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Decision 91-05-007 May 8, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

In the Matter of the Application of SOUTHERN CALIFORNIA GAS COMPANY for authority to revise its rates effective October 1, 1989, in its Annual Cost Allocation proceeding.	Application 89-04-021 (Filed April 12, 1989)
And Related Matters.	Application 89-05-006 Application 90-02-027 Application 90-04-029 Application 90-10-032

(See Appendix A for appearances.)

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I N D E X

O P I N I O N

This decision addresses the applications of San Diego Gas & Electric Company (SDG&E), Southern California Edison Company (Edison), and Pacific Gas and Electric Company (PG&E) for approval of programs for monitoring the efficiency of qualifying facilities (QFs). The utilities propose that QFs which do not meet certain efficiency standards would receive less than avoided costs for the power they sell to the utilities.

This decision approves, with certain modifications, the programs proposed by SDG&E, Edison, and PG&E. It is in the interest of California ratepayers and consistent with state and federal policy to assure that QFs meet minimum efficiency standards set by the Federal Energy Regulatory Commission (FERC).

I. Procedural Background

SDG&E filed its application on February 8, 1990 seeking approval of a QF monitoring program. SDG&E proposes that QFs which do not meet certain efficiency standards would receive less than full avoided costs for energy sold to the utility and would not be offered certain gas discounts. Edison filed a similar application on April 19, 1990. On October 10, 1990, PG&E filed its application addressing avoided cost issues.

The California Cogeneration Council (CCC) and the Cogenerators of Southern California (CSC) protested the applications. DRA responded in support of the utility applications.

Several major issues were raised during the proceeding:

- Whether the Commission has jurisdiction to order monitoring and enforcement of Qualifying Facility (QF) efficiency standards;

- Whether QF efficiency monitoring would benefit ratepayers;
- Whether the utilities should be entitled to review QF operational data in monitoring compliance with efficiency standards and how confidentiality can be assured in cases where it is required;
- Whether the proposed program elements are reasonable;
- Whether the Commission should hold the utilities harmless for failure to enforce power purchase contracts prior to Commission approval of pending utility program proposals.

On July 13, 1990, several parties filed for approval of a settlement on the issue of utility monitoring of cogenerator efficiency for determining appropriate gas rates. The Commission addressed the settlement in Decision (D.) 90-12-019, finding that certain of its provisions were contrary to the Public Utilities Code.

II. Summaries of the Proposed Monitoring Programs

A. SDG&E

SDG&E proposes that cogenerators submit to it each year on January 31 operational data for the previous year. It would then evaluate the data in light of FERC efficiency standards. Facilities which do not submit data, or whose data shows that they are not in compliance with efficiency standards, would be subject to suspension of certain contract benefits. Specifically, non-complying cogenerators would receive 80% of published avoided energy and capacity costs. Cogenerators under 100 kilowatts would be removed from the PGQF tariff for cogenerators. Prior to suspension, SDG&E would retain contractual benefits for a 5-month probation period, during which time power producers may modify their facilities to meet operational requirements. During the suspension period, no changes would be made to electrical interconnection arrangements with SDG&E. Power producers whose benefits are suspended may have benefits reinstated if they can show compliance with efficiency standards. SDG&E would permit facilities to appeal its decisions regarding compliance and suspension of benefits.

SDG&E's application also asks the Commission to suspend enforcement of power purchase contracts until the Commission issues a decision approving monitoring and enforcement guidelines. SDG&E also asks that the Commission find that it is not at risk for not invoking enforcement procedures.

B. Edison

Edison proposes a program similar to SDG&E's except that annual data would be required and evaluated on a staggered schedule. Facilities which are not in compliance would be placed on probation for one year, during which time the facility would be required to correct deficiencies. If, after the probation period, the facility does not meet efficiency standards, Edison would suspend the facility's benefits. Facilities which do not submit data would have benefits suspended immediately. Specifically, Edison would reduce the price at which it purchases energy (to an unspecified amount), will remove facilities from Tariff Schedule No. GS-PG, remove power producers from parallel operation under Tariff Schedule No. S, and would collect past overpayments.

C. PG&E

PG&E proposes a program similar to SDG&E's with certain differences. PG&E would provide a six month probation period for facilities which do not comply with FERC efficiency standards, except those facilities which are "flagrantly out of compliance" (those with no steam host and those whose operations fall below 35% efficiency levels). These latter facilities and those unable to comply with efficiency standards within the six month probation period would receive 80% of short-term avoided costs. Benefits could not be reinstated until after the subsequent annual review.

Like SDG&E, PG&E asks the Commission to find that PG&E is not at risk for payments made to power producers in excess of PG&E's replacement cost of power, pending approval of its program. It also seeks a finding that the reasonable costs to PG&E of administering its program, including the costs of metering facilities, are recoverable from PG&E's ratepayers.

III. Commission Jurisdiction Over Monitoring and Enforcement of Cogenerator Efficiency Standards

A. Positions of the Parties

1. Cogenerators

CCC and CSC argue that this Commission does not have jurisdiction to administer the federal rules which guide payments to QFs under the Public Utility Regulatory Procedures Act (PURPA).

