

BEFORE THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement
the Commission's Procurement Incentive
Framework and to Examine the Integration of
Greenhouse Gas Emissions Standards into
Procurement Policies.

Rulemaking 06-04-009
(Filed April 13, 2006)

**COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES ON
THE DECISION GRANTING IN PART PETITION OF SOUTHERN
CALIFORNIA EDISON TO MODIFY DECISION 07-01-039**

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I. INTRODUCTION

Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, the Division of Ratepayer Advocates (DRA) submits these comments on the "Proposed Decision Granting in Part Petition of Southern California Edison Company to Modify Decision 07-01-039" (PD). The PD would authorize a partial exemption from the Emissions Performance Standard (EPS) adopted in Decision (D.) 07-01-039 for Southern California Edison's (SCE's) expenditures in the Four Corners Generating Station Units 4 and 5 (Four Corners) through the end of 2011. The PD would require SCE to study the feasibility of maintaining its interest in Four Corners after 2011 and to report on the study and propose a course of action in SCE's next general rate case. The PD also directs SCE to report its planned remedial activities for ensuring that SCE's pleadings do not misrepresent the basis for SCE's positions.

The PD correctly denied SCE's request for a broad exemption from the EPS, but as explained below, the Commission should not allow SCE to recover its Four Corners expenditures between the time the Commission adopted the EPS and the time that the Commission grants an exemption. Moreover, the PD does not

adequately address the failure of SCE's Petition for Modification of D.07-01-039¹ to disclose fully SCE's obligations to Four Corners co-tenants, its role in approving capital expenditures, and its ability to modify its obligations in response to changes in the law. DRA respectfully requests that the Commission open an independent investigation into SCE's submission of its PFM and consider whether more serious sanctions are warranted for SCE's failure to represent truthfully its obligations under the Four Corners agreements.

II. DISCUSSION

A. **The Commission should not allow SCE to recover Four Corners expenditures made after D.07-01-039 established the EPS, but before the Commission grants an exemption.**

The PD would allow SCE to recover "a yet to be determined portion of the \$178,593,000 capital expenditures for Four Corners" subject to a showing of reasonableness in SCE's general rate case for test year 2012, which will be filed later this year. For expenses forecasted to be made before 2012,²

For each capital project of \$5 million or more, SCE's reasonableness showing must identify whether, based on industry standards, the project likely will extend the life of Unit 4 or Unit 5 beyond five years or some additional five-year increment. If life extension by one or more five-year increments is likely, the reasonableness showing for a capital project of \$5 million or more also must explain why the project is warranted nonetheless.³

The PD's exemption should be further narrowed to preclude recovery of Four Corners expenditures made after the enactment of the EPS, but before the Commission grants any exemption for the EPS. SCE first raised the issue of the application of the EPS to its Four Corners ownership obligations before the

¹ Petition for Modification of D.07-01-039 of Southern California Edison Company (PFM), filed January 28, 2008 and amended on February 12, 2008.

² The PD would deny recovery of expenses forecasted to be made in 2012 or later. PD, Ordering Paragraph 2, p.25.

³ PD, Ordering Paragraph 1(b), p. 25.

Commission adopted the EPS and requested that the Commission exclude Four Corners from EPS requirements.⁴ D.07-01-039 rejected this request, but noted that “[i]f SCE anticipates that the EPS will prevent it from complying with its contractual obligations at Four Corners, it should file an application for petition for modification, together with adequate supporting information, documentation, and analysis, and request appropriate relief.”⁵

SCE filed its PFM on January 28, 2008, more than a year after the issuance of D.07-01-039. SCE apparently approved over four dozen projects as a member of the Four Corners Engineering and Operating Committee and the Coordinating Committees after enactment of the EPS.⁶ Thus, while SCE acknowledged that the EPS should be modified in order to allow ongoing capital expenditures, it continued to approve such expenditures without disclosing that fact in its PFM.

Spending ratepayer money on unauthorized expenditures is unreasonable, so SCE should not be allowed to recover requested capital expenditures that it approved following the adoption of D.07-01-039, until and unless the Commission adopts a decision that exempts Four Corners capital expenditures from the EPS. The Commission should not reward SCE’s failure to obtain Commission guidance and approval of Four Corners capital expenditures after the enactment of the EPS.

