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)

OPPOSITION OF THE CITY AND COUNTY OF SAN FRANCISCO TO THE APPLICATION FOR REHEARING OF DECISION 11-12-052 FILED BY SOUTHERN CALIFORNIA EDISON COMPANY

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I. INTRODUCTION

Southern California Edison's ("SCE") rehearing application complains of requirements set forth in D.11-12-052 that apply to the Investor-Owned Utilities ("IOUs") but not to other retail sellers. SCE argues that these requirements violate the requirement in the California Renewable Portfolio Standard ("RPS") legislation that all retail sellers should be subject to the same RPS rules. SCE's rehearing application confuses implementation of the RPS with longstanding and ongoing CPUC regulation of IOU rates, and should be rejected.

II. THE LEGAL STANDARD FOR AN APPLICATION FOR REHEARING

Under Commission Rule of Practice and Procedure 16.1(c), an application for rehearing must "set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous" and must demonstrate that the Commission committed "legal error, so that the Commission may correct it expeditiously." The claimed error here concerns the Commission's construction of a statute. Relevant case law concerning court review of a State agency's construction of a statute demonstrates that the Applicant's burden here is a difficult one.

The Commission is the State agency charged IOU rate regulation, and with the implementing RPS as to the IOUs and other retail sellers (other than municipal utilities). It is well-settled under California law that "the contemporaneous administrative construction of [an] enactment by those charged with its enforcement . . . is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." (*Coca-Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 921; see also *Burlington Northern and Santa Fe Ry. Co v. Pub. Util. Comm.* (2003) 112 Cal.App.4th 881, 889.) If an agency has "reasonably interpreted" a statute a court must uphold it. (*Engs Motor Truck Co. v.*

State Bd. of Equalization (1987) 189 Cal.App.3d 1458, 1466.) A court will "not to assess the wisdom" of the agency's interpretation. (*Id.*)

III. IN ITS APPLICATION, SCE FAILS TO SHOW THAT THE COMMISSION COMMITTED "LEGAL ERROR" BECAUSE THE COMMISSION HAS "REASONABLY INTERPRETED" THE RPS

D.11-12-052 is one of a series of Commission decisions, interpreting and implementing Senate Bill (SB) 2 (1X), legislation that updated and expanded the California Renewable Portfolio Standard ("RPS"). Southern California Edison ("SCE") seeks rehearing of D. 11-12-052, on the grounds that the decision includes requirements that apply to the IOUs but not other retail sellers. SCE claims these requirements are contrary to Section 380(e) which states that "[e]ach load-serving entity shall be subject to the same requirements for . . . the renewable portfolio standard program that are applicable to electrical corporation pursuant to this section, or otherwise required by law, or by order or decision of the commission"[1] and to Section 365.1(c) which requires the Commission to "[e]nsure that other providers are subject to the same requirements that are applicable to the state's three largest electrical corporations under any programs or rules adopted by the commission to implement . . . the renewables portfolio standard provisions of Article 16 (commencing with Section 399.11) . . . ."

SCE's arguments are misplaced. As the Commission explained clearly in D.10-03-021, the Commission "has different responsibilities with respect to utilities, on the one hand, and ESPs and CCAs on the other. Th[e] Commission does not set the rates of ESPs or CCAs and has no responsibility to ensure that their charges to their customers are just and reasonable." Id at 48. In this context, interpreting the RPS to mean the Commission cannot impose requirements on the IOUs to ensure that their RPS procurements result in just and reasonable rates is nonsensical and contrary to the California regulatory structure.

[1] Unless otherwise noted, all statutory references are to the California Public Utilities Code.

Although the provisions complained of by SCE apply with respect to IOU purchases of RPS compliant products, they constitute an exercise by the CPUC of its authority to regulate IOU rates and protect ratepayers, rather than enforcement of the RPS. Neither SB 2 (1X), nor the RPS changed or reduced the CPUC's authority over IOU rates, or its responsibility to protect captive ratepayers. Nor did these statutes give the CPUC authority to regulate the rates of non-IOU retail sellers, such as Community Choice Aggregators. Accordingly, the requirements complained of by SCE are entirely consistent with California public utilities law.

