BEFORE THE
PUBLIC UTILITIES COMMISSION
OF THE
STATE OF CALIFORNIA

Application of Southern California Edison Company (U338E) for Applying the Market Index Formula and As-Available Capacity Prices adopted in D.07-09-040 to Calculate Short-Run Avoided Cost for Payments to Qualifying Facilities beginning July 2003 and Associated Relief.	A.08-11-001
And Related Matters.	R.06-02-013 R.04-04-003 R.04-04-025 R.99-11-022

OPENING COMMENTS OF SHELL ENERGY NORTH AMERICA (US), L.P. ON THE PRESIDING JUDGE'S PROPOSED DECISION

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SUBJECT INDEX

SUMMARY OF RECOMMENDATIONS

1. Provisions of the settlement agreement that impose CHP procurement and reporting obligations on ESPs and CCAs should be severed from the settlement agreement and considered through a separate phase of the consolidated proceedings.

2. ESPs and CCAs should not be restricted in the manner by which they meet their GHG emission reduction targets. ESPs and CCAs should be able to choose whether to rely on CHP purchases to meet any portion of their GHG emissions reduction targets.

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In accordance with Commission Rule 14.3, Shell Energy North America (US), L.P. ("Shell Energy") files its opening comments on the proposed decision ("PD") that was circulated by Presiding Judge Mark Wetzell on November 16, 2010. In its opening comments, Shell Energy identifies errors of fact and law in the PD. In particular, Shell Energy addresses the following matters:

- The settlement agreement cannot be approved in its current form because the Commission failed to provide notice and an opportunity for comment on a new initiative to require ESPs and CCAs to procure from CHP resources to meet GHG emissions reduction goals; and
- The Commission does not have statutory authority to impose a CHP procurement obligation on ESPs and CCAs.

Proposed findings of fact and conclusions of law are set forth in Appendix A.

I.

INTRODUCTION

Shell Energy is a registered energy service provider ("ESP") and an active participant in Commission proceedings addressing ESP program requirements as well as electric industry issues that affect the competitiveness of the direct access program. Shell Energy has not, however, participated actively in the underlying consolidated Commission proceedings that, in the words of the settlement parties, address "issues affecting the relationship of the IOUs with the QFs historically and going forward."[1]

Shell Energy does not object to the PD's recommendation to approve those portions of the QF/CHP Settlement Agreement ("settlement agreement") that resolve QF pricing and QF contract issues that have been in dispute among the IOUs, QFs and ratepayer interests over most of the past decade. See PD at pp. 5-6. Shell Energy does not wish to stand in the way of the terms of the settlement agreement that address these longstanding disputed issues.

Some of the terms of the settlement agreement, however, extend beyond the scope of the existing disputes between QFs and the IOUs. These settlement provisions also extend beyond the scope of the issues identified in the underlying Commission proceedings. Specifically, the settlement agreement proposes to impose CHP procurement obligations and CHP reporting obligations on all LSEs, including ESPs and CCAs. ESPs and CCAs were not provided notice that these issues would be addressed in these proceedings. As a result, ESPs and CCAs were not afforded an opportunity to address the merits of these issues before these proposed provisions appeared in the settlement agreement.

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[1] R.04-04-003; R.04-04-025, "Motion of Joint Parties for Limited Abeyance," p. 2 (filed June 26, 2009).

The settlement provisions that require ESPs (and CCAs) to purchase CHP resources to meet a portion of their GHG emissions reduction targets have no statutory basis and no support in previous Commission decisions. The PD recommends that the Commission require ESPs and CCAs to purchase from CHP resources, but the PD fails to provide an evidentiary basis for its recommendation. The PD further fails to cite any Commission proceeding in which parties had an opportunity to provide comments on the issue of a mandatory CHP procurement obligation for ESPs and CCAs.

The PD states that ESPs and CCAs had an opportunity to comment on the settlement agreement. Providing an opportunity to comment on the settlement agreement is not sufficient to satisfy due process, however. Expansion of the settlement discussions to include the imposition of new requirements on ESPs and CCAs, and exclusion of ESPs and CCAs from the settlement discussions, constitutes a denial of due process.

Because the ESP/CCA CHP procurement obligation has no basis in existing statutes, and because the CHP procurement obligation is not a matter on which the Commission has provided notice and an opportunity for comment, all provisions related to the ESP/CCA CHP procurement obligation (and CHP reporting obligation) should be severed from the settlement agreement. To the extent consistent with current law, any new obligation to be imposed on ESPs and CCAs should be addressed in a separate phase of the underlying consolidated proceedings. With due regard for the limitations on Commission authority, if the severed settlement provisions are to be considered at all, they must be considered on their own merits, with a full opportunity for participation by all interested stakeholders.

II.

