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 WESTERN POWER TRADING FORUM AND THE MARIN ENERGY AUTHORITY TO THE SEPARATE APPLICATIONS FOR REHEARING OF DECISION 11-12-052 FILED BY SOUTHERN CALIFORNIA EDISON COMPANY AND PUBLIC UTILITY DISTRICT NO. 1 OF COWLITZ COUNTY

Daniel W. Douglass
Douglass & Liddell
21700 Oxnard Street, Suite 1030
Woodland Hills, California 91367
Telephone: (818) 961-3001
Facsimile: (818) 961-3004
Email: douglass@energyattorney.com

Counsel for
WESTERN POWER TRADING FORUM
MARIN ENERGY AUTHORITY

February 6, 2012

TABLE OF CONTENTS

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 WESTERN POWER TRADING FORUM AND THE MARIN ENERGY AUTHORITY TO THE SEPARATE APPLICATIONS FOR REHEARING OF DECISION 11-12-052 FILED BY SOUTHERN CALIFORNIA EDISON COMPANY AND PUBLIC UTILITY DISTRICT NO. 1 OF COWLITZ COUNTY

In accordance with Rule 16.1(d) of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission"), the Western Power Trading Forum ("WPTF")[1] and the Marin Energy Authority ("MEA")[2] hereby submit the following joint response to the separate applications for rehearing of Decision ("D.") 11-12-052 issued on December 21, 2011 ("Decision"). On January 19, 2012, southern California Edison Company ("SCE") filed its application for rehearing of the Decision. The subsequent day, Cowlitz Public Utility District No. 1, a non-profit, Public Utility District located in Longview, Washington ("Cowlitz") also filed an application for rehearing of the Decision. Rule 16.1(d) provides, in part, that "In instances of multiple applications for rehearing the response may be to all such applications, and may be filed 15 days after the last application for rehearing was filed." Therefore, this joint response by WPTF and MEA is timely filed.

[1] WPTF is a California non-profit, mutual benefit corporation. It is a broadly based membership organization dedicated to enhancing competition in Western electric markets in order to reduce the cost of electricity to consumers throughout the region while maintaining the current high level of system reliability. WPTF actions are focused on supporting development of competitive electricity markets throughout the region and developing uniform operating rules to facilitate transactions among market participants.

[2] MEA is the State of California's first operating community choice aggregation program, serving the County of Marin and the eleven cities and towns within Marin County.

I. Response to SCE Application for Rehearing

The SCE application for rehearing incorrectly alleges that the Decision commits legal error by applying different rules to the investor-owned utilities ("IOUs"), energy service providers ("ESPs") and community choice aggregators ("CCAs"), as explained in the following excerpt:

> As discussed below, California law is clear that all retail sellers, including investor-owned utilities ("IOUs"), electric service providers ("ESPs") and community choice aggregators ("CCAs") must be subject to the ***same*** requirements, terms, and conditions with respect to the RPS program. Indeed, SB 2 (1x) specifically provides that "[i]n order to achieve a balanced portfolio," ***all retail sellers*** must procure products in accordance with the portfolio content category requirements.
>
> Several of the rules in the Decision create different and more burdensome RPS rules for IOUs than for other retail sellers in violation of California law. In particular, for a product to count in the second portfolio content category under Public Utilities Code Section 399.16(b)(2), which includes products that are firmed and shaped, IOUs must enter into substitute energy contracts that include a minimum duration. This requirement does not apply to ESPs or CCAs. Further, products in the first and second portfolio content categories under Public Utilities Code Sections 399.16(b)(1) and (b)(2), respectively, that are resold only maintain these categorizations if the resold product is delivered after the effective date of the resale contract. While this rule applies to all retail sellers, for ESPs and CCAs, the effective date is defined as the resale contract's effective date, whereas for IOUs, the effective date is defined as the date that final and non-appealable Commission approval of the resale contract is obtained. This rule gives ESPs and CCAs significantly more flexibility to enter into resale transactions than IOUs. Finally, the Decision continues the Commission's $50 per renewable energy credit ("REC") price cap for unbundled RECs for IOUs, but not ESPs or CCAs.[3]

The SCE application for rehearing should be rejected. It is an impermissible collateral attack on prior Commission decisions on the same subject and makes significant omissions in terms of relevant statutory authority. Furthermore, anticompetitive motivations of SCE are revealed by an analysis of precisely *which* provisions it wishes to be made applicable to ESPs and CCAs.

