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July 15, 2013

California Public Utilities Commission
Attention: Energy Division, Tariff Unit
505 Van Ness Avenue
San Francisco, CA 94102
EDTariffUnit@cpuc.ca.gov

Re: Qualified Support of CAC to Commissioner Ferron's Alternate Draft Resolutions E-4569[1] (SCE) and E-4529[2] (PG&E)

I. Introduction

The Cogeneration Association of California (CAC) strongly supports the conclusions in the Alternate Draft Resolutions offered by Commissioner Ferron disapproving the adoption of two Calpine Resource Adequacy-only contracts under the CPUC QF/CHP Program Settlement.[3] The Ferron Alternate Resolutions sustain the Settlement's policies, express objectives and goals of the CPUC CHP Program by rejecting any accounting for these RA-only resources to meet the megawatt procurement targets for CHP. RA products have their own procurement program, separate and distinct from the CHP Program. In addition, the Ferron Alternate Resolutions appropriately adopt a bar against future RA-only agreements accounting under the Settlement. In short, the Ferron Alternate Resolutions "get it right" with regard to the ultimate result by rejecting these RA-only contracts as CHP contracts under the Settlement.

CAC qualifies its support only to seek clarification and specificity of a few important passages in order to eliminate potential misinterpretations or applications of the Ferron Alternate Resolutions. These limited qualifications address the following:

a. Passages imprecisely defining base load CHP;
b. Rejection of unsupported concessions on claims of "reliance" by Calpine;

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1 Resolution E-4569; SCE requests the Commission approve two Confirmations for Resource Adequacy Capacity Products that SCE executed with Calpine Energy Services, L.P.; LMEC for 280.5 MW and Gilroy Cogen, L.P. for 130 MWs; Advice Letter 2771-E filed on August 31, 2012. The Alternative Draft offers options to accept some unknown portion of this capacity.

2 Resolution E-4529; PG&E requests the Commission approve the Confirmation for 280.5 MW of Resource Adequacy Capacity Product that PG&E has executed with Calpine Energy Services, L.P.; Los Medanos Energy Center; Advice Letter 4074-E filed on July 2, 2012. The Alternative Draft offers options to accept some unknown portion of this capacity.

3 The Qualifying Facility and Combined Heat and Power Program Settlement Agreement, October 8, 2010, including the Settlement Term Sheet, the pro forma agreements and related filings with the Federal Energy Regulatory Commission pertaining to the implementation of the Settlement, collectively referred to as "Settlement."

c. The Commission's authority to act to correct failures in the procurement of CHP under the Settlement;
d. The legal error in defining eligibility under the Settlement as restricted to a single, isolated provision of the Settlement Term Sheet; and
e. The references to Settlement-eligible capacity-only deliveries from Utility Prescheduled Facilities (UPF) or other resources.

II. Discussion

A. Defining CHP Resources Targeted by the Settlement

In light of the controversy created by definitions, inclusions and exclusions under the Settlement, there is an apparent need to be careful and precise in descriptions related to the Settlement. CHP facilities are primarily thermal generation operations serving the demands of their host facility. They may or may not provide electric power to their host. Similarly, they may or may not provide net export electric power to the electric grid to serve utility customers. Some passages in the Ferron Alternate Resolutions warrant clarification to reflect these aspects of the Settlement-targeted CHP resources.[4] The attached redline of the draft Ferron Alternate Resolution for SCE reflects recommended clarifications to these passages for both resolutions.

B. Reject Unsupported Concessions on Claims of "Reliance" by Calpine

The Ferron Alternate Resolutions understandably rely on and adopt the provisions from earlier resolutions related to the Calpine RA-only contracts. Some of these adopted provisions concede that Calpine and other CHP RFO bidders "relied" upon "the utility's acceptance of RA-only bids as eligible…."[5] This supposed detrimental reliance provides at least some basis for conceding that the Calpine bids are "compliant" with the RFO and eligible.

The Commission's concession of Calpine's "compliance" and the claims of reliance are both unwarranted. This section addresses the unsupported reliance claim. The next two sections address the unwarranted compliance and eligibility concessions.