THE COMMISSION MAY NOT IMPOSE NEW PROCUREMENT AND REPORTING OBLIGATIONS ON ESPs AND CCAs WITHOUT PROVIDING NOTICE AND AN OPPORTUNITY TO BE HEARD

Due process requires notice and an opportunity to be heard when the substantive rights of individuals are being adjudicated. Because the settlement agreement would impose new obligations on ESPs and CCAs, these entities are entitled to be heard on the facts, law and policy underlying the proposals. See P.U. Code Section 1701.1(a), see also D.09-03-046 (March 26, 2009) ("the constitutional requirements of due process and equal protection are applicable to . . . Commission proceedings . . ."). The Commission failed to afford due process rights to ESPs and CCAs in connection with matters in the settlement agreement that directly affect ESPs and CCAs.

Specifically, the settlement agreement would impose, on ESPs and CCAs, a CHP procurement obligation as well as a CHP procurement reporting obligation. These requirements would be imposed on ESPs and CCAs without any prior Commission notice that these matters were to be considered in any of the underlying Commission proceedings. If the Commission were to approve the PD, the CHP procurement requirement would be imposed without an opportunity for ESPs and CCAs to comment on or provide evidence regarding the merits of these proposals.

A. A CHP Procurement Obligation is Not Within the Scope of the Underlying Cases

In no proceeding has the Commission previously raised the issue of requiring ESPs (or CCAs) to purchase CHP to meet their GHG emission reduction targets. In fact, until October 4, 2010, when the settling parties served a copy of their proposed settlement in various Commission

proceedings (just four days before the settling parties filed the settlement agreement with the Commission), the Commission had not entertained comments or discussion on the issue of whether ESPs or CCAs should be required to make purchases from CHP facilities. The issue of a CHP procurement obligation is not a subject of any of the underlying Commission proceedings that have been consolidated for purposes of considering the settlement agreement.

The PD insists that both a GHG emission reduction target for ESPs and CCAs and an ESP/CCA CHP procurement obligation are matters within the scope of proceedings that are being resolved by the settlement agreement. See PD at p. 34. The PD fails to support this statement, however. Nothing that the Commission has said or done in R.04-04-003 or R.06-02-013 provides any notice that a CHP procurement-related GHG emissions reduction target -- or a CHP procurement obligation for ESPs/CCAs -- is or was being considered by the Commission in these proceedings.

The PD relies on D.08-09-012 (September 4, 2008) as support for allocating QF contract costs to the customers of ESPs and CCAs through a nonbypassable charge. See PD at p. 34. Contrary to the settlement agreement, however, neither D.08-09-012 nor any other Decision in R.06-02-013 authorizes the Commission to impose a CHP procurement obligation on ESPs or CCAs. The Commission cannot claim that the PD's recommendation for a CHP procurement obligation for ESPs and CCAs has any basis in the scope of issues or decisions in R.06-02-013.

The PD also relies on D.06-06-071 (June 29, 2006) for the proposition that "Commission jurisdiction over CCAs and ESPs for purposes of GHG emissions reductions" is within the scope of R.04-04-003. PD at p. 34. In fact, in D.06-06-071, the Commission determined that it has jurisdiction to require ESPs to comply with a GHG emissions cap. See Decision at p. 24. There is no discussion, however, in any Commission decision (or Scoping Memo), of a CHP

procurement obligation to be imposed on ESPs and CCAs. To the contrary, in D.08-10-037 (October 16, 2008), the Commission emphasized the desirability of providing "flexibility" to facilitate compliance with GHG emissions limits. The Commission stated: "We stress the importance of a liquid and transparent allowance trading system and sufficient flexible compliance options to help market participants meet their obligations while maintaining the environmental integrity of the emissions cap." Decision at p. 252. The PD's recommendation to adopt a mandatory CHP procurement obligation for ESPs and CCAs is antithetical to the Commission's policy favoring "flexible compliance options."

B. The Settlement Parties Represented to the Commission that the Scope of the Settlement Discussions Was Limited to the "Relationship between QFs and the IOUs"

The PD notes that the settlement process leading up to submission of the settlement agreement required more than 18 months of negotiations. PD at p. 2. The negotiations were held while the two active underlying Commission proceedings -- A.08-11-001; and R.04-04-003/R.04-04-025 -- were held in abeyance. In requesting a "limited abeyance" of these Commission proceedings, the settlement parties never mentioned that they were considering a CHP procurement requirement for ESPs and CCAs.

Rather, on June 26, 2009, the "joint parties" (SCE, PG&E, SDG&E, TURN, CAC/EPUC, and CCC) filed a motion requesting a limited abeyance of R.04-04-003 and R.04-04-025 because the parties are "actively involved in global settlement negotiations to resolve issues affecting the relationship of the IOUs with the QFs historically and going forward."[2] No mention was made of an effort to impose a CHP procurement obligation on ESPs and CCAs.

