solar Parties do not believe the concerns raised by SCE prevent the Commission from moving forward and adopting a well designed and successful feed-in tariff.

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30 Southern California Edison Company's (U388-E) Response to ALJ's Ruling on Additional Commission Consideration of a Feed-in Tariff, Docket No. R.08-08-009, p. 11 (Apr. 10, 2009).

31 Reply Comments of the Solar Alliance and The Vote Solar Initiative on the Energy Division Staff Proposal on Feed-in Tarff for Renewable Generators Greater than 1.5 MW, p. 7, CPUC Docket No. R.08-08-009 (April 17, 2009).

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 has been explained herein, there are multiple approaches, which are not mutually exlusive, that the Commission can take to set the purchase price for electricity under an expanded FIT program. For example, the Commission could set such price above the MPR by recognizing avoided transmission and distribution line losses and congestion costs, avoided or deferred transmission and distribution upgrades, avoided environmental compliance costs, and avoided RPS non-compliance penalties. Or, to the extent feed-in tariff purchases include an acquisition of renewable energy attributes, the Commission might reach the same result by establishing a price for procuring such attributes. Moreover, in contrast to these administrative pricing means, the Commission may also make use of market-based approaches such as competitive bidding. Finally, a Renewable Portfolio Standard, or resource specific procurement target, creates a distinct and separate framework whereby a utility with a specified procurement target may have a separate avoided cost for satisfying that requirement. Each of these approaches, however, might deliver different pricing outcomes or have different implications for renewable energy markets in California. Therefore, it is imperative that they each be explored in detail. As the Commission is planning to conduct further rulemaking expressly on the subject of establishing a pricing methodology, the Joint Solar Parties will await such exploration and defer discussion of pricing outcomes for the planned next phase of the Commission's FIT proceeding.

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?

The Commission has authority to establish feed-in tariff eligibility requirements, including certification as an exempt wholesale generator. However, the Joint Solar Parties

believe feed-in tariff generators should have flexibility to determine the most appropriate means of complying with federal regulatory requirements and that such requirements should not be imposed through feed-in tariff terms and conditions.

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

The Joint Solar Parties have no further comment at this time.

B. CONCLUSION

The Joint Solar Parties appreciate the opportunity to provide these comments on the Commission's jurisdiction with respect to the setting of prices in an expanded feed-in tariff program.

Respectfully submitted this June 18, 2009, at San Francisco, California.

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By */s/ Kevin T. Fox*
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ATTACHMENT A

Verifications

I am the attorney for The Vote Solar Initiative (Vote Solar); Vote Solar is absent from the County of Alameda, California, where I have my office, and I make this verification for Vote Solar for that reason; the statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information or 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 June 18, 2009 at Oakland, California.

/s/ *Kevin T. Fox*
Kevin T. Fox, Attorney for The Vote Solar Initiative

I am the Executive Director - California of The Solar Alliance, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information or 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 June 18, 2009 at San Francisco, California.

/s/ *Sara Birmingam*
Sara Birmingham, Executive Director – California, The Solar Alliance

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the *Brief of the Solar Alliance and the Vote Solar Initiative on Jurisdiction in the Setting of Prices for a Feed-in Tarff* upon all known parties of record in this proceeding by delivering a copy via electronic mail to all parties who have provided an electronic mail address. First class mail will be used if electronic service cannot be effectuated.

Executed on June 23, 2009 in Oakland, CA.

_/s/ Kevin T. Fox_____

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