CCC describes the legislative history of PURPA to support its argument that only the FERC has jurisdiction to certify and decertify QFs. FERC set up specific standards for certification under a process that enables QFs to avoid lengthy proceedings. Under the process, a QF may "self-certify" by submitting documentation to FERC of its operational status. CCC also believes the underlying purpose of PURPA, which was to reduce the utilities' obstruction of the development of an independent power industry, would be undermined if the utilities had regulatory powers over QFs.

FERC policy, according to CCC, is binding on state agencies. CCC states the FERC has consistently refused to establish efficiency monitoring as part of its regulatory process:

> "The Commission believes that the administrative costs associated with monitoring large numbers of qualifying facilities would be prohibitive...(A)n applicant that ceases to meet the requirements for qualifying status and fails to notify the Commission pursuant to

> Section 292.207(d)(2) may be subject to civil and criminal penalties. The Commission will investigate any complaints that qualifying requirements are not being met. As a result, the commission believes it is not necessary to establish a monitoring system." (Small Power Production; Order Granting in Part and Denying in Part Rehearing of Orders Nos. 69 and 70, and Amending Regulations, 45 Fed. Reg. 33,958, 33,963 (1980).)

CCC cites Resources Recovery, Inc., 18 FERC 61, 314, (1982) in which the FERC rejected a utility petition to revoke a QF's status in the course of a pending resolution over ownership of the QF. FERC rejected the utility's petition on procedural grounds, finding that "it is not consistent with the procedures set out in 18 C.F.R. 292.207..." CCC cites other FERC orders by which FERC declined to enforce efficiency standards by QFs.

CSC argues that FERC rules explicitly limit which regulations state regulatory agencies are required to implement:

> "Not later than one year after these rules take effect, each State regulatory authority shall, after notice and an opportunity for public hearing, commence implementation of Subpart C...Such implementation may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utility arising under Subpart C, or any other action reasonably designed to implement such subpart." (18 C.F.R. Section 292.401(a).)

CSC interprets this language to mean the states may implement only Subpart C of Part 292 of the FERC rules. Certification and decertification procedures are not included in Subpart C.

CSC submits that if a utility doubts the operational efficiencies of a QF, it may petition FERC to revoke the facility's QF status pursuant to federal rules. It also argues that neither the Commission nor the utilities should be permitted to second guess FERC and its jurisdiction over QFs.

CCC raises an issue related to that of the Commission's jurisdiction to oversee avoided cost payments. It argues that the QF's power purchase agreements do not give electric utilities the authority to monitor or enforce efficiency standards. CCC points out that all standard offer contracts contain a statement that the QF "warrants that the Plant will meet the requirements of a Qualifying Facility as defined herein from the date of first power delivery throughout the terms of this Agreement." CCC states that a warranty is a legally enforceable guarantee, but that it does not imply that the guarantor must prove it is living up to its promise. Rather, according to CCC, a warranty gives the contracting utility the right to challenge the guarantor's compliance. CCC argues that such challenges are appropriately made by way of formal complaints at the Commission or in the courts. CCC believes this is what the Commission intended when it rejected utility proposals which would allow them to terminate contracts for failure to comply with applicable rules (D.83-10-093).

2. <u>The Utilities</u>

The utilities argue that the Commission is within its authority to oversee QF efficiency monitoring programs.

PG&E emphasizes that Section 210 of PURPA requires FERC to establish rules for utility purchases from QFs and expressly commands the states to implement, guide and administer those purchases under Section 210(f). It comments that the Commission has supervised administration of Standard Offer agreements under explicit Commission rules. PG&E argues that preemption of state action by a federal agency may be established only when the latter clearly expresses an intent to preempt state law. According to PG&E, FERC has set forth no monitoring standards or procedures and the states are therefore free to implement their own programs, within the guidelines set forth in the FERC rules.

PG&E cites the FERC's preamble to the QF regulation to support its view that utilities are entitled to operational information from QFs:

> "The Commission believes the initiation of purchase and sale arrangements, pursuant to subpart C of this part of the Commission's rules, will necessitate the flow of information between potential qualifying facilities and affected electric utilities. The Commission therefore notes that the requirements contained in the proposed rule...for the filing of substantial information (on QF status) with this Commission are not necessary." (18 CFR 292, Subpart B.)

Edison makes similar comments, adding that its program does not propose decertification of QFs, contrary to the claims of the cogenerators. It would merely determine whether QFs meet applicable federal efficiency requirements as warranted by QFs in their power purchase agreements. Edison points out that the U.S. Supreme Court has observed that, in enacting PURPA, Congress expressed its preference to "let the States retain the primary regulatory role." FERC v. Mississippi, 456 U.S. at 765.

SDG&E emphasizes that the main issue is QF responsibility for meeting explicit contract commitments. SDG&E points out that all its standard offer contracts, except Standard Offer 3, require that cogenerators make operational information available to the utilities as required by contract terms. SDG&E cites the Commission's commitment to contract enforcement:

> "The standard offer contract entitles a QF to the payment terms of the offer so long as a QF can meet all the terms and conditions of its contract." (D.88-10-032, Finding of Fact 8.)