B. The Commission should conduct an independent investigation of SCE’s incomplete and misleading Petition for Modification of D.07-01-039.

The October 23 Ruling expressed concern that “by failing to include the full [Four Corners] Agreements, SCE sought to mislead the assigned ALJ and this Commission in direct contravention of the Commission’s Rules of Practice and Procedure” and therefore directed SCE to explain why the additional information

⁴ Comments of SCE on the Proposed Decisions of President Peevey and ALJ Gottstein, filed January 2, 2007, pp. 12-13.

⁵ D.07-01-039, p. 46.

⁶ October 23, 2008 Assigned Commissioner and Administrative Law Judge’s Ruling Entering Additional Information into the Record and Seeking Comments (October 23, 2008 Ruling), Attachment E.

was not relevant or necessary and why the Commission should not initiate an investigation into whether SCE violated Rule 1 of the Commission’s Rules of Practice and Procedure.⁷ SCE responded that it “certainly had no intent to mislead the Commission”⁸ through statements made in its PFM. SCE contended that its PFM “would have benefited from the inclusion of additional detail (and supporting documentation) that would have more completely explained that nature of its obligations.”⁹ SCE acknowledged that its PFM “apparently contributed to misunderstandings and confusion as to the fundamental bases of the requested relief”¹⁰ and “sincerely apologize[d] for the time and effort spent by the Commission to review SCE’s Four Corners contractual obligations and the concerns arising from that review with respect to” SCE’s PFM.¹¹ In order to respond to the concerns in the October 23, 2008 ruling, SCE hired the law firm Munger Tolles and Olson LLP to review the PFM, pleadings and underlying contract. Munger Tolles and Olson found that the PFM was “incomplete in certain respects, but that those deficiencies did not cause the [PFM] to be misleading”.¹² Based on SCE’s representations and the Munger Tolles and Olson report, the PD concludes that “given all of the circumstances here, including SCE’s public apology, its recognition of the need for remedial action, and its agreement to undertake such action, we will not pursue a formal investigation.”¹³

The Commission should not accept this determination, but should instead pursue an independent investigation. The Munger, Tolles and Olson report

⁷ October 23, 2008 Ruling, p. 7. Rule 1.1 of the Commission’s Rules of Practice and Procedure prohibits “mislead[ing] the Commission or its staff by an artifice or false statement of fact or law.”

⁸ Response of SCE to Assigned Commissioner and ALJ’s Ruling Entering Additional Information into the Record and Seeking Comments, filed November 6, 2008, (SCE November 6, 2008 Response), p. 2.

⁹ SCE November 6, 2008 Response, p. 2.

¹⁰ SCE November 6, 2008 Response, p. 2.

¹¹ SCE November 6, 2008 Response, pp. 2-3.

¹² SCE November 6, 2008 Response, p. 2.

¹³ PD, p. 20.

described why, in the view of that report's authors, SCE's failure to include a full description and the complete contracts reflecting SCE's obligations to Four Corners co-tenants was not misleading. However, the Munger, Tolles and Olson report was silent on SCE's failure to note or explain why contractual provisions would not allow it to amend the contracts in response the requirements of D.07-01-039.

Western Power Trading Forum (WPTF) observed that the Four Corners Project Operating Agreement provided that the Operating Agreement "shall be subject to filing with, and to such changes or modifications as may from time to time be directed by, competent regulatory authority, if any, in the exercise of its jurisdiction."¹⁴ WPTF noted that "SCE has failed to explain why the above provision would not impact [SCE's PFM], when it appears to provide SCE with the right to request modification of the Operating Agreement to reflect changes in the California law" resulting from SB 1368 and D.07-01-039.¹⁵ The Commission should direct its staff to conduct an investigation that considers whether SCE's failure to point out its ability to request changes to the agreements was a further factor that suggests its intent to mislead the Commission.