Calpine has no basis for any claim of reliance on the utility's acceptance of RA-only bids. All CHP RFO participant bidders accepted explicit waivers under the utility protocols or participant instructions. These waivers establish there is no right or expectation to an approved CPUC contract under the RFO process. Calpine had and has no justifiable

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[4] SCE draft resolution p. 12 – *"The QF/CHP settlement was designed to provide opportunities to CHP facilities whose primary, if not exclusive, purpose is to provide energy and heat to a host industrial facility, while also remaining interconnected to the grid and available to provide some benefits to the utilities."* …. *"…the majority of…* [CHP facilities'] *capacity and energy is devoted to their industrial host.*"

[5] Ferron Alternative Resolution for SCE at p. 2.

reliance on the approval of its RA-only bid under the CHP RFO protocols.[6] The attached redline of the draft Ferron Alternate Resolution for SCE reflects recommended clarifications to the passages for both resolutions that inappropriately recognize justified "reliance" by Calpine.

There is no justifiable "reliance" claim relative to Calpine. However, this claim is particularly affrontive to CHP parties who reasonably relied upon and accepted the Settlement expecting a CHP-to-CHP RFO for a limited number of CHP MWs. All CHP participants in the RFO devoted time and money to a process distorted by RA-only bids in a CHP-only RFO. As virtually every Commissioner acknowledged in public comments at the April 4, 2013 business meeting, the express objective of the Settlement is to provide for CHP that cannot otherwise compete with RA-only or all-source bid solicitation merchant generation providers. These entities supply materially different products (and at materially different costs) than baseload CHP facilities meeting host thermal and electric demands. There is no denying from the Settlement Term Sheet provisions in Article 1, the performance factors in the pro forma CHP Agreement, and the distinct market conditions articulated to FERC regarding separate RA-markets from CHP that the Settlement must not account for these resources.

C. The Commission Should Not Undermine Its Authority to Correct Implementation Failures in the Procurement of CHP under the Settlement

There is no reason that the Commission should concede that Calpine is an "eligible" resource to participate or succeed in a CHP RFO under the Settlement.[7] These passages needlessly undermine the Commission's authority and provide unwarranted avenues for appellate challenges.

The Settlement expressly authorizes the Commission to adjust the CHP procurement targets to meet program objectives, and recognizes the Commission's authority to procure CHP on other grounds.[8]

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[6] For SCE, see, generally, Article 8, SCE's 2011 CHP RFO Participant Instructions, and Article 8.03, specifically, which provides in part – *"By submitting an Offer, Offeror knowingly, voluntarily and completely waives any rights under statute, regulation, state or federal constitution or common law to assert any claim, complaint or other challenge in any regulatory, judicial or other forum…."* For PG&E, see Section XV, Waiver of Claims and Limitations of Remedies, PG&E's CHP RFO Protocol for First Solicitation, December 7, 2011. These comprehensive waivers are consistent between the SCE instructions and the PG&E protocols, and undermine any claimed reliance on the acceptance or approval of the Calpine bids.

[7] Ferron Alternative Resolution for SCE at p. 11 – *"…we find both the LMEC and the Gilroy facilities are consistent with the Settlement's eligibility requirements, allowing LMEC and Gilroy to participate in the utility's CHP requests for offers." See also,* Ordering Paragraphs 1 and 2 at pp. 17-18.

[8] For example, Term Sheet Section 5.1.4.5 provides –

> "*Any MW shortfall that occurs in the Initial Program Period shall be rolled over into the Second Program Period to reach the 3,000 MW Target;* ***however, such shortfall may also be addressed by other actions deemed appropriate by the CPUC.***" (Emphasis supplied.)

Calpine's compliance with conditions or protocols un-reviewed or approved by the Commission is irrelevant. The time is now for the Commission to assess these procurement issues. There should be no concession relative to this review and the application of a reasoned resolution.

Finally, and most significantly, well establish rules of construction support the Ferron Alternative Resolution relative to the integration of all aspects of the Settlement and not merely an isolated, single provision.[9] The Settlement is a collective set of documents and filings, and not simply one provision of the Settlement Term Sheet addressing, in a certain context, eligibility. The Commission has the duty to harmonize all aspects of the Settlement, and not solely Section 4.2.2.1 of the Term Sheet. Accordingly, other passages of the Term Sheet, particularly including the provisions related to PURPA and program goals and objectives must be harmonized. Attachments to the Settlement, primarily the pro forma contracts for CHP calling for a 95% capacity factor (meaning capacity and energy) must be harmonized. The surrounding circumstances of the Settlement, mainly the FERC filings identifying a separate RA and CHP market under the Commission's program must be harmonized.