SDG&E also cites federal authority setting forth the states' role in administering PURPA:

> "These rules afford the State regulatory authorities and nonregulated electric utilities great latitude in determining the manner of

> implementation of the Commissions rules."
> (45 Fed. Reg. 12230, February 25, 1980.)

It comments that the Commission's approval of standard offers, which include warranty provisions, is an explicit exercise of the Commission's jurisdiction which has not been challenged heretofore.

SDG&E believes that, as a matter of law, a power producer is not a QF if it does not meet efficiency requirements. The FERC rules define a "Qualifying cogeneration facility" as one "which meets the criteria for qualification set forth in Section 292.203." 18 CFR 292.207(a)(1). According to SDG&E, the FERC need not approve the status of a power producer for it to become a QF. SDG&E argues that the sole purpose of the requirement that QFs notify the FERC of their status is to facilitate "monitoring the market penetration of qualifying facilities." 45 Fed. Reg. 17971 (March 20, 1980). In support of its position that QF status is determined by compliance with efficiency standards and not by FERC actions, it states the revocation process to which the cogenerators refer applies only to facilities which have previously been formally certified by FERC 18 CFR 292.207(d)(1).

3. DRA

DRA cites several court decisions in support of its argument that the Commission does have authority to oversee QF efficiency on the basis that neither Congress nor FERC have stated an intent to preempt the states from such oversight. DRA believes the federal and state interests are consonant rather than conflicting. It argues that the Commission should not defer to FERC enforcement which does not appear to be forthcoming. According to DRA, Commission enforcement is sensible and necessary in light of the costs to California ratepayers of noncompliance.

B. Discussion

We find that the Commission has jurisdiction to require the utilities to enforce QF efficiency standards. Section 210 of PURPA anticipates that the states will implement, guide and administer power purchases arising under PURPA (16 U.S.C. Section 824a-3). Over the past ten years, the Commission has established rates, contract terms, and interconnection arrangements under PURPA. Power purchase contracts we have approved require QFs to meet efficiency requirements. For example, Edison's Standard Offer 1 contract provides that the "Generating Facility shall meet the qualifying facility requirements established as of the effective date of this Agreement by the Federal Energy Regulatory Commission's rules (18 Code of Federal Regulations Section 292)." These contracts also require QFs to provide the utilities with operational information. Edison's Standard Offer 1, for example, requires the generating facility to maintain daily operational records and provides that each party to the contract shall "have the right to review and obtain copies of metering records and operations and maintenance logs of the Generating Facility."

FERC regulations grant the states explicit authority to consider contract provisions in setting rates. As CCC observes, Section 292.401 of the federal rules directs the states to implement Subpart C of those rules. Subpart C sets forth guidance for setting rates for purchases of electricity from QFs. Subpart C states that rates for purchases may be affected by "The terms of any contract or other legally enforceable obligation, including...sanctions for noncompliance." Thus, we have considerable latitude under federal regulations to set or adjust rates where there is noncompliance with the terms of the contract.

The FERC has no QF monitoring program and does not presently plan to develop one. Contrary to the cogenerators' claim, FERC's inaction does not preempt us from the types of enforcement efforts proposed by the utilities. In a case involving state oversight of PURPA, the federal court found that preemption of state action by a federal agency may be established only "by the regulatory agency's clear expression of an intent to preempt state law." (Greensboro Lumber Co. v. Georgia Power Co., 643 F. Supp. 1345, 1384 (N.D. Ga. 1986).) The cogenerators do not cite any FERC order which expresses an intent to preempt the states from establishing monitoring programs. The cited FERC orders merely decline to establish a federal program or to require specific power producers to file information in FERC investigations.

The cogenerators argue that federal rules do not permit us to delegate to utilities enforcement of contracts. This argument is implausible. The contracts in question are between the utilities and the power producers. In a bilateral contract, each party has the authority and obligation to enforce performance of the contract by the other party.

FERC shares our view that the utilities have a role in contract compliance. In developing its rules, FERC expected QFs to share information with utilities and to assure contract compliance. The preamble to FERC's regulations rejects a proposal that QFs be required to file operational information with the agency on the basis that "the initiation of purchase and sale arrangements...will necessitate the flow of information between potential qualifying facilities and affected electric utilities." (FERC Regulations and Preambles, Paragraph 30,134 (1980).)

CCC argues that contract warranties do not imply that QFs must demonstrate performance. We disagree. The contracts explicitly require that power producers meet efficiency requirements and will provide operational data which would allow confirmation of compliance.

To conclude, utility monitoring of QF efficiency does not contradict any federal statute or rule. To the contrary, such a program would complement federal rules. The Commission is fully within its authority to establish guidelines for QF efficiency monitoring, and to set rates which reflect the reasonable costs of power purchased from third party power producers. Our interpretation of federal rules is consistent with our role of administering PURPA generally and with the intent of PURPA which is to promote efficient, alternative energy production.

IV. The Costs and Benefits of Efficiency Monitoring

We consider next whether utility efforts to determine QF compliance with efficiency standards will provide net benefits to utility ratepayers.

