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 UTILITY REFORM NETWORK TO THE APPLICATION FOR REHEARING OF DECISION 11-12-052 BY SOUTHERN CALIFORNIA EDISON

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Pursuant to Rule 16.1(d) of the Commission Rules of Practice and Procedure, The Utility Reform Network (TURN) hereby submits this response to the application for rehearing of Decision 11-12-052 (*hereafter* "the Decision") filed by Southern California Edison (SCE). In this application, SCE seeks rehearing on the grounds that the Decision fails to apply the same Renewable Portfolio Standard (RPS) program rules to all retail sellers, as required by Public Utilities Code §399.12(j) §365.1(c), and §380(e)).

Specifically, SCE argues that the Decision is deficient because it fails to apply the following rules equally to all retail sellers:

(1) For products conforming to the product category defined in §399.16(b)(2), the Decision requires utilities to submit substitute energy contracts with a duration of at least 5 years (or the length of the renewable contract, if shorter) as part of an up-front showing at the time of Commission approval of the transaction. This requirement does not apply to Electric Service Providers (ESPs) or Community Choice Aggregators (CCAs).

(2) The Decision states that resale of first or second product category renewable energy by an Investor Owned Utility (IOU) may not occur until after the underlying contract has been approved by the Commission and the appeal period has run. For ESPs and CCAs, the Commission allows resale upon "the effective date chosen by the parties and stated in the contract."[1]

[1] D.11-12-052, page 51.

(3) The Decision continues the $50/MWh price cap for purchases of unbundled Renewable Energy Credits (RECs) by IOUs but does not apply this price cap to ESPs and CCAs.

TURN agrees with SCE, in part, that the requirements of §399.16(b)(2) must be applied equally to all retail sellers. TURN disagrees with the other claims raised by SCE and urges the Commission to deny the remainder of the application.

SCE's motivation for the application is transparently self-serving. In order to remedy these alleged violations of law, SCE argues that these rules "should either be removed from the Decision or modified to apply equally to all retail sellers."[2] While TURN appreciates the desire to apply substantive rules equally to all retail sellers, SCE's ultimate goal appears to be to eliminate the applicability of all three requirements to IOUs. The Commission should not, and need not, grant such extreme relief.

I. ALL RETAIL SELLERS MUST COMPLY WITH THE SUBSTANTIVE, BUT NOT PROCEDURAL, REQUIREMENTS APPLICABLE TO PRODUCTS CONFORMING TO §399.16(B)(2)

SCE asserts that the Decision fails to apply equal terms and conditions to all retail sellers because, for ESPs and CCAs, there is no minimum duration for substitute energy contracts tied to renewable energy products defined in §399.16(b)(2). SCE further argues that all retail sellers should be required to submit their contracts for advance Commission approval in order to qualify for this product category. TURN agrees with the first assertion and disagrees with the second.

The requirement governing the duration of substitute energy contracts derives from

[2] SCE Application, page 5.

the interpretation of "firmed and shaped" in §399.16(b)(2). The Decision determines that a minimum duration requirement "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."[3] To the extent that the duration of the substitute energy contract is important for determining the validity of the claim that the product has been "firmed and shaped" with "incremental energy" that is "not in the portfolio of the retail seller claiming the transaction for RPS compliance"[4], the duration is fundamental to the overall requirement.

If there is no duration requirement for some retail sellers, it will be far more challenging to determine, either *ex-ante* or *ex-post,* whether the transactions are "incremental" or are merely routine hourly purchases that occur in the course of normal business. The absence of such a requirement could allow ESPs and CCAs to game the compliance showing in ways that are difficult to predict in advance. What is certain is that these retail sellers will take full advantage of ambiguities regarding the "incremental" showing by attempting to demonstrate that unrelated energy imports are sufficient. As a result, exempting ESPs and CCAs from this requirement effectively creates a different substantive compliance standard and thereby violates the "same terms and conditions" test.