Since for all electricity purchases, including RPS purchases, IOUs are subject to CPUC regulation, the fact that the CPUC exercises this jurisdiction in the case of IOUs cannot be a violation of the stricture in the RPS that all retail sellers should be subject to the same rules. Followed to its logical conclusion, SCE's argument would require that, as to the RPS, either the CPUC must 1) regulate non-IOU rates, or 2) cease to regulate IOU rates. There is nothing in SB 2 (1X) or the RPS to suggest that the legislature intended either outcome, and in fact, such an outcome would be absurd. It is worth noting that although IOU RPS commitments are subject to CPUC oversight and approval, they are also afforded significant protection: non-by-passable charges for the life of the commitment (non-IOU retail sellers obtain no such protection for their RPS purchases).[2]

As described below, the CPUC clearly supported the requirements applicable only to the IOUs as necessary to ensure prudent and cost-effective RPS purchases, and hence an exercise of its IOU rate regulation. As the implementing agency, the CPUC's interpretation of the RPS and the California Public Utilities Code should be afforded great deference. Conversely, SCE's

[2] The City takes no position on whether the restrictions imposed by the CPUC on IOU RPS procurements in fact result in more prudent, cost-effective investments. However, that question in a matter squarely within the CPUC's purview.

interpretation should be given no weight. SCE attacks CPUC restrictions designed to provide for prudent and cost effective RPS commitments by the IOUs, while ignoring the substantial protections afforded by CPUC regulation to IOU RPS commitments.

D.11-12-058 properly justifies each of the requirements that apply only to the IOUs (and are the subject of SCE's rehearing application) as an exercise of the CPUC's rate authority over the IOUs, as follows:

- SCE complains that, in the case of the IOUs, D.11-12-052 requires that contracts for substitute energy used to firm and shape RPS procurement contracts must be for the lesser of 5 years or the length of the RPS contract. SCE rehearing application at 5. D.11-12-052 justifies this requirement as follows: "in exercising its responsibility to protect ratepayers from unreasonable costs, the Commission may consider imposing additional requirements on IOUs' contracts. . . . Contracts for substitute energy of this length will help ensure that the firmed and shaped transaction is sufficiently well-defined that Energy Division staff can reasonably evaluate the viability and cost of the deal when it is presented to the Commission for approval via advice letter." Id. at 50. It is noteworthy that D.11-12-058 accepts as reasonable a San Diego Gas and Electric ("SDG&E") request that "cost recovery expressly be allowed even if the procurement turns out, when the compliance determination is made by Commission staff, not to meet the criteria of the portfolio content category that the IOU initially presented in the advice letter." Id. at 11. Thus, it appears that ratepayers will take the risk that products procured under an agreement are not ultimately of the same type and value as that reflected in the price. In this context, the CPUC has authority to impose requirements on the IOUs to maximize the likelihood that the products purchased by the IOUs and paid for by captive ratepayers, will be the products delivered. Conversely, the

CPUC has no authority to impose requirements on non-IOU retail sellers that are designed to ensure that their purchases are prudent and cost effective. The CPUC does not afford non-IOU retail sellers any cost recovery protections if the products they purchase do not ultimately qualify as the products sold.

- SCE complains that the effective date for an IOU resale contract is the date on which CPUC approval of a contract is final, whereas for non-IOU retail sellers, the effective date is the date on which the contract executed. SCE application for rehearing at 8. This distinction, however, merely reflects the reality that IOU procurement contracts must be approved by the CPUC, whereas procurement contracts by non-IOU retail sellers do not require such approval. The fact that the rules for implementation of the RPS appropriately reflect this reality does not make them inconsistent with the RPS stricture that the rules for IOUs and non-IOU retail sellers should be the same.

- SCE complains about a longstanding $50 cap on the price of renewable energy credits in the case of IOUs. This requirement was adopted in D.10-03-021; D.11-12-058 merely reminds parties that the requirement is still in effect. D.11-12-058 at 55. D.10-03-021 justified the $50 price cap as follows: "We believe that it is possible to create temporary protections for ratepayers through imposition of a price cap without damaging the basic structure of the TREC market or undermining the financial incentives for new renewable construction that are among the longer-term benefits of a TREC market. We therefore adopt a temporary TREC price cap." Id at 58-59. Once again, in adopting the price cap, the CPUC was exercising its ongoing authority and responsibility to regulate IOU rates and to protect ratepayers.

IV. CONCLUSION

SCE's rehearing application is premised on a flawed interpretation of the RPS and its relation to the CPUC's regulation of IOU rates. The rehearing application should be dismissed.

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