A. Positions of the Parties

1. Utilities

The utilities believe compliance problems exist. PG&E estimates that up to fifteen percent of cogeneration facilities may be out of compliance with efficiency standards, based on a preliminary study. It estimates that the cost of noncompliance could be as high as $75 million annually. Edison states it has been unable to confirm contract compliance of 190 of the 250 QFs it surveyed. Similarly, SDG&E received responses from only a fraction of the QFs it surveyed regarding operational efficiency.

The utilities assert the costs of enforcement are likely to be minimal, especially after the first year. SDG&E argues there is essentially no incremental cost in collecting the necessary data, given the cogenerators' reporting obligations.

2. Cogenerators

CCC argues that the utilities have not shown that proposed efficiency monitoring would benefit ratepayers. First, it states the utilities have not provided meaningful estimates of costs and benefits. CCC argues that SDG&E's study of cogenerator compliance with efficiency standards is flawed because, as SDG&E's witness pointed out, "much of the data provided was questionable." CCC also believes SDG&E's estimate that its program would cost nothing is "disingenuous." CCC also argues that a high percentage of cogenerated power is produced by a few large facilities and that such cogenerators are most likely in compliance with FERC statutes because of the demands of financing institutions.

CCC believes the Commission should order the utilities to use less costly alternatives to fullblown monitoring programs. It suggests the utilities use existing complaint procedures to ferret out noncomplying QFs or to review data already submitted to regulatory agencies to determine compliance. CCC also suggests the Commission undertake an independent study of QF compliance with efficiency standards if it suspects a problem.

3. DRA

DRA believes the evidence demonstrates that the Commission should be concerned with noncomplying QFs, referring to utility studies. DRA also states that PURPA mandated pricing advantages to QFs because their efficiency conserves fuel and results in cleaner air and societal benefits which are lost when QFs do not meet minimum efficiency standards.

B. Discussion

The utilities have provided adequate evidence to show that some power producers may be out of compliance with efficiency standards and that the cost of enforcing such standards is likely to be more than offset by reduced payments to power producers and the benefits associated with efficiency improvements. At the very least, they have shown that it is sensible to undertake an initial review of QF operations to monitor contract compliance.

The applications do not seek funding for the administration of monitoring programs. They seek approval of program guidelines. If, at a later date, the utilities request rate increases to cover the costs of monitoring programs, they must show that their expenses are reasonable in light of prevailing circumstances. As we have said in other decisions, the utilities have a duty to take reasonable steps to enforce tariffs and to keep all costs down. The reasonable costs of efficiency monitoring efforts should be recoverable from ratepayers.

V. Confidentiality of QF Operational Information

A. Positions of the Parties

1. Cogenerators

CCC objects to any program element which would require QFs to share operating data with the utilities. CCC points out that information is deemed worthy of protection under California's Trade Secret Act if it:

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. (Cal. Civ. Code Section 3426.1(d).)

CCC asserts that QF information meets both of these tests. First, it believes the information has independent economic value and that its release would cause competitive harm. CCC points out that both Edison and PG&E have affiliates which compete with other participants in the QF industry; utility affiliates might receive a competitive advantage over QFs if they gain access to QF operational data. Utility access to QF data, according to CCC, would also put QFs at a disadvantage in contract negotiations with utilities. CCC also expresses concern that non-utility competitors could gain access to QF operating data if the information is provided to utilities.

The test of whether the information is protected under (2), according to CCC, is whether the value of the trade secret outweighs the other party's need for the information <u>Agricultural Labor Relations Bd. v. Richard A. Glass Co.</u>, 175 Cal. App. 3d 703, 715. CCC believes the need for disclosure of cogenerators' information has not been demonstrated in this case.

2. Utilities

SDG&E maintains that CCC's witness could not provide any justification for maintaining confidentiality of the information and admitted that he had provided efficiency information to PG&E and the FERC without any concerns about its disclosure. SDG&E comments that release of customer information by SDG&E employees is grounds for dismissal. It offers to conduct data analysis at the cogenerator's facility and leave the customer's data on site.

Edison and PG&E make similar comments regarding the failure of CCC to support its assertions that QF information is confidential and that providing it to utilities creates a risk of disclosure. PG&E adds that affidavits would not assure compliance given that QFs which are out of compliance have already warranted, under contract, that they would meet efficiency standards.

Edison objects to the use of third-party auditors stating that they may not have the expertise needed to perform the efficiency calculations. It comments that the applicants have proposed adequate procedures for protecting QF data just as they now protect customer information.

3. DRA

DRA opposes the use of affidavits or third party confirmation of QF efficiency. It believes that some judgment must be applied in determining QF efficiency and therefore a simple statement would not be adequate to assure contract compliance. DRA argues that both the utilities and the Commission staff should be entitled to QF operational data. DRA comments that QF contracts require such information disclosure and the QFs have been aware of the contract requirement for the years they have done business with California utilities.

DRA also states that no party has made a convincing showing that a utility will misuse information supplied to QFs. According to DRA, the utilities have been designing, operating, and maintaining power plants for many years; QF operational information is therefore unlikely to be useful to the utilities.