These other facts sustain the Ferron Alternative Resolutions, and any passages subject to misinterpretation should be clarified. The attached redline of the draft Ferron Alternate Resolution for SCE reflects recommended clarifications to the passages on eligibility, the retention of the Commission's authority, and conclusions consistent with rules of statutory construction.

D. References to Settlement-Eligible Capacity-only Delivery from Utility Prescheduled Facilities (UPF) or other Resources

The Ferron Alternate Resolution's rationale endeavors to compare an RA-only option with other features in the Settlement, specifically Utility Prescheduled Facilities (UPFs), and less directly to CHP with Additional Dispatchable Capacity (ADC).[10] An RA-only product is not akin to either UPF or ADC products. The latter two products are capacity with associated dispatchable energy. RA is only capacity and does not have an energy product component. Once again, it is important to distinguish carefully the descriptions and definitions of products related to the Settlement, and in the context of the alternate resolutions. The attached redline of the draft Ferron Alternate Resolution for SCE reflects recommended clarifications to these passages.

See, e.g., Section 15.2.1.7 – *"…the CPUC may on grounds other than the Settlement direct the procurement of CHP resources."*

[9] California Civil Code §1641; *Universal Sales Corp., supra*, p. 775, *citing Homer Laughlin Engineers Corporation v. J. W. Leavitt & Co.*, 116 Cal.App. 197, 200, 201, 2 P.2d 511, 512 *"[the] court [is] to construe the contract from a reading of the whole thereof, and, where any word or phrase was subject to different meanings, then such meaning should be given as would harmonize with the provisions of the instrument in its entirety, and, in arriving at a true construction of the instrument, all of the surrounding circumstances should be considered."*

[10] Ferron Alternative Resolution for SCE at p. 13 for UPF, and at p. 12 for ADC.

III. Conclusion

CAC supports the conclusions reached in the Ferron Alternative Resolutions. CAC seeks revisions to the draft alternative resolutions in order to clarify passages that may be subject to misinterpretation. Additionally, CAC seeks modifications to reflect the Commission's authority, and justifications for the alternate resolution. The attached redline provides recommended modifications to reach these objectives.

As previously stated, CAC does not oppose the approval of the Calpine and similar agreements with SCE and PG&E, as part of the RA procurement program. CAC opposes the counting of the RA-only capacity, in whole or in part, whether in future or past CHP RFOs, as part of the CHP Program, specifically to meet the MW targets for CHP procurement under the Settlement.

Respectfully submitted,

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Cogeneration Association of California

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

PROPOSED ALTERNATE
RESOLUTION OF COMMISSION FERRON ON E-4569
July 25, 2013

R E S O L U T I O N

Resolution E-4569. Southern California Edison Company ("SCE") requests the Commission approve two Confirmations for Resource Adequacy Capacity Products that SCE executed with Calpine Energy Services, L.P. ("Calpine").

PROPOSED OUTCOME: This Resolution denies, without prejudice, SCE's Confirmation for Resource Adequacy ("RA") Capacity Product, an Agreement for Combined Heat and Power Resource Adequacy Capacity Product for (1) 280.5 Megawatts ("MW") of Combined Heat and Power Resource Adequacy capacity associated with the Los Medanos Energy Center, LLC, (2) 120 MW of Combined Heat and Power Resource Adequacy capacity associated with the Calpine Gilroy Cogen, L.P. SCE may re-submit for Commission consideration these Agreements within the established RA framework. If SCE resubmits these agreements, the associated MWs shall not count towards the Combined Heat and Power program targets. The Resolution provides additional guidance to SCE for Combined Heat and Power solicitations in the future.

SAFETY CONSIDERATIONS: The two agreements are denied and we anticipate no adverse impacts on safety as a result.

ESTIMATED COST: None

By Advice Letter 2771-E filed on August 31, 2012.