[3] SCE Application, at pp. 2-3 (emphasis added and footnotes omitted).

A. SCE Mounts an Impermissible Collateral Attack on Prior Commission Decisions on Precisely the Same Topic.

SCE mounts an impermissible collateral attack on two prior Commission decisions. Specifically, it attacks D.05-11-025[4] and D.11-01-026.[5] In D.05-11-025, the Commission delineated its approach to implementing RPS program requirements for ESPs, CCAs, and small and multi-jurisdictional utilities ("SMJUs"). The Commission found that the guidance provided by the RPS statute was ambiguous, which required the Commission to utilize its discretion to provide a framework for RPS compliance by ESPs, CCAs, and SMJUs. It was decided that ESPs, CCAs, and SMJUs would meet the basic requirements of the RPS program, but the Commission would allow them some latitude in the manner in which they met these requirements. The decision provides:

> We approach this question as an issue of policy. ESPs and CCAs each are subject to separate and distinct legal and regulatory requirements. Although they are each subject to certain requirements of this Commission as assigned by the Legislature, neither is regulated as a "public utility" as defined by the Public Utilities Code, nor are they subject to Commission regulatory authority as a matter of course. Instead, the Commission is granted specific regulatory authority over these entities for particular issues, in this case, RPS. Because of this, each of these entities in existence or planned operates under a business model that is different from a regulated public utility.
>
> For example, as AReM argues, this Commission does not set rates or rates of return for ESPs, or review their overall procurement plans, and ESPs are currently limited in their ability to sign up new customers. Likewise, there is merit to Los Angeles and Chula Vista's fundamental point that CCAs are more akin to local publicly-owned utilities than they are to the investor-owned utilities.
>
> This Commission has less overall control over how ESPs and CCAs operate than we do over how utilities operate. Also, to the extent we consider ESP and CCA operations, our concerns about their operations differ somewhat from our concerns about the operations of the investor-owned utilities. In the context of the

[4] Opinion on Participation of Energy Service Providers, Community Choice Aggregators, and Small and Multi-Jurisdictional Utilities in the Renewables Portfolio Standards Program, issued November 21, 2005.

[5] Decision Revising Rules for the Renewables Portfolio Standard Pursuant to Senate Bill 695, issued January 14, 2011.

> RPS program, our primary concern is to ensure that ESPs and CCAs do in fact reach the goal of 20% renewable energy by 2010. We are, however, somewhat less concerned about the details of how they get there.
>
> Therefore, we do not believe it is reasonable to require these entities to be subject to the exact same steps for RPS implementation purposes as the utilities we fully regulate. We also do not believe that it is necessarily reasonable to subject ESPs and CCAs to the same RPS process requirements as each other, simply because they are not utilities. A CCA, for example, will likely be answerable to the political authorities in the community in which it is operating, in addition to its customers. The business of an ESP, on the other hand, is much more highly sensitive to price pressures than a utility, which has captive customers, at least at this time. Thus, we are sensitive to the particular requirements and pressures of each type of entity and do not necessarily want to impose a "one size fits all" RPS regulatory scheme.[6]

As a result of this analysis and conclusion, the Commission then determined that it would exercise its authority over ESPs, CCAs, and SMJUs in five basic areas: (1) requiring meeting the 20% goal; (2) adding at least 1% of retail sales in renewable sales per year; (3) reporting progress toward these goals to the Commission; (4) utilizing flexible compliance mechanisms; and (5) being subject to penalties.[7] The SCE application directly challenges issues outside of these five basic areas.

Moreover, more recently in D.11-01-026, the Commission looked again at the issue of ESP obligations and rejected a similar SCE challenge:

> SCE provides no logical basis for the Commission to impose either of these ratepayer protection mechanisms—the independent evaluator or the procurement review group—on ESPs, and it is difficult to discern one. This Commission has no responsibility for the price reasonableness of ESP procurement (whether conventional or RPS-eligible), and has no regulatory authority over ESP rates. In contrast, the Commission has responsibility for the price reasonableness of IOU procurement, and the reasonableness of IOU rates. *Section 365.1(c) does not require that the Commission take elements of the procurement practices of the utilities it regulates with respect to procurement and rates and impose them on the ESPs that it does not regulate with respect to procurement and rates, simply*

[6] D.05-11-025, at pp. 12-13.