B. Discussion

The test for determining whether QF information should be considered confidential is whether the potential harm to QFs is greater than the costs to ratepayers of non-compliance by QFs. CCC has not demonstrated that the information the utilities seek is confidential or that the likelihood of damage to power producers would outweigh the value of the information. CCC provided no evidence that the data would be useful to utilities in designing their own plants or in competing with QFs. They have provided no evidence that the utilities, even inadvertently, have provided or would provide the information to competitors. Moreover, power producers under contract with the utilities voluntarily entered into the agreements knowing of the requirements to disclose operational information.

Although the CCC's evidence is unconvincing, its argument is conceptually compelling. We believe that in some cases disclosure of operational data could cause competitive harm. We are particularly concerned that utility affiliates with power production units not gain access to the operational data of their competitors.

The utilities have proposed various means of protecting QF operational data. To assure confidentiality of operating data, SDG&E has offered to conduct inspections on site. All three applicants promise to treat power producer information as they treat any other customer information. In addition to the measures proposed by the utilities, a QF should have the option to enter into a nondisclosure agreement with the utility. Businesses commonly use such agreements to protect confidential information.

CCC argues that affidavits or third party confirmation of compliance should provide adequate insurance of compliance with power production contracts. At this time, affidavits alone may not provide adequate protection to utility ratepayers who bear the costs of power production contracts. We can envision circumstances when an alternative, such as confirmation by third party auditors, might adequately protect ratepayer interests. Such an alternative might be appropriate if the utilities discover that power producers as a group are, contrary to utility expectations, substantially in compliance with power purchase contracts, or if utility programs promote action by noncomplying power producers to improve plant efficiency. Under such circumstances, the utilities may, at their option, amend their programs to permit third party auditors to confirm the compliance of power producers. The utilities would not need Commission authority to make such a change, but, as always, their efforts to assure contract compliance would be subject to reasonableness reviews. If the utilities opt for such an alternative, the power producers would still need to provide operating information to utilities upon request, either under a nondisclosure agreement or on site.

In any event, power producers who seek full contract payments must produce operational information to the Commission and its staff upon request. As we stated in D.90-12-019, the Commission is not a competitor and no competitive harm can arise from our access to the information. Access to information may become necessary as part of our obligation to protect ratepayers if it appears that power producers are not complying with contract terms. Power producers' operating information provided by the utility would be subject to the protections afforded to all such under Section 583.

Finally, Edison asks the Commission to require SoCal to share with Edison power producers' operational information in cases where the accuracy of information submittals is in doubt and the power producer is served by both Edison and SoCal. SoCal objects to sharing the information, arguing that it is confidential and should not be shared with any other company.

The monitoring programs of SoCal and Edison might be more efficiently administered if the two utilities could share operational data. These administrative efficiencies, however, are not alone reason enough to order SoCal to share confidential information with Edison. Edison argues that it has a particular interest in the information: to the extent SoCal sells gas at discounts to non-complying power producers, its own gas rates are higher under current regulatory practices. We respond that we would not require SoCal to share confidential information with Edison so that Edison may monitor, on a continuing basis, SoCal's efforts to enforce its gas tariffs. If Edison believes SoCal is not enforcing its gas tariffs, Edison may seek relief in reasonableness reviews or by filing a complaint.

VI. Program Elements

The cogenerators participating in this proceeding emphasized the jurisdictional issues and confidentiality issues associated with utility monitoring programs rather than specific program elements. CCC did, however, oppose the utilities' proposal to pay non-complying power producers 80% of avoided costs and Edison's proposal to suspend parallel operation for non-complying power producers. Although few program elements were contested, we believe several should be considered. The programs differ somewhat between the utilities and we believe consistency may be appropriate in certain areas.

A. Payments to Non-Complying Power Producers

CCC recommends that the utilities pay 90% of avoided costs to power producers which do not meet efficiency standards rather than 80% as proposed by SDG&E and PG&E. CCC bases its proposal on a contract between PG&E and Santa Fe Geothermal.

SDG&E proposed the 80% level because it determined that its economy energy purchases between 1987 and 1989 cost approximately 77% of its published avoided cost. DRA and PG&E support this level because it approximates the market price for economy energy.

Without knowing the other terms of PG&E's contract with Santa Fe Geothermal, we are uncertain whether 90% of avoided cost is a reasonable proxy for a market price for energy from a facility that does not meet efficiency standards. We agree with the utilities and DRA that 80% of published avoided costs for as-available energy and capacity are appropriate prices for cogenerators that do not meet efficiency standards because it approximates economy energy prices.

Edison proposes to collect all past overpayments from power producers whose benefits are ultimately suspended. We agree with Edison that past payments to non-complying power producers should be reduced. Edison's proposal is reasonable and is fair to power producers, considering that they may have been overcompensated for many months or years. All three utilities should collect past payments from power producers that do not comply with efficiency standards and whose benefits are ultimately suspended. Past payments should be collected for overcompensation for any time period during which the power producer was not in compliance with efficiency standards.

B. Parallel Operation

CCC objects to Edison's proposal to suspend parallel operation for non-complying power producers. Edison's tariff for parallel operation specifies that the service is offered only to QFs, not to other power producers which do not meet federal efficiency standards. (Stand-by or breakdown service under the tariff is available to power producers which are not QFs.) The utility should evaluate whether continued parallel operation represents a burden to the utility or its customers. If the utility determines that such a burden exists, it is reasonable for the utility to disconnect a non-complying producer from the system.

during a period of non-compliance. If the utility determines that there is no such burden, it is reasonable for the utility to permit the producer to remain in parallel operation under such terms as protect the utility and its customers.