SUMMARY

Southern California Edison ("SCE") filed Advice Letter (AL) 2771-E on August 31, 2012 requesting Commission review of a Confirmation for Resource Adequacy ("RA") Capacity Product, which is a capacity-only Power Purchase Agreement ("PPA") with Calpine Energy Services, L.P. ("Calpine" or "Seller"). The contract would convey 280.5 megawatts ("MW") of capacity associated with

the Los Medanos Energy Center ("LMEC Agreement") and 120 MW of capacity associated with the Calpine Gilroy Cogen, L.P. ("Gilroy"). This Confirmation is rejected because it is inconsistent with the requirements of the Combined Heat and Power Request for Offer ("CHP RFO") competitive solicitation under the Qualifying Facility and Combined Heat and Power Program Settlement Agreement ("QF/CHP Settlement"). Only contracts that include an energy product component (like a CHP under the pro forma contract offering capacity and energy at a high capacity factor, or a Utility Prescheduled Facility (UPF) or an Additional Dispatchable Capacity (ADC) facility) offering capacity and associated energy upon dispatch instruction) can be solicited through a CHP RFO.

We recognize that the QF/CHP Settlement includes the Settlement Term Sheet, but also other key documents and surrounding circumstances like the pro forma contracts and implementation filings made at the Federal Energy Regulatory Commission (FERC). All of these documents and surrounding circumstances are part of the QF/CHP Settlement, and the Commission recognizes its authority and obligation to harmonize all of these parts to properly implement the QF/CHP Settlement.

We recognize that the Commission was silent in approving the QF/CHP Settlement, specifically whether contracts for only resource adequacy are appropriate to be procured and counted in this program. No QF/CHP Settlement party raised the issue of the eligibility of capacity-only contracts with the Commission at the time of the Commission's review and approval of the QF/CHP Settlement. The Commission now clarifies in this Resolution for subsequent CHP solicitations that no RA-only bids shall be accepted. The Commission is also now clarifying acceptable eligibility protocols and conditions associated with identified CHP, UPF and ADC projects under the QF/CHP Settlement.

The Confirmation is rejected *without prejudice*, which provides SCE with the option to execute an RA-only contract with the LMEC and Gilroy facilities, and any other ~~bidder who relied on the utility's acceptance of~~ RA-only bidders ~~as eligible in~~ from the first or subsequent solicitations, and seek that contract for approval within the existing RA framework.

BACKGROUND

On December 16, 2010, the Commission adopted the Qualifying Facility and Combined Heat and Power Program Settlement Agreement ("QF/CHP Settlement") with the issuance of D.10-12-035. The QF/CHP Settlement resolves a number of longstanding issues regarding the contractual obligations and procurement options for facilities operating under legacy and new qualifying facility ("QF") contracts.

The QF/CHP Settlement establishes megawatt ("MW") procurement targets and greenhouse gas ("GHG") emissions reduction targets that the investor-owned utilities are required to meet by entering into contracts with eligible CHP Facilities, as defined in the QF/CHP Settlement. Pursuant to D.10-12-035, the three large electric investor owned utilities ("IOUs") must procure a minimum of 3,000 MW of CHP to attain GHG emissions limits consistent with the California Air Resources Board ("CARB") Scoping Plan, currently set at 4.8 million metric tonnes ("MMT").

In addition, the Commission defined several procurement processes for the IOUs within the QF/CHP Settlement. Per Section 4.2.1 of the Settlement Term Sheet, the Commission directs the three IOUs to conduct Requests For Offers exclusively for CHP resources ("CHP RFOs") as a means of achieving the MW Targets and GHG Emissions Reduction Targets. The Settlement Term Sheet ~~establishes~~ provides certain terms and conditions regarding eligibility, contract length, pricing, evaluation and selection and other terms and conditions of the for the RFOs. All provisions of the Settlement Term Sheet must be read in the context of the entire QF/CHP Settlement, and all terms must be harmonized under the Commission's authority and obligation.

Per Section 5.1.4, the IOUs will conduct three CHP RFOs during the Initial Program Period scheduled at regular intervals, with the first initiated no later than 90 days of the QF/CHP Settlement Effective Date (November 23, 2011), or February 21, 2012. The three RFOs shall solicit CHP resources for an amount no less than the Net MW Target (the MW Target A, B, or C not otherwise procured by the Section 4 procurement processes) for each IOU.

