BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.	Rulemaking 11-05-005 (Filed May 5, 2011)

RESPONSE OF THE CENTER FOR ENERGY EFFICIENCY AND RENEWABLE TECHNOLOGIES TO APPLICATION FOR REHEARING OF DECISION 11-11-012

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The Center for Energy Efficiency and Renewable Technologies (CEERT) and respectfully submits this Response to the Application of Southern California Edison Company (SCE) for Rehearing of Decision (D.) 11-11-012 (Application for Rehearing). This Response is timely filed and served pursuant to Rule 16.1(d) of the Commission's Rules of Practice and Procedure.

SCE'S APPLICATION FOR REHEARING DOES NOT IDENTIFY LEGAL ERROR IN D.11-11-012, BUT INSTEAD SEEKS RELIEF IN VIOLATION OF PU CODE SECTION 1709 AND WELL-ESTABLISHED PRINCIPLES OF COLLATERAL ESTOPPEL AND SHOULD BE SUMMARILY DENIED.

In 2007, in Rulemaking (R.) 06-05-027, the Commission issued D.07-07-027 to implement Public Utilities (PU) Code §399.20, as added in 2006 in Assembly Bill (AB) 1969 to the state's Renewable Portfolio Standard (RPS) Program (PU Code §§399.11, et al.). Specifically, D.07-07-027 directed the RPS-obligated investor-owned utilities (IOUs), including SCE, "to offer standard tariffs and contracts to water and wastewater customers for the purchase of renewable energy from projects up to 1.5 megawatts (MW)."[1] By D.07-07-027, the Commission further directed SCE and Pacific Gas and Electric Company (PG&E) to offer these tariffs and contracts to "all customers in their service territories selling renewable energy from

[1] D.11-11-012, at p. 3; see, D.07-07-027, at pp. 62-63.

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projects up to 1.5 MW."[2] Pursuant to statutory direction, the Commission adopted the "market price referent" (MPR) as the rate for payment for renewable energy output delivered to the utilities pursuant to these tariffs.[3]

On August 24, 2007, SCE filed an application for rehearing of D.07-07-027, which, among other things, specifically challenged the legal authority of the Commission to establish an "MPR-based payment" for renewable energy delivered pursuant to these tariffs.[4] In doing so, SCE stated:

> "Moreover, the Decision [D.07-07-027] may violate the Federal Power Act [n. 25 "See 16 USC §§ 824-824m and §824a-3"] as the Decision now requires SCE to purchase power at wholesale from no-water and no-wastewater customers-generators and sets a rate for those purchases that exceeds avoided cost."[5]

In D.08-02-010, the Commission considered and denied SCE's application for rehearing of D.07-07-027. As to SCE's claims that the pricing mechanism was at odds with applicable law, D.08-02-010 found that SCE's application for rehearing lacked merit and specificity and that, in fact, D.07-07-027 was legally compliant.[6] SCE *never* appealed, at all or in time, either D.07-07-027 or D.08-02-010 to the California Supreme Court or court of appeal, which have sole "jurisdiction to review, reverse, correct, or annul any order or decision of the commission."[7]

In D.11-11-012, issued in R.11-05-005, the Commission grants, with modifications, a motion filed by the Clean Coalition to make certain revisions to the standard power purchase agreement (PPA) offered as part of SCE's California Renewable Energy Small Tariff (CREST), which D.11-11-012 confirms is SCE's tariff approved pursuant to D.07-07-027. The PPA

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[2] D.11-11-012, at p. 3; see, D.07-07-027, at pp. 46-48.
[3] D.07-07-027, at p. 16; PU Code §399.20(d) (AB 1969).
[4] R.06-05-027 (RPS) SCE Application for Rehearing (August 24, 2007), at p. 11.
[5] Id., at p. 12.
[6] D.08-01-010, at p. 10.
[7] PU Code §§1756, 1759.

revisions at issue related to *non-price* contract terms, which had been addressed among stakeholders, including SCE.

In responding to the motion, SCE *never* challenged Clean Coalition's Motion on grounds that the requests therein violated either state or federal law as to the Commission's authority to establish the tariff rate for this program pursuant to AB 1969 or the tariff actually adopted for this program in D.07-07-027. Thus, the Commission, as well as all parties to R.11-05-005, had been provided no notice that any such challenge to the motion would be made by SCE. In fact, the claim that the "MPR is unlawful," as used in this AB 1969 program, was raised for the first time by SCE in its Comments on the Proposed Decision on the motion.[8] In doing so, SCE cited to the *same* federal statutes identified in its application for rehearing of D.07-07-027, but makes no reference to either D.07-07-027 on this point; D.08-02-010, in which SCE's rehearing request was denied; or SCE's decision *not* to appeal either D.07-07-027 or D.08-02-010 further.

Both important statutory and judicial case law govern and limit the ability of litigants to repeatedly challenge the decisions of this Commission once its orders are final. First, PU Code §1709 states: "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive." Second, well-established principles of collateral estoppel or "issue preclusion," which prevents "repetitive litigation" by precluding parties from seeking to relitigate issues that have been raised, addressed, and decided against them in decisions that have become final, have routinely been applied and followed by the Commission.[9]

There is certainly no exception to these rules that turns, as SCE seems to suggest, on how the *party* views the issue. Rather, it is incumbent upon the party to raise its claims in a timely

[8] SCE Comments on Proposed Decision, at pp. 3-5.
[9] *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 182; see also, D.07-07-040, at pp. 10, 16.

manner, rather than effect a burdensome end-run on the process by seeking multiple bites at the apple. SCE's assertion that it "never waived its legal right to challenge the CPUC's setting of wholesale power prices, which by law is outside of the CPUC's authority to establish"[10] is incorrect. *If* a party believes that an error has been committed on an adjudicated issue, it is up to the party to timely challenge that error, and, further, *if* that challenge has been made and lost, the party has had its day in court regardless of what it perceives to be the merits of its claims.