C. Contracts Subject to the Monitoring Program

The evidence in this proceeding suggests that the utilities will direct their monitoring efforts at power producers which have signed standard offer contracts because those contracts include provisions for compliance with FERC efficiency standards. We have expressed our concern that the full benefits to ratepayers anticipated under PURPA would not be realized if power producers do not comply with minimum efficiency standards; accordingly, ratepayers should not pay full avoided costs in such cases. This principle would apply equally to non-standard agreements which explicitly or implicitly require compliance with efficiency standards. Whether or not a contract specifies that the power producer must meet efficiency standards, it is one criteria which we will consider in determining whether a non-standard contract is the economic equivalent of a standard offer.

We are also concerned that in their monitoring efforts the utilities treat their affiliates as they treat any other power producer. In order to assure the monitoring programs are fair, and to promote the perception of fairness, we will require that the utilities supply to the Commission Advisory and Compliance Division (CACD) operational data of their affiliated power producers. The information shall be the same required of other power producers and the affiliates shall be subject to the same rules applied to other power producers. CACD will monitor the data to ensure that the utilities treat their affiliates as they treat other power producers.

D. Program Implementation

The utilities propose somewhat different implementation schedules. SDG&E and PG&E would require all power producers to submit annual information on the same date; Edison would stagger such submittals. We share Edison's concern that the new program may put some strain on staffing if all power producers submit information on the same date. On the other hand, we are concerned that all power producers be treated alike, especially during the first year. We will direct Edison to collect information from power producers simultaneously.

We note also that SDG&E and PG&E propose to begin their programs in January 1992. In light of our concern that some power producers may not be in compliance with efficiency standards, and that ratepayers may be paying too much for power in such cases, we will direct the utilities to initiate their programs within 60 days of the effective date of this decision.

E. Probation Periods and Reinstatement of Benefits

The utilities' proposals differ somewhat in their treatment of probation periods. SDG&E provides a 5-month probation period; PG&E provides a six-month period; Edison provides a 12-month period. During the probation period, power producers would have an opportunity to make plant modifications and meet efficiency standards without penalty. After the probation period, the utility would suspend benefits (and collect overpayments made during the probation period) until the power producer can demonstrate compliance. PG&E would not reinstate benefits until after the next annual review period; SDG&E would reinstate benefits two months following a demonstration of compliance; Edison's proposal does not specify a reinstatement policy.

The probation periods proposed by the utilities provide a very liberal opportunity for power producers to improve operational efficiencies without penalty. Indeed, we believe they are too liberal. The utilities' contracts with power producers explicitly require minimum efficiency standards. Moreover, the state's power producers have been on notice for over a year of utility proposals for monitoring and enforcement. Under the circumstances, no probation period should be expected by the power producers. For the time being, however, it is reasonable to permit a 90-day probation period during which non-complying power producers would continue to be treated as QFs. The probation period should not apply to a power producer which does not have a steam host or operates at less than 35% efficiency. As PG&E suggests, a power producer with these operating deficiencies would be flagrantly violating the terms of its contract and should not be entitled to a probation period.

As a matter of fairness, we believe the utilities should reinstate benefits to qualified power producers as soon as possible. Under PG&E's proposal, a power producer found to be in compliance with FERC efficiency standards could be denied contracted payments for several months. Because we have shortened the probation period, it is reasonable to require the utilities to reinstate full contract benefits and tariffed services beginning with the first billing period following a demonstration of compliance.

VII. Suspension of Enforcement Efforts During the Period Prior to Commission Action in this Proceeding

We deny the utilities' requests to hold them harmless for enforcement efforts, or lack thereof, until the Commission approves of specific monitoring and enforcement programs. This proceeding is not a reasonableness review. We have no evidence in this proceeding to suggest that the utilities' payments to power producers have been either prudent or imprudent. It would be inconsistent with our regulatory framework to make a blanket finding that the utilities should not be at risk for failing to enforce tariff or contract provisions. In D.90-12-019, in which we considered a settlement for enforcing gas rates for cogenerators, we stated "our consideration of this matter in this proceeding does not relieve the utilities from the duty to enforce their tariffs pursuant to the Code." This view applies equally to enforcement of power purchase contract provisions.

VIII. Conclusion

This decision sets forth guidelines for utility programs to monitor and enforce power producers' compliance with FERC efficiency standards. Unless power producers meet these minimum requirements, utility ratepayers will not receive the benefits of independent power production for which they pay under standard offers and other contracts which require compliance with efficiency standards.

We approve specific monitoring and enforcement guidelines in this decision in order to give the utilities an indication of enforcement efforts which appear reasonable under the existing set of circumstances. We are aware that the utilities may be hesitant to oversee the compliance of facilities which may compete with utility services. Along the same lines, power producers reasonably seek some regulatory protection against unreasonable utility oversight efforts. Our approval of program guidelines, however, does not signal that we intend to manage utility efforts to enforce tariffs or contracts. Contract and tariff enforcement is the obligation of the utilities, subject to reasonableness reviews.