SCE launched the 2011 CHP RFO for 630 MW on December 15, 2011. SCE decided to use a two track solicitation for the first RFO to manage the risk related to interconnection costs that would be borne by the IOUs and ratepayers. At the 2011 CHP RFO Bidders Conference, SCE outlined "Keys to a Successful Offer" including a preference for competitively-priced offers, optionality by varying the offer's term length and providing curtailment provisions, a preference to execute Pro-Forma CHP or UPF Documents, and signs of project viability for new, expanded or repowered CHPs including progress toward interconnection.

In response, Calpine submitted offers for RA-only capacity from its LMEC and Gilroy facilities. Both Calpine offers were short listed by SCE, which then negotiated offer terms with Calpine. The resultant CHP agreements were immaterially modified from the Pro-Forma RA Confirmation. On July 2, 2012, SCE executed the CHP agreements with Calpine's LMEC and Gilroy facilities and submitted Advice 2771-E for Commission approval.

NOTICE

Notice of AL 2771-E was made by publication in the Commission's Daily Calendar. Southern California Edison states that a copy of the Advice Letter was mailed and distributed in accordance with Section 3.14 of General Order 96-B.

PROTESTS

Advice Letter 2771-E was timely protested by the following parties: (1) Shell Energy North America (US), L.P. ("Shell Energy"), the Marin Energy Authority ("MEA"), and the Alliance for Retail Energy Markets ("AReM") jointly ("Joint Parties"); (2) Energy Producers and Users Coalition ("EPUC") ; the Cogeneration Association of California; and (4) California Cogeneration Council ("CCC"), collectively ("Protesting Parties") on September 20, 2012. SCE filed a response to the protests of the Protesting Parties on September 27, 2012. Similarly, PG&E filed a response to the protests of the Protesting Parties on September 27, 2012. However, on October 12, 2012, PG&E submitted a letter to Energy Division requesting to withdraw its response specifically noting that General Order 96-B only allows the utility that filed an advice letter to respond to protests to that advice letter. We agree with PG&E's interpretation of GO-96B as it pertains to

the opportunity to submit a response and therefore will not consider PG&E's response in this resolution. However, PG&E maintains the right to file comments on the draft resolution related to this advice letter.

(1) Shell Energy North America (US), L.P. ("Shell Energy"), the Marin Energy Authority ("MEA"), and the Alliance for Retail Energy Markets ("AReM") collectively ("Joint Parties")

The Joint Parties protested the LMEC and Gilroy Advice Letter for two reasons: (1) the QF/CHP Settlement Agreement does not contemplate or permit "capacity-only" contracts with CHP facilities; (2) SCE's proposed allocation of a portion of the Resource Adequacy ("RA") capacity (and associated RA capacity costs) from the LMEC and Gilroy Agreements to direct access ("DA") and community choice aggregation ("CCA") customers through the cost allocation mechanism ("CAM") was not approved in D.10-12-035, which adopted the QF/CHP Settlement. [1]

(a) Joint Parties' First Claim: the QF/CHP Settlement Agreement does not contemplate or permit "capacity-only" contracts with CHP facilities.

In their protest, the Joint Parties stated that the QF/CHP Settlement did not contemplate or permit capacity-only contracts. The Joint Parties also stated that LMEC and Gilroy should not have been a part of SCE's CHP RFO and instead should have bid into SCE's all source solicitation, competing with other RA capacity-only products. In addition, the Joint Parties indicated that SCE revised its CHP RFO protocol to accept offers for capacity-only products, and that procurement of capacity-only product provides no CHP energy deliveries or GHG emissions reduction benefits. Due to the various reasons mentioned above, the Joint Parties requested the Commission to reject AL 2771-E.

In its response to the Protesting Parties, SCE stated that neither protesting party provided a basis for their claims regarding the reason for which RA contracts were not permitted in the QF/CHP Settlement nor were the reasons stated by the

[1] D.10-12-035, as modified by D. 11-03-051 and D.11-07-010.

protestors in any way supported by the Settlement. SCE further stated that the QF/CHP Settlement itself did not preclude RA-only contracts and explained that both facilities met the eligibility requirements per the Settlement and therefore, are included within the scope of the QF/CHP Ssettlement. Citing Term Sheet Section 4.2.1 at 12, SCE interprets the QF/CHP Settlement as not limiting of the types of CHP resources it may procure through its CHP RFO, including RA-only agreements. SCE also defended its revision of its CHP RFO and explained that there was nothing improper about SCE revising its CHP RFO protocol to accept offers for RA-only products.