[7] Id at pp. 10-11.

> *because the Commission has authority over ESPs' participation in the RPS program, and we decline to do so here.*[8]

The SCE application thus constitutes an improper collateral attack on prior Commission decisions[9] that have considered and reconsidered precisely the same topic – what is meant by the statutory language that imposes the "same requirements" on ESPs and CCAs? It therefore implicates the principle of *res judicata.* As the Commission has observed, the requirements for the proper application of *res judicata* have been described as follows: "The doctrine of *res judicata* precludes parties or their privies from re-litigating an issue that has been finally determined by a court of competent jurisdiction….The application of the doctrine in a given case depends upon an affirmative answer to these three questions: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party to or in privity with a party to the prior adjudication?"[10] In the case of the SCE application, the answer to each of these three queries is affirmative. Accordingly, the Commission should reject the SCE application as an impermissible collateral attack on the determinations made in D.05-11-025 and D.11-01-026 regarding the application of the "same requirements" language.

WPTF and MEA would also note that SCE is once again wasting the time and resources of both the Commission and other parties to this proceeding by continuing to raise the same issue in disparate proceedings. Should it continue to do so in the future, the Commission should not hesitate to invoke sanctions against the utility for its frivolous appeals.

---

[8] D.11-01-026, at pp. 22-23 (emphasis added).

[9] *See*, P.U. Code Section 1709. "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."

[10] D.04-10-039, quoting *Levy v. Cohen*, 19 Cal.3d 165, 171 (1977).

B. SCE Omits Consideration of the Commission's Jurisdictional Authority with Regard to Both ESPs and CCAs and Offers Arguments Already Rejected by the Commission.

The SCE application repeatedly reiterates that "ESPs and CCAs must be subject to the same RPS terms and conditions as IOUs."[11] In doing so, SCE conveniently ignores the fact that existing statute is clear with respect to the Commission's authority to regulate the rates and terms and conditions of service of ESPs:

> Registration with the commission is an exercise of the licensing function of the commission, and does not constitute regulation of the rates or terms and conditions of service offered by electric service providers. *Nothing in this part authorizes the commission to regulate the rates or terms and conditions of service offered by electric service providers.*[12]

The provisions in SB 2(1X) do not overturn this essential framework for ESP service. Moreover, SB 695 is not applicable to CCAs. SCE repeatedly cites P.U. Code Section 365.1(c) to assert that the "same requirements" are applicable to all load-serving entities. However, this statute is simply not applicable to CCAs. Code Section 365.1(a) clearly states that its provisions are <u>not</u> applicable to CCAs:

> "Other provider" does not include a community choice aggregator, as defined in Section 331.1, and the limitations in this section do not apply to the sale of electricity by "other providers" to a community choice aggregator for resale to community choice aggregation electricity consumers pursuant to Section 366.2.

SCE further cites P.U. Code Section 380(e) as authority for its positions. This code section also contains the "same requirements' language that SCE repeatedly cites. However, its application fails to reveal that the Commission has already defined what is meant by this wording (see Section A above). Put simply once again SCE is overreaching and making precisely the same

[11] SCE application, at p. 6. *See also*, pp. 2-5 and 8.

[12] P.U. Code section 394(f), (emphasis added).

strained interpretation of the applicable statutes that have been rejected by the Commission before.

C. SCE's Selective Analysis of Which Terms and Conditions are to be Applicable is Revealing.

Although SCE calls for all terms and conditions of the Commission rules to be imposed equally on IOUs, ESPs and CCAs, it displays a revealing selectivity with regard to the items it cites to demonstrate inequality of treatment. For example, SCE argues that resale conditions can and should be the same for all retail sellers or should not apply at all; and that the Commission should eliminate the $50/REC price cap applicable only to IOUs. However, the utility does not express concern over the inequality that exists with regard to it having guaranteed rates of return, a franchised service territory and RPS cost containment provisions not available to other load-serving entities such as ESPs. This may be merely oversight, but it is more likely evidence that SCE's concern about "equal terms and conditions" apply only to those items that might burden its current (ESP) or potential future (CCA) competitors. If the utility's actions are essentially directed at frustrating the viability or desirability of competitive choice options, its credibility is severely compromised.