While supporting this portion of SCE's argument, TURN disagrees that all retail sellers must present their contracts for advance approval by the Commission prior to being eligible to count the procurement towards the second product category. There is no basis for requiring up-front approval of specific contracts by ESPs and CCAs since the Commission cannot guarantee rate recovery for these load-serving entities.

[3] D.11-12-052, page 50.
[4] D.11-12-052, page 49.

In D.11-01-026, the Commission rejected a similar proposal by SCE to subject all retail seller renewable energy contracts to an up front advice letter process.[5] There is no reason for the Commission to revisit the issue at this time.

TURN therefore urges the Commission to modify D.11-12-052 and apply similar duration requirements for substitute energy contracts used to qualify a transaction for the second product category. By contrast, SCE's effort to require up-front contract approval for all retail sellers should be denied.

Under no circumstances should the Commission modify these requirements for IOUs since there is no valid basis for concluding that the Decision exceeds the scope of, or violates, the relevant statutory provisions. SCE's true agenda is to eliminate this requirement altogether -- their application alleges that the durational requirement is unreasonable on its face, regardless of whether uniformly applied to all retail sellers.[6] TURN strongly disagrees with SCE. The adoption of a durational requirement is fully within the Commission's authority to determine what characteristics are relevant to the classification of a "firmed and shaped" renewable energy product. SCE may believe that this requirement constitutes an unwise policy choice, but this (incorrect) critique does not rise to the level of legal infirmity.

II. THE CONTESTED RESALE REQUIREMENTS ARE PROCEDURAL, NOT SUBSTANTIVE, AND RELATE TO A CONTRACT APPROVAL PROCESS THAT IS NOT RELEVANT TO ALL RETAIL SELLERS

SCE further asserts that the Decision fails to apply the "same terms and conditions"

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[5] D.11-01-026, page 23 ("SCE makes the fall-back proposal that the current advice letter process be extended to the RPS procurement contracts of all RPS-obligated retail sellers. SCE does not present any arguments to support this significant change to the Commission's long-standing position, consistent with § 394(f), that it does not review or approve the procurement contracts of ESPs, whether for conventional generation or RPS-eligible resources.")

[6] SCE application for rehearing, page 7.

to the resale of First and Second category products. Specifically, the Decision limits resale contracts for First and Second category products to "electricity and RECs that have not yet been generated prior to the effective date of the resale contract".[7] SCE argues that the "effective date" discriminates against electrical corporations because other retail sellers do not require Commission review and approval of such transactions before they are "effective".[8]

SCE's argument has no legal merit and should be rejected. The Commission cannot require up-front approval of specific contracts by ESPs and CCAs and is not authorized (pursuant to §394(f)) to permit rate recovery for procurement commitments made by these load-serving entities.[9] By contrast, the Commission directly oversees the contracting activity of IOUs and typically requires an up-front advice letter filing for any substantial transaction. SCE's proposal ignores this fundamental difference.

The timing issues raised by SCE may create different challenges for various retail sellers but do not prevent any entity from reselling renewable energy with the original product characteristics intact. The only difference is that an IOU must seek advance approval from the Commission. This advance approval is critical because the revenues from an IOU resale are credited to ratepayers. As a result, the Commission needs to establish reasonableness criteria and ensure that resale contracts will benefit ratepayers. For other retail sellers, the Commission has no authority to require any specific treatment of resale revenues and is not involved in determining whether their retail customers will benefit, or be harmed, by the transaction. If SCE wishes to limit the delays associated with up-front contract approval, there are other remedies available to accomplish this goal (including

[7] D.11-12-052, page 36.
[8] SCE application, pages 7-8.
[9] Cal. Pub. Util. Code §394(f)("Nothing in this part authorizes the Commission to regulate the rates or terms and conditions of service offered by electric service providers.")

submitting a proposal for Commission pre-approval of certain resale quantities). An application for rehearing is not the proper forum for addressing this concern.