We address the Joint Parties' first claim in the "Discussion" section below.

(b) Joint Parties' Second Claim: CAM treatment cannot be afforded to a capacity–only contract

The Joint Parties stated that unless a contract includes costs for both energy and capacity-related products, a "net capacity cost" cannot be calculated and cannot be subject to the CAM to which CCAs and ESPs are subject. The Joint Parties claim that SCE may not use the CAM for allocating the cost of the LMEC and Gilroy Agreements because there is no way to determine if the capacity costs to be imposed under these contracts reflect a reasonable netting of energy and ancillary services.

We discuss the Joint Parties' second claim in the "Discussion" section below.

(2) Energy Producers and Users Coalition ("EPUC") and Cogeneration Association of California ("CAC")

In their separate protests, EPUC and CAC state that both Los Medanos and Gilroy RA Confirmations do not comport with the CPUC's QF/CHP Program Settlement standards for MW targets, and the terms of the confirmation letters do not conform to the terms of the QF/CHP Settlement for the following reasons:

(a) RA Confirmation associated with these projects may not be properly accounted for as part of the 3,000 MW First Program Period target under the QF/CHP Settlement;

(b) The Resource Adequacy Confirmations do not provide any obligation to provide energy nor ancillary services from Gilroy or Los Medanos, and do not provide the incentive or encouragement for CHP operation contemplated by the QF/CHP Settlement;
(c) The QF/CHP Settlement contemplates the procurement from CHP generators that produce energy and provide RA capacity only as a collateral benefit, the case for LMEC and Gilroy facilities was not contemplated;
(d) SCE should procure its RA needs through an RA only solicitation;
(e) SCE did not consider the Los Medanos facility as an eligible resource under the QF/CHP Settlement, or potentially capable of providing power products consistent with the Settlement.

(3) California Cogeneration Council, jointly ("CCC")

In its protest CCC did not object to SCE entering into an RA-only contract with Calpine, but argues that this procurement should not count toward the QF/CHP Settlement's MW Targets. CCC requested the Commission to hold that:

(a) The Calpine Agreements do not count toward the QF/CHP Settlement's MW Target
(b) RA-only products will not be eligible for future CHP RFOs and will not count against the MW Target established by the QF/CHP Settlement.

(4) SCE Reply to Protests

SCE interprets the protesting parties' comments as implying that the term "CHP resources" does in fact include RA, but only if bundled with energy. According to SCE, the bundling requirement makes no logical sense, and has no basis in the QF/CHP Settlement language. SCE argues that the definition of the phrase "CHP resources" was broadly defined in the QF/CHP Settlement and was not specifically worded to exclude RA-only contracts. In addition, SCE states that the Net Capacity Costs can be calculated for RA-only contracts, and accordingly should be allocated to non-IOU load serving entities.

Due to the similarity of the protests filed by the CAC/EPUC, SCE referenced the two protests together in its reply comments filing. Since some of the questions

and statements issued by the CAC/EPUC were already summarized in the section above, this section will only cover new ideas introduced by the CAC/EPUC.

Recognizing that capacity only products could be procured elsewhere, SCE asserted that the availability of other procurement avenues does not preclude procurement through the CHP RFO. While SCE agrees with the CCC regarding the CHP Programs' intent of creating a venue for viable contracting opportunities for existing and new CHP generating facilities, SCE claims that this intent does not provide a valid reason as to prohibit RA-only projects from bidding into the SCE CHP RFO. In its application filed at the Federal Energy Regulatory Commission ("FERC") pursuant to Section 210(m) of PURPA ("Section 210(m) application"),[2] SCE listed QFs with which it had a contract. At the time that SCE filed its Section 210(m) application, SCE did not have a contract with LMEC, and thus LMEC would not be included in this list, even though it is a "CHP resource." SCE explained that given that LMEC is not located in SCE's service territory, SCE was not under any obligation to include LMEC in its application. Furthermore, through its competitive solicitation SCE found that the price for both the LMEC and Gilroy facilities were cost-competitive and that both projects provided lower costs to the electric ratepayer in meeting the QF/CHP Settlement MW targets. SCE argues that the MWs associated with the RA only agreements should be counted since both facilities are eligible per the QF/CHP Settlement eligibility requirements, won SCE's competitive CHP solicitation, and provide the most ratepayer benefits at the least cost.