II. Response to Cowlitz Application for Rehearing

Cowlitz offers a very direct and persuasive argument that the Decision runs afoul of well-accepted Constitutional principles:

> The Decision sets forth clear requirements for transactions involving purchases of in-state generation to qualify for Category 1 treatment for Renewables Portfolio Standard ("RPS") compliance purposes, but does not do so for transactions involving out-of-state generation and leaves uncertain what is required in order for purchases from an out-of-state generator to qualify for Category 1 treatment. By doing so, the Decision imposes a significant barrier to the negotiation and approval of purchases of out-of-state power and discriminates against out-of-state generators in violation of the Commerce Clause of the United States Constitution.

> The Decision also imposes additional restrictions on firmed and shaped transactions that are not required by statute and are likely to result in the treatment of many if not most transactions for the purchase of bundled out-of-state power as Category 3. In doing so, the Decision will unnecessarily, artificially, and severely restrict the ability of out-of-state renewable generators to compete in the California market for RPS compliance purposes, deprive out-of-state generators of the opportunity to earn a competitive market return on their investment in renewable generation, and increase the cost to California utilities and their ratepayers of meeting RPS requirements. As a result, the Decision is an abuse of discretion and not supported by substantial evidence in light of the record as a whole.[13]

WPTF and MEA concur with the Cowlitz argument. The decision is legally vulnerable to Constitutional challenge because it discriminates against interstate generation by imposing different requirements on in-state versus out-of-state generators in violation of the Commerce Clause.[14] Rehearing on the constitutionality of the Decision should be granted, as requested by Cowlitz.

III. Conclusion

The SCE application raises yet again arguments that have been repeatedly rejected by the Commission. As a result, it constitutes an impermissible collateral attack on prior Commission decisions on precisely the same topic. Further, the utility ignores the clear meaning of relevant statutory provisions relative to Commission jurisdiction over ESPs and CCAs. Finally, SCE is highly selective in its identification of which terms and conditions should be applicable to its current and future potential competitors, which severely undercuts the credibility of its argument.

The Cowlitz application, however, raises legitimate Constitutional questions that were ignored or dealt with perfunctorily at best in the Decision. As a result, rehearing should be granted on the Commerce Clause and other constitutional arguments raised by Cowlitz.

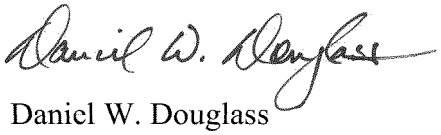
---

[13] Cowlitz application, at pp. 2-3.

[14] *See*, United States Constitution, Article I, Section 8, Clause 3.

WPTF and MEA thank the Commission for its consideration of these comments and urge the Commission to act expeditiously to consider and implement the recommendations discussed herein.

Respectfully submitted,



Daniel W. Douglass
Douglass & Liddell
21700 Oxnard Street, Suite 1030
Woodland Hills, California 91367
Telephone: (818) 961-3001
Facsimile: (818) 961-3004
Email: douglass@energyattorney.com

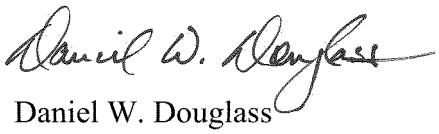
Counsel for
WESTERN POWER TRADING FORUM
MARIN ENERGY AUTHORITY

February 6, 2012

VERIFICATION

I, Daniel Douglass, am counsel for the Western Power Trading Forum and the Marin Energy Authority and am authorized to make this Verification on their behalf. I declare under penalty of perjury that the statements in the foregoing copy of the Response of the Western Power Trading Forum and the Marin Energy Authority to the Separate Applications for Rehearing of Decision 11-12-052 filed By Southern California Edison Company and Public Utility District No. 1 of Cowlitz County, 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.

Executed on February 6, 2012 at Woodland Hills, California.



Daniel W. Douglass
DOUGLASS & LIDDELL

Counsel for
WESTERN POWER TRADING FORUM
MARIN ENERGY AUTHORITY