Moreover, the Commission should direct its staff to conduct an independent investigation, rather than accepting the Munger, Tolles, and Olson report without additional inquiry, since SCE commissioned the report and paid for it. In addition, Ronald Olson, one of the founders of Munger, Tolles and Olson, has been a director of SCE and its parent company Edison International since 1995.¹⁶ These

¹⁴ Comments of the WPTF to Assigned Commissioner and ALJ's Ruling Entering Additional Information into the Record and Seeking Comments, filed November 24, 2008, (WPTF November 24, 2008 Comments), p.6, citing Section 34.9 of the Four Corners Operating agreement, and Section 11 of the Four Corners Units 4 & 5 Capital Improvements, Design and Construction Agreement.

¹⁵ WPTF November 24, 2008 Comments, p.6; *see also* Comments of NRDC on the Additional Information on SCE's Ownership Interest in the Four Corners Generating Plant and Applicability to the Greenhouse Gas Emissions Performance Standard, filed November 24, 2008, p. 3.

¹⁶ <http://ir.edisoninvestor.com/phoenix.zhtml?c=85474&p=irol-govBio&ID=136351>.

two factors suggest the need for an independent investigation completed by an entity with no financial interest in the outcome of the investigation.

III. CONCLUSION

The PD narrows the EPS exemption requested by SCE, but the exemption should further preclude recovery of Four Corners expenditures SCE made after the Commission adopted the EPS, but before it grants any exemption. The Commission should initiate an independent investigation by its staff into whether SCE violated Rule 1.1 of the Commission's Rules of Practice and Procedure.

Respectfully submitted,

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APPENDIX A
DRA's PROPOSED CHANGES TO FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDERING PARAGRAPHS

Findings of Fact.

6. Given the important role Four Corners Units 4 and 5 have played and currently play in SCE's energy supply portfolio, the long-term contractual commitments SCE has made to its co-tenants, and the limited time remaining under the contracts, it is prudent to allow Four Corners a partial exemption from the EPS for capital expenditures made prior to January 1, 2012 but after the Commission adopts this exemption, subject to review for reasonableness.

~~12 The totality of the circumstances, including SCE's public apology, its recognition of the need for remedial action, and its agreement to undertake such action, support our determination not to open a formal investigation~~ Given the serious nature of the omissions and in order to consider every aspect of the omissions, the Commission should independently investigate whether errors and omissions in SCE's petition reach the level of a violation of Rule 1.1 of the Commission's Rules of Practice and Procedure.

Conclusions of Law

1. Any recovery in rates of capital expenditures for Four Corners made prior to January 1, 2012, should be subject to review for reasonableness, as further detailed in the Ordering Paragraphs.

2. A fair reading of relevant legal authority supports our determination ~~not~~ to open a formal investigation into whether errors and omissions in SCE's petition reached the level of a violation of Rule 1.1 of the Commission's Rules of Practice and Procedure.

ORDERING PARAGRAPH

1. Decision 07-01-039 is modified to grant a partial exemption from the Adopted Interim Emission Performance Standard Rules for the period prior to January 1, 2012, but after the Commission adopts this exemption for Units 4 and 5 of the Four Corners Generating Station (Four Corners) such that Southern California Edison Company (SCE) may recover a yet to be determined portion of the \$178,593,000 capital expenditures for Four Corners subject to the following qualifications:

- a. Recovery in rates is subject to a showing of reasonableness in the general rate case for test year 2012 that SCE will file later in 2010;
- b. For each capital project of \$5 million or more, SCE's reasonableness showing must identify whether, based on industry standards, the project likely will extend the life of Unit 4 or Unit 5 beyond five years or some additional five-year increment. If life extension by one or more five-year increments is likely, the reasonableness showing for a capital project of \$5 million or more also must explain why the project is warranted nonetheless.

~~5. Southern California Edison Company must report, in the general rate case for test year 2012 that it will file in 2010, on its remedial activities to ensure that its pleadings are complete, accurate, and fully explain the bases for its positions.~~
The Commission shall open an Order Instituting Investigation into whether Southern California Edison Company's incomplete disclosure in its Petition for Modification of D.07-01-039 constitutes a violate of Rule 1.1 of the Commission's Rules of Practice and Procedure.