We discuss the EPUC/CAC's and CCC's claims in the "Discussion" section below.

[2] SCE, along with Pacific Gas and Electric Company and San Diego Gas & Electric Company, was required by the terms of the QF/CHP Settlement to file at FERC the Section 210(m) application pursuant to Section 292.310 of the FERC's regulations in order to terminate the mandatory purchase obligation under PURPA.

DISCUSSION

On August 31, 2012, SCE filed Advice Letter AL 2771-E requesting Commission approval of the Confirmation of Resource Adequacy Capacity Product, which is a capacity-only agreement for 280.5 MWs of capacity associated with the Los Medanos Energy Center and 120 MWs of capacity associated with the Gilroy facility.

Specifically, SCE requests from the Commission:

1. Approval of the Confirmations in their entirety;

2. A finding that the Confirmations, and SCE's entry into the Confirmations, are reasonable and prudent for all purposes, subject only to further review with respect to the reasonableness of SCE's administration of the Confirmations;

3. A finding that the 280.5 MW associated with the LMEC Confirmation and the 130 MW associated with the Gilroy Confirmation apply toward SCE's procurement target of 1,402 MW of CHP capacity in the Initial Program Period, as established by the QF/CHP Program;

4. A finding that the Confirmations are neutral toward the GHG Target as they are for Existing CHP Facilities without a change in operations; and

5. Any other and further relief as the Commission finds just and reasonable.

Energy Division evaluated the LMEC and Gilroy agreements based on the following criteria:

- Consistency with D.10-12-035 which approved the QF/CHP Settlement including:
  - Consistency with CHP RFOs, eligibility requirements
  - Consistency with MW accounting
  - Consistency with GHG accounting
  - Consistency with cost recovery requirements
- The need for LMEC and Gilroy's procurement

In considering these factors, we also consider the analysis and recommendations of an Independent Evaluator.[3] For the proposed Confirmation, we have reviewed the conclusions from the IE report with respect to eligibility, but not regarding price reasonableness and other factors since they are not necessary in determining the outcome of this resolution.

Consistency with D.10-12-035, which approved the QF/CHP Program Settlement

On December 16, 2010, the Commission adopted the QF/CHP Settlement with the issuance of D.10-12-035. The QF/CHP Settlement resolves a number of longstanding issues regarding the contractual obligations and procurement options for facilities operating under legacy and new QF contracts. Furthermore, the QF/CHP Settlement establishes a MW and GHG target for the IOUs. The IOUs must procure 3,000 MW of CHP and 4.8 MMT of greenhouse gas emission reductions in proportion to the load of the IOU and non-IOU Load Serving Entities. The QF/CHP Settlement became effective on November 23, 2011.

Eligibility of the Facility and Consistency of RA-Only Contracts with CHP Requests for Offers (CHP RFOs)

Per Section 4.2 of the Settlement Term Sheet, the IOUs are directed to conduct Requests for Offers for CHP resources as a means of achieving their respective MW and GHG Emissions Reduction Targets. Per Section 4.2.2, CHP facilities with a nameplate Power Rating of greater than 5 MW may bid into the CHP RFO. In addition, the CHP facility must meet the State and Federal definitions[4] for cogeneration and the Emissions Performance Standard.

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[3] Per Settlement Term Sheet 4.3.2: "Use of an IE shall be required for any negotiations between an IOU and its affiliate and may be used, at the election of either the buyer or the Seller, in other negotiations."

[4] State definition of cogeneration per Public Utilities Code Section 216.6. Federal definition of qualifying cogeneration per 18 C.F.R. §292.205 implementing PURPA.

Read in isolation and without consideration of the QF/CHP Settlement as a whole, ~~Under~~ Section 4.2.2.1 of the ~~QF/CHP~~ Settlement Term Sheet suggests that~~,~~ the LMEC and Gilroy facilities both qualify to participate in the CHP RFO. However, Section 4.2.2.1 cannot be read in isolation to properly interpret and apply the QF/CHP Settlement. The Commission's authority and responsibility is to implement the QF/CHP Settlement to attain the objectives of the QF/CHP Program. Accordingly, a project that is offering an RA-only product without associated energy consistent with the terms of the QF/CHP Settlement as a whole