The time for SCE to have perfected a challenge of D.07-07-027 as to its pricing mechanism was in its application for rehearing of that decision filed in 2007 and *decided* in 2008. SCE did just that, lost, but did not pursue any further appeal. D.07-07-027 has long since become final and only *the Commission* has the authority, upon notice to the parties, to "rescind, alter, or amend" that order.[11]

D.11-11-012 makes clear that the scope of its consideration of the Clean Coalition motion did *not* extend or include the pricing mechanism adopted for the AB 1969 tariffs in D.07-07-027 and never noticed a contrary intent. Further, and quite correctly, D.11-11-012 rejects SCE's end-run efforts to challenge that tariff rate now:

> "SCE's opening comments on the proposed decision … claim that the current pricing mechanism is unlawful. … SCE improperly seeks to collaterally attack Commission decisions regarding CREST pricing that are not at issue here. Consequently, we give no weight to SCE's comments on these issues."[12]

SCE's application for rehearing states that D.11-11-012 "wrongly claims that SCE's legal challenge" is an "improper" collateral attack.[13] However, SCE provides no legal or factual authority in support of this claim and certainly no justification for why SCE would be entitled to multiple challenges to D.07-07-027 on the issue of the lawfulness of the adopted MPR tariff rate,

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[10] SCE Application for Rehearing, at p. 2.
[11] PU Code §1708.
[12] D.11-11-012, at p. 35.
[13] SCE Application for Rehearing, at p. 9.

especially based on the *same* assertion of federal law cited in its application for rehearing of D.07-07-027 and denied in D.08-02-010.[14]

The Commission has no choice but to summarily deny SCE's Application for Rehearing of D.11-11-012, which correctly rejected SCE's attempt to relitigate the issue of the tariff rate adopted in D.07-07-027. However, the Commission should also ensure that, in doing so, that it does not issue an order that in any way prejudges the outcome of the current consideration of an expansion of this tariff (feed in tariff (FiT)) in R.11-05-005.

In this regard, while ostensibly SCE's Application for Rehearing of D.11-11-012 seeks to change a pricing mechanism adopted in D.07-07-027, it also contains the following statement:

> "The CPUC is currently considering reforms to the renewable FiT [feed in tariff] program as part of its implementation of SB 32 and SB 2 (1x), including possible changes to the pricing for renewable FiTs [fn. omitted]. Rather than waiting for these reforms, the CPUC reaffirmed and expanded the eligibility for the unlawful pricing in the CREST program, thus ensuring that SCE's customers would be forced for many years to pay prices 15% higher than if the CPUC had not acted."[15]

In making these statements, SCE cites only to its own comments and opinion on the limitation of the Commission's pricing authority under the successor amendments to AB 1969 (Senate Bill (SB) 32 and SB 2 (1x).

By doing so, SCE's Application for Rehearing not only seeks to inappropriately relitigate the pricing mechanism adopted in D.07-07-027, but also to either chill or limit any decision the Commission may make with reference to its implementation of SB 32 and SB 2 (1x). On this point, CEERT strongly urges the Commission to reject this attempt by SCE to seek an outcome here that is beyond the purview of D.11-11-012.

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[14] SCE Application for Rehearing, at pp. 2, 4, 5, 13, citing the same Federal Power Act provisions as it did in its previous application for rehearing of D.07-07-027.
[15] SCE Application for Rehearing, at p. 12.

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Further, the record in support of the Commission's broad pricing authority for a Renewable FiT has been established by multiple parties. It should be noted especially that SCE's view of the implications of recent Federal Energy Regulatory Commission (FERC) orders on the Commission's wholesale pricing authority is overly restrictive and does *not* reflect the actual outcome of these decisions or the positions of other parties.[16] Not only do these orders establish the "broad latitude" the Commission has in establishing avoided cost rates for payment to independent generators, but, more significantly, make clear that "avoided cost" is not the sole basis for authorizing or establishing payments to renewable generators. Thus, as an example, FERC has confirmed that "'a state may separately provide additional compensation for environmental externalities, *outside the confines of*, and, in addition to the PURPA avoided cost rate, through the creation of renewable energy credits (RECs).'"[17] It is, therefore, important to ensure that any order the Commission issues on the SB 32 FiT in this proceeding is not inappropriately limited or influenced by SCE's Application for Rehearing here.

[16] See, e.g., CEERT Opening Brief on SB 32 Implementation, at pp. 11-12, citing FERC Order Granting Clarification and Dismissing Rehearing, 133 FERC ¶ 61, 059 (October 21, 2010) ("FERC October 2010 Order"), at ¶23, ¶26.
[17] FERC October 2010 Order at ¶31, mimeo at p. 15; emphasis added.

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CONCLUSION

For the reasons state above, SCE's Application for Rehearing of D.11-11-012 does not identify legal error in D.11-11-012. In fact, the Application for Rehearing's fatal legal flaws require that it be summarily denied.

Respectfully submitted,

December 6, 2011

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VERIFICATION

(Rule 1.11)

I am the attorney for the Center for Energy Efficiency and Renewable Technologies (CEERT). Because CEERT is absent from the City and County of San Francisco, California, where I have my office, I make this verification for said party for that reason. The statements in the foregoing Response of the Center for Energy Efficiency and Renewable Technologies Comments to Application for Rehearing of Decision 11-11-012, have been prepared and read by me and are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct and executed on December 6, 2011, at San Francisco, California.

Respectfully submitted,

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