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Bcc:

Subject: Re: Courtesy E-mail Notification in Application 08-11-001 et al. - ALJ Wetzell's  
Ruling

ALJ Wetzell,

The investor-owned utilities (IOUs),  
Southern California Edison Company (SCE), Pacific Gas and Electric Company  
(PG&E), and San Diego Gas & Electric Company (SDG&E), assert  
that the CARE comments below are submitted inconsistent with the  
California Public Utilities Commission's (CPUC) Rules of Practice

and Procedure and recommend that the CPUC either direct Mr. Boyd, of CARE, (1) to properly submit the comments below to the CPUC as CARE's Opening Comments on the QF/CHP Settlement on October 25, 2010, or (2) direct parties to treat this e-mail as CARE's Opening Comments on the QF/CHP Settlement and address them in their Reply Comments, dated November 1, 2010.

\*\*\*\*\*

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Re: Courtesy

E-mail Notification in Application 08-11-001 et al. - ALJ Wetzell's Ruling

ALJ Wetzell,

Californians for Renewable Energy, Inc. (CARE)<sup>[1]</sup>

respectfully objects to and protests your October 8, 2010 ruling issued on October 13, 2010 Shortening Time for Comments and replies on Proposed Settlement and Consolidating Proceedings.<sup>[2]</sup>

First the proposed schedule violates CARE's procedural due process rights because an October 25, 2010 (12 days) comments due date and a November, 1, 2010 (7 days) reply comment due date is unreasonable and unjustified considering the size of the settlement agreement, its complexity, and the complexity of the issues addressed in this purported "Combined Heat and Power ("CHP") settlement. It is clear from the results of the CHP Settlement that its ultimate purpose is to eliminate QF contracts altogether for QFs greater than 20 MW taking away their anti-monopoly standard offer protections established under PURPA and returning to a market based formula where the CPUC regulated utilities maintain market share of the wholesale generation markets.

Results of CHP Settlement

- CHP procurement program through 2020
  - MW targets
  - GHG reduction targets
- Establishes new energy pricing for QFs

- Transitions Short Run Avoided Cost Energy Pricing to a market based formula by 2015
- New form contracts
- CHP RFO form contract
- Transition contract
- PURPA contract for 20 MW or smaller
- As-available contract
- Legacy energy pricing amendment
- Parties support utilities’ FERC PURPA 210 (m) application
- Settlement of pending CPUC cases and court litigation

Simply put I do not understand how the Commission’s Rules are permitted to be waived for the filing of the Settlement and waiving Parties opportunity to even object to the shortened comment period on the settlement which we contend is substantively pre-empted by FERC’s exclusive wholesale ratemaking authority.

Additional this settlement seeks to avoid FERC’s lawful review of the Settlement before the CPUC approves it and effected Parties have had no opportunity to meaningfully participate in the Commission’s decision making process. This violates CARE’s rights to due process under both Federal and State law. I respectfully demand that you direct the Settling Parties to file their Proposed Settlement with the FERC for its initial review prior to CPUC approval immediately.

As FERC’s July 15, 2010 Order 132 FERC ¶ 61,047 stated regarding CPUC’s limited wholesale ratemaking authority “[a]lthough the CPUC has not argued that its [] program is an implementation of PURPA, we find that, to the extent the CHP generators that can take part in the [] program obtain QF status, the CPUC’s [] feed-in tariff is *not* preempted by the FPA, PURPA or Commission regulations,<sup>[3]</sup> subject to certain requirements,…” Therefore any CPUC approved PPA would be pre-empted by FERC’s authority short of the FERC’s first opportunity to review the contract.

Any CPUC approved PPA without FERC’s prior review would not be lawful, and would exist in violation of the Federal Power Act (FPA) if the CPUC sets a wholesale price for electricity over the avoided cost. Any of the CPUC Decisions listed in CARE’s Complaint EL10-84 *et al.* must be consistent with and not exceed CPUC’s wholesale ratemaking authority under PURPA. Rightfully or wrongly so CARE believes that the FERC July 15, 2010 Order 132 FERC ¶ 61,047 found that except for setting the wholesale price for QFs the CPUC’s authority to set the wholesale price for electricity and ancillary services is pre-empted by Federal Energy Regulatory Commission (FERC) wholesale ratemaking authority. Despite FERC’s Order the CPUC continues to approve power purchase agreements (“PPAs” or “contracts”) between the CPUC regulated retail selling utilities<sup>[4]</sup> Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas and Electric Company (SDG&E) and other independent FERC regulated wholesale sellers of energy and ancillary services regulated by the FERC without an initial opportunity to review the contracts.

As stated in *MORGAN STANLEY CAPITAL GROUP INC. v. PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY ET AL*<sup>[5]</sup>.

at 1 to 2 “[t]he court held that contract rates are presumptively reasonable *only where FERC has had an initial opportunity to review the contracts* without applying the *Mobile-Sierra* presumption and therefore that the presumption should not apply to contracts entered into under “market-based” tariffs.” [Emphasis added]

Since in the May 2, 2007 ALJ's Ruling<sup>[6]</sup> following April 24, 2007 PHC Establishing Schedules and Topics for Workshops, Evidentiary Hearings and Briefs and Ruling on Motions for: Party Status, Filing Under Seal, and to Strike Testimony under R.06-02-013 it states “In addition, the Scoping Memo/Assigned Commissioner’s Ruling (ACR) issued September 25, 2006 in this proceeding further clarified that “This proceeding will not be the place to relitigate the targets already established elsewhere.”<sup>[7]</sup>

“Therefore this proposed settlement is not allowed within the scope of R.06-02-013.

Additionally pursuant to Rule 12.1(a); Proposal of Settlements, “Parties may, by written motion any time after the first prehearing conference and within 30 days after the last day of hearing, propose settlements on the resolution of any material issue of law or fact or on a mutually agreeable outcome to the proceeding. Settlements need not be joined by all parties.” Since the hearings in R.06-02-013 were held in 2007 clearly the settlement is not “within 30 days after the last day of hearing”. This also appears to be the case for Docket R.99-11-022 where CARE is not a Party.

In Application 08-11-001 CARE is not a Party also, but in this proceeding SCE addresses the Market Index Formula and As-Available Capacity Prices adopted in D.07-09-040. However under the two rulemaking proceedings where CARE is a Party; R.04-04-003 and R.04-04-025, on May 21, 2008 (prior to the Application 08-11-001) CARE filed its Petition for Modification of this same Decision D.07-09-040.

In your October 8, 2010 ruling you state “Moving Parties aver that no party will be prejudiced by the expedited review, noting that they issued notice of a settlement conference on September 24, 2010 and provided the Proposed Settlement’s Term Sheet and pro forma agreements and amendments on the IOUs’ websites on October 4, 2010. In addition, they presented the Proposed Settlement at a settlement conference on October 7, 2010.” What indifference and extreme prejudice towards CARE’s own May 21, 2008 PTM the MIF does this intend to demonstrate? Clearly we weren’t even given a fair hearing on our PTM.

Parties had only 3 days opportunity to review “the Proposed Settlement’s Term Sheet and pro forma agreements and amendments on the IOUs’ websites on October 4, 2010” for a “settlement conference on October 7, 2010.” According to Rule 12.1 (b) “Notice of the date, time, and place shall be served on all parties at least seven (7) days in advance of the conference.” Clearly the posting of the substantive documents necessary for the settlement conference fails to meet the requirements for proper notice if not the intent of the rule to provide sufficient notice to meaningful and informed participation in the settlement.

During the October 7, 2010 conference call the Settling Parties stated that they had been told by CPUC staff to enter in to the Settlement with these specific terms including issues clearly outside the scope of those listed proceedings and precluded by Federal law where they seek to settle anyways. This is improper and CARE objects to CPUC staff exercising undue influence on the settlement as specific evidence of constructive retaliatory action against CARE and its members. We believe this is because we represent low-income, people of color and native people ratepayers in our complaints and pleadings before the FERC and CPUC which is a protected activity under both the Federal and State constitutions and civil rights statutes. The CPUC continues to seek to deny us our constitutional right to petition the government for grievances.

Respectfully,

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October 14, 2010

<sup>[1]</sup>

CARE in behalf of itself and members Robert Sarvey, and Michael Boyd individually who are QF# 03-80 and QF#03-76 respectively.

<sup>[2]</sup>

<http://www.cpuc.ca.gov/EFILE/RULINGS/124598.htm>

<sup>[3]</sup>

18 C.F.R. § 292.101 *et seq.* (2010).

<sup>[4]</sup>

These three utilities are named as respondents to CARE's complaint before FERC in Docket EL10-84 for participating in an unlawful conspiracy and contrivance with CPUC to violate the FPA. These three utilities' sales are in to the wholesale markets operated by the California Independent System Operator Corporation (CAISO) and they are operating under FERC approved wholesale Tariffs as well as FERC authorized open access transmission tariffs (OATTs).

See FERC's Notice of Complaint <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12428401>

<sup>[5]</sup>

<http://www.supremecourt.gov/opinions/07pdf/06-1457.pdf>

<sup>[6]</sup>

<http://docs.cpuc.ca.gov/EFILE/RULINGS/67374.htm>

<sup>[7]</sup>

ACR, R.06-02-013, September 25, 2006, p. 17.

--- On **Wed, 10/13/10, Dinglasan, Gladys**

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wrote:

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Subject: Courtesy E-mail Notification in Application 08-11-001  
et al. -  
ALJ Wetzell's Ruling

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As a courtesy, the Commission  
notifies you that the text of ALJ Wetzell's Ruling  
Re Shortening  
Time for Comments and replies on Proposed Settlement  
and Consolidating  
Proceedings was made available at

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