The guidelines we adopt today are designed to recognize that the utilities believe a significant number of power producers are not in compliance with efficiency standards and that the utilities have not previously undertaken broad enforcement efforts. The guidelines, however, may be inappropriate in the future. We expect the utilities to tailor their programs as necessary to address prevailing circumstances.

Findings of Fact

1. SDG&E, Edison, and PG&E seek approval of programs to monitor and enforce efficiency standards for third party power producers.

2. The Commission has established rules implementing Section 210 of PURPA and approved standard power purchase contracts pursuant to Section 210 of PURPA and in conformance with FERC regulations.

3. The FERC has developed no regulations or policies addressing utility monitoring of power producer plant efficiencies.

4. The FERC has issued no regulation or order which expresses an intent to preempt the states from authorizing and overseeing utility programs for monitoring compliance with efficiency standards.

5. Utility power purchase agreements require that power producers comply with efficiency standards and that they provide the utility with information which would confirm such compliance.

6. The utilities have provided adequate evidence to show that the costs of their monitoring programs are likely to be offset by reduced payments to power producers and the benefits associated with increased plant efficiencies.

7. The utilities' applications do not seek rate increases to reflect the costs of efficiency monitoring programs.

8. The utilities are entitled to recover the reasonable costs of monitoring programs from their ratepayers.

9. The evidence presented in this proceeding does not demonstrate that power producers will realize substantial harm by disclosing operating data to the utilities or that such the risk of harm would outweigh the potential benefits associated with assuring that power producers operate according to efficiency standards.

10. In some cases, disclosure of power producers' operating information may cause competitive harm to the power producer.

11. The utilities have proposed mechanisms to protect confidential information of power producers.

12. The use of nondisclosure agreements between utilities and power producers will reduce the risk of disclosure of confidential information.

13. The use of third party auditors to confirm power producers' operating efficiencies may be adequate to protect utility ratepayers.

14. Utility efforts to assure contract compliance are subject to reasonableness reviews.

15. No competitive harm can arise from Commission access to power producers' operating data.

16. Commission access to power producers' operating data may be required to assure that utility payments to power producers are reasonable.

17. A reasonable estimate of the cost of economy energy to the utilities is approximately 80% of published avoided costs.

18. Edison's tariffs offer parallel generation to power producers which are QFs.

19. A 90-day probation period during which power producers would have an opportunity to meet efficiency standards is fair to power producers in cases where contracts specify that power producers must meet such efficiency standards.

20. Under PG&E's proposal, a power producer found to be in compliance with efficiency standards may not receive contractual payments for several months.

21. This proceeding has not considered the reasonableness of past utility monitoring of power producers' operating efficiencies.

Conclusions of Law

1. Section 210 of PURPA anticipates that the states will implement and administer power purchases which are the subject of PURPA within the regulatory framework established by the FERC.

2. FERC regulations grant the states authority to set rates for power purchases from third party power producers.

3. The states have authority to implement PURPA as long as state programs are consistent with the FERC's regulatory program.

4. Federal law does not preempt the states from establishing rules and regulations regarding utilities' purchases of power from third parties which are not QFs according to FERC rules.

5. The utilities have a duty to take all reasonable steps to enforce contracts with power producers when contract costs are born by utility ratepayers.

6. Failure by a power producer to maintain efficiency standards is a material breach of the power producer's power purchase agreement with the utility. However, for short-term purposes, the power purchase agreement should remain in full force and effect aside from adjustments to contractual and tariffed benefits consistent with this decision.

7. The Commission should direct the utilities to sign nondisclosure agreements with power producers who seek additional protection of information they consider confidential.

8. The utilities should assure that their employees who have access to power producers' operating data do not disclose that information to any party who is not charged with monitoring power producers' operating efficiencies or to any employee of a utility affiliate engaged in unregulated power production.

9. Employees of utility affiliates should not be given access to power producers' operating information.

10. Section 583 protects the confidentiality of information provided to the Commission by utilities, including efficiency data submitted by the utilities to CACD.

11. Utility ratepayers should bear no more than 80% of published avoided costs for electricity from power producers who do not meet efficiency standards or who do not provide evidence of

compliance with efficiency standards except where the Commission approves of nonstandard contracts which provide otherwise.

12. The utilities should collect past overpayments from power producers whose benefits are suspended following a probation period of 90 days. The utilities should collect past payments for overcompensation beginning on the day probation was initiated for the power producer.

13. The utility should disconnect a non-complying producer from its system where continued parallel operation would be a burden to the utility or its customers.

14. The utilities should be ordered to treat their power producer affiliates as they treat any other power producer, and should be ordered to submit efficiency data to CACD on the same basis that power producers submit such data to the utilities.

15. The utilities should be ordered to require power producers to submit efficiency data simultaneously.

16. The utilities should implement their programs within 60 days of the effective date of this decision.

17. The utilities should be ordered to provide a 90-day probation period for non-complying power producers. Power producers should continue receiving contract and tariff services as QFs during the probation period, except that power producers without a steam host and those operating at less than 35% efficiency levels should not be provided a probation period.