Unfortunately, SCE's true agenda is not to harmonize the application of the effective date requirement amongst retail sellers but rather to eliminate the entire provision.[10] This critique is policy-based and not related to any demonstrated legal error. Therefore, this portion of SCE's application should be denied.

III. THE COMMISSION DOES NOT NEED TO APPLY A PRICE CAP ON RENEWABLE ENERGY CREDIT PURCHASES TO ALL RETAIL SELLERS

SCE urges the Commission to rescind the $50/MWh price cap on unbundled REC purchases by IOUs originally adopted in D.10-03-021 and affirmed by D.11-12-052. Claiming that the cap should be applied to all retail sellers, SCE argues that the continuation of a maximum price constitutes "unequal application" of the policy and impermissible creates "an additional restriction on the third portfolio content category".[11] SCE urges the Commission to remedy the supposed legal error by eliminating the unbundled REC price cap for IOUs.

The Commission has previously addressed this exact issue. In D.11-01-026, the Commission determined that the REC price cap "is not an RPS program requirement" but is rather "a method to protect IOU ratepayers" and "consistent with the statutory provision of cost containment mechanisms for RPS procurement that apply only to IOUs."[12] That decision further explained that

> this Commission's general responsibility to ensure just and reasonable rates for IOU ratepayers does not extend to the customers of ESPs. (See § 394(f).) As

[10] SCE application, page 9 (The Commission "should eliminate this condition on resale contracts maintaining their original categorization for all retail sellers.")
[11] SCE Application, page 9.
[12] D.11-01-026, page 18.

> a matter of RPS program administration, protecting IOU ratepayers from excessive prices for TRECs does not also require limiting the prices ESPs may choose to pay for TRECs.[13]

Because the Commission lacks authority over the rates of non-IOU retail sellers, there is no basis for applying a cost limit to their procurement. But the Commission has broad authority to regulate IOU procurement, regularly provides specific limits on prices paid for specific types of resources, and must approve the reasonableness of major procurement transactions. Under §399.15(c), the Commission is charged with establishing RPS cost containment measures exclusively for IOUs. The statutory scheme deliberately excludes ESPs and CCAs from any Commission-approved cost containment mechanism.[14]

Furthermore, SCE ignores the fact that §399.21(b) explicitly directs the Commission to "allow an electrical corporation to recover the reasonable costs of purchasing, selling, and administering renewable energy contracts in rates." In order for the Commission to fulfill this statutory responsibility, it must adopt rules that establish the "reasonable costs" of such transactions. The creation of a REC price cap provides up-front guidance to IOUs for purposes of determining a "reasonable cost" and is therefore consistent with the purpose of this statutory provision.

The Commission should reject SCE's call for the Commission to simply repeal the price cap for IOU purchases of unbundled RECs. There is no legal error in the Decision and the Commission has thoroughly considered the relevant facts in establishing this particular ratepayer protection.

IV. CONCLUSION

[13] D.11-01-026, page 18.

[14] The cost containment provisions only apply to "electrical corporations" whereas other sections of law refer to obligations applicable to "retail sellers". The choice between these two designations is deliberate and should be assumed to be a material difference.

For the reasons stated in the previous sections, TURN urges the Commission to deny SCE's application on all grounds raised except for the claim that all retail sellers must comply with the same requirements for the duration of contracts for substitute energy needed to establish that a product falls within the definition of §399.16(b)(2).

Respectfully submitted,

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VERIFICATION

I, Matthew Freedman, am an attorney of record for THE UTILITY REFORM NETWORK in this proceeding and am authorized to make this verification on the organization's behalf. The statements in the foregoing document are true of my own knowledge, except for those matters which are stated on information and belief, and as to those matters, I believe them to be true.

I am making this verification on TURN's behalf because, as the lead attorney in the proceeding, I have unique personal knowledge of certain facts stated in the foregoing document.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 14, 2012, at San Francisco, California.

_____/S/_____

Matthew Freedman
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