[2] R.04-04-003, et al., "Motion of Joint Parties for Limited Abeyance," supra, p. 2 (emphasis added). A similar motion was filed by SCE in A.08-11-001 on July 13, 2009.

In her June 30, 2009 Ruling granting the joint parties' request for a limited abeyance, Presiding Judge Yip-Kikugawa noted that the joint parties "stated that they are pursuing a global settlement to resolve numerous issues affecting the relationship between the investor-owned utilities and qualifying facilities . . . ."[3] Once again, the Judge did not indicate that the parties were addressing issues that affect ESPs and CCAs.

Inasmuch as the settlement parties represented to the Commission that their settlement discussions were addressing the "relationship between the IOUs and QFs," there was no indication -- no notice -- that the settlement agreement would impose CHP procurement and reporting obligations on ESPs and CCAs. Combined with the fact that the Scoping Memos in these proceedings did not include any consideration of a CHP procurement and reporting obligation for ESPs and CCAs, these settlement provisions cannot be adopted without providing due process rights to ESPs and CCAs.

C. Adherence to the Commission's Settlement Rules Does Not Eliminate the Due Process Deficiency of the Settlement Agreement

The PD recommends that the Commission find that the settlement parties have complied with the Commission's settlement rules. See PD at p. 28. The PD further recommends that the Commission find that "parties were given notice of the settlement and had the opportunity to be heard . . . ." PD at p. 32. The PD recommends that the Commission conclude that "the process followed here meets due process requirements." Id.

Whether or not the settlement parties complied with the Commission's settlement rules is not the issue here. Even if the settlement parties followed the Commission's Rule 12 settlement

[3] R.04-04-003; R.04-04-025, "Administrative Law Judge's Ruling Granting Motion for Limited Abeyance," p. 2 (issued June 30, 2009) (emphasis added). See also R.08-11-001, "Administrative Law Judge's Ruling Granting Motion for Limited Abeyance," p. 1 (issued July 14, 2009).

procedures, they incorporated in the settlement agreement terms and conditions that are not within the scope of the underlying proceedings. Parties that were not included in the settlement process had no inkling that the settlement parties would propose an ESP/CCA CHP procurement obligation in a settlement effort that was supposedly devoted to the resolution of QF issues among the IOUs, QF interests and ratepayer advocates. The settlement parties -- and the Commission -- improperly failed to provide adequate notice and an opportunity for comment. This is a clear violation of due process.

III.

THERE IS NO STATUTORY BASIS FOR IMPOSING A CHP PROCUREMENT OBLIGATION ON ESPs AND CCAs

The PD fails to establish a statutory basis for imposing a CHP procurement obligation on ESPs and CCAs. Neither AB 32 nor SB 695 provide the Commission with authority to impose a CHP procurement obligation on ESPs and CCAs.

Section 6.3.1 of the settlement agreement proposes to establish GHG emissions reduction targets for the IOUs, ESPs and CCAs based on the GHG emissions reduction target attributable to CHP in CARB's December 2008 Scoping Plan. See PD at pp. 17-18. CARB's December 2008 Scoping Plan does not impose a CHP purchase requirement on ESPs or CCAs, however. Although AB 32 imposes GHG emission reduction targets on all California LSEs, these targets do not have to be met though CHP purchases. Nowhere in its "Scoping Plan" does CARB state that CHP procurement is an obligation of ESPs or CCAs.

Moreover, CARB has not adopted final regulations implementing AB 32. While CHP procurement may be one means by which ESPs and CCAs may achieve CARB's GHG emission

reduction goals, CHP procurement is not a statutory requirement that is imposed on ESPs or CCAs.

The PD relies on SB 695 (P.U. Code Section 365.1(c)(1)) as support for imposing a CHP procurement requirement on ESPs and CCAs. See PD at pp. 47-48. SB 695 does not provide a basis for imposing a CHP procurement obligation on ESPs or CCAs, however. Among other things, this statute applies to "any programs or rules adopted by the [C]ommission to implement . . . the requirements for the electricity sector adopted by [CARB]." Because CHP procurement is not a "requirement" that has been adopted by CARB, the Commission does not have the authority to impose a CHP procurement requirement on ESPs and CCAs.[4]

The CHP procurement program that is advanced in the settlement agreement is a program that has been voluntarily entered into by the IOUs as part of a broader settlement of longstanding disputes with QFs. This proposed CHP procurement program cannot be imposed on non-IOU LSEs under the guise of SB 695 compliance.

IV.

THE PD FAILS TO PROVIDE ANY JUSTIFICATION FOR IMPOSING A CHP PROCUREMENT OBLIGATION ON ESPs AND CCAs

The PD is devoid of any meaningful explanation as to why ESPs and CCAs should be required to purchase from CHP resources. The only statement made in the PD to support imposition of a CHP procurement obligation on ESPs and CCAs is that the Commission does not

[4] Moreover, there is no statutory authority for the Commission to impose a CHP reporting obligation on ESPs or CCAs. Section 8.1.1 of the settlement agreement would require each "CPUC Jurisdictional Entity" (which includes ESPs and CCAs) to prepare a semi-annual report detailing its progress toward the CHP procurement target set forth in Section 6.3 and the associated GHG emissions reduction target. The detailed reporting obligation proposed in the settlement agreement improperly presumes that ESPs and CCAs can be ordered to purchase CHP to meet GHG reduction targets.

find that ESPs and CCAs are "unable or unwilling" to procure CHP resources. See PD at p. 56 (emphasis added). There is no other statement to explain why a mandatory CHP procurement obligation should be imposed on ESPs and CCAs. The PD's recommendation is not supported by the record and it is not supported in the PD itself.

As discussed above, parties had no notice that this issue would be addressed in any one of the referenced proceedings. As a consequence, no party had an opportunity to present evidence on whether ESPs and CCAs are "able" or "willing" to purchase CHP to meet their GHG emissions reduction targets. There is also no evidence regarding cost-effective alternatives to CHP that may be preferable in meeting GHG emission targets. In summary, there is no evidence to support a mandatory CHP procurement obligation for ESPs and CCAs.

V.

CONCLUSION

The PD improperly seeks to impose new obligations on ESPs and CCAs without the benefit of statutory authority and without notice and a meaningful opportunity for comment. On this basis, the Commission must modify the PD. The Commission should sever the provisions of the settlement agreement that impose new CHP procurement and reporting obligations on ESPs and CCAs. To the extent consistent with the law and with the limitations on Commission jurisdiction, if these provisions are to be considered at all, the Commission should provide a process through which all interested stakeholders can meaningfully participate in the consideration of these issues in a separate phase of these proceedings.

Proposed findings of fact and conclusions of law are set forth in Appendix A.

Respectfully submitted,

/s/

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Date: December 6, 2010

APPENDIX A

PROPOSED REVISED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Proposed Revised Findings of Fact (FOF):

1. Delete FOF No. 10 and replace with the following:

   Although the settlement parties followed the process in Rule 12 respecting submission of a proposed settlement agreement to the Commission, the settlement agreement cannot be reviewed under the Commission's settlement process because the settlement agreement addresses issues that are not within the scope of issues identified by the Commission in the underlying proceedings, and because stakeholders did not have adequate notice or a meaningful opportunity to comment on these issues.

2. Modify FOF No. 15 by adding the following text at the end:

   . . ., but it also attempts to address issues that are neither pending at the Commission nor within the scope of issues identified in any of the underlying Commission proceedings.

3. Delete FOF No. 20.

4. Delete FOF No. 24 and replace with the following:

   The Commission does not have statutory authority to impose a CHP procurement obligation on ESPs and CCAs.

5. Delete FOF No. 25 and replace with the following:

   Although all LSEs are subject to GHG emission reduction requirements as imposed by CARB, the Commission does not dictate the means by which non-IOU LSEs meet their GHG emission reduction requirements.

6. Delete FOF No. 26.

B. Proposed Revised Conclusions of Law ("COL"):

1. Delete COL No. 3.

2. Delete COL No. 4.

3. Delete COL No. 5 and replace with the following:

The proposed settlement includes provisions that are not within the scope of the underlying proceedings. With respect to these provisions, interested parties were not afforded adequate notice or a meaningful opportunity to comment.

4. Delete COL NO. 6 and replace the following:

   Provisions of the settlement outside the scope of the underlying proceedings should be severed from the settlement in order to establish a process for consideration of the merits of these proposals.

5. Delete COL No. 7.

6. Modify COL No. 8 by adding the following language at the end:

   . . ., but ESPs should be allowed flexibility in meeting their GHG emissions reduction requirements.

7. Delete COL No. 11.

8. Delete COL Nos. 17, 18 and 19.

9. Delete COL Nos. 21 and 22.

10. Delete COL No. 24.

CERTIFICATE OF SERVICE

I hereby certify that I have served, this day, a copy of the foregoing OPENING COMMENTS OF SHELL ENERGY NORTH AMERICA (US), L.P. ON THE PRESIDING JUDGE'S PROPOSED DECISION on the Honorable Michael R. Peevey, Assigned Commissioner and the Honorable Mark Wetzell, Presiding Administrative Law Judge, by electronic mail and Federal Express; and on all parties on the service lists for Docket Nos. A.08-11-001, R.06-02-013, R.04-04-003, R.04-04-025, and R.99-11-022, by electronic mail only.

Executed on December 6, 2010, at San Diego, California.

/s/
Sue Pote

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