18. The utilities should reinstate billing contract and tariffed benefits to power producers beginning with the first billing period following a demonstration that the power producer is in compliance with efficiency standards.

19. The Commission should not, in this decision, rule on the reasonableness of utility efforts to monitor power producers' operating efficiencies.

20. SDG&E's application in its annual cost allocation proceeding should be closed.

21. The applications of PG&E, SDG&E, and Edison for approval of efficiency monitoring programs should be closed.

22. This decision should become effective on the date it is signed because further delay may result in higher costs to utility ratepayers.

ORDER

IT IS ORDERED that:

1. The applications of San Diego Gas and Electric Company (SDG&E), Pacific Gas and Electric Company (PG&E), and Southern California Edison Company (Edison) seeking approval of programs to monitor the efficiency of power producers are granted with the following exceptions:

Power producers whose contract benefits are suspended shall be paid 80% of published avoided costs for as-available energy and capacity;

The utilities shall collect past overpayments from power producers whose benefits as qualifying facilities (QFs) are suspended. Past payments shall be assessed beginning on the day the power producer failed to meet pertinent efficiency standards;

Utility monitoring programs shall treat power producers with standard offer contracts and those with non-standard offer contracts alike to the extent that the latter explicitly or implicitly require compliance with efficiency standards;

The utilities' power producer affiliates shall be subject to the same rules as other power producers;

The utilities shall submit to the Commission Advisory and Compliance Division efficiency data of their affiliates' power producing facilities. The information shall be submitted on the same terms and in the same format which is required of non-affiliated power producers;

The date for submitting efficiency data shall be the same for all power producers subject to the monitoring program;

The utilities shall provide a 90-day probation period for power producers found to be out of compliance with efficiency standards, except that tariffed and contractual benefits of power producers which have no steam host, or whose operating efficiency is below 35%, shall be suspended immediately. During the probation period, power producers shall qualify for contracted prices for power and tariffed services offered to QFs;

The utilities shall reinstate contractual and tariffed benefits to power producers who can demonstrate compliance with efficiency standards. Benefits shall be reinstated beginning with the first billing period following demonstration of compliance.

2. The utilities shall implement their monitoring programs within sixty days of the effective date of this decision.

3. SDG&E, PG&E, and Edison shall not permit any person who is not charged with monitoring power producer operating efficiencies to gain access to power producers' operating data. SDG&E, PG&E and Edison shall not permit any employee of any utility affiliate to gain access to power producers' operating data.

4. SDG&E, PG&E, and Edison shall provide power producers the option of entering into a nondisclosure agreement prior to their disclosure of plant operating data.

5. Application (A.) 89-05-006, filed by SDG&E, in its annual cost allocation proceeding, is closed.

6. A.90-02-027, A.90-04-029 and A.90-10-32 are closed.

This order is effective today.

Dated May 8, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
G. MITCHELL WILK
JOHN B. OHANIAN
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY

NEAL J. SHULMAN, Executive Director

APPENDIX A

List of Appearances

Applicants: Wayne P. Sakarias, Attorney at Law, for San Diego Gas & Electric Company; Gloria M. Ing, Allen E. Kelinsky, Richard K. Durant, James M. Lehrer, and Julie A. Miller, Attorneys at Law, for Southern California Edison Company; and Nancy Day, Attorney at Law, and Lawrence Erkie, for Southern California Gas Company.

Interested Parties: Messrs. Morrison & Foerster, by Jerry R. Bloom and Lynn Haug, Attorneys at Law, for California Cogeneration Council; Thomas P. Corr, Attorney at Law, for Independent Power Corporation; Messrs. Lindsay, Hart, Neil & Weigler, by Paul J. Kaufman, Attorney at Law, for Lindsay, Hart, Neil & Weigler; Messrs. Roberts & Kerner, by Douglas K. Kerner, Attorney at Law, for Bonneville Pacific Corporation; Messrs. Graham & James, by Martin A. Mattes, Attorney at Law, for Toya Menka; Joseph G. Meyer, for Joseph Meyer Associates; Roger Peters, Mark D. Patrizio, Douglas A. Oglesby, Attorneys at Law, and Gary Gauthier, for Pacific Gas and Electric Company; Messrs. Armour, Goodin, Schlotz & Mac Bride, by James D. Squeri, and Barbara L. Snider, Attorneys at Law, for Kelco Division of Merck & Company, Inc.; Thomas A. Tribble, for the Regents of the University of California; Karen Edson, for KKE & Associates; Dian M. Grueneich, Attorney at Law, and Matthew V. Brady, for California Department of General Services; Jan Smutny-Jones, Attorney at Law, for Independent Energy Producers Association; Robert Weisenmiller, for Morse, Richard Weisenmiller & Associates; Roger L. Avery, for Hershey Chocolate USA; Peter Minkler, for IPT Corporation; Jones, Day, Reavis & Pogue, by Donald J. Bouey, Attorney at Law, for Jones, Day, Reavis & Pogue; and B. Jeanine Hull, Attorney at Law, for Hadson Power Systems, Inc.

Division of Ratepayer Advocates: Ida Passamonti, Attorney at Law, David E. Morse, and Martin Homec.

(END OF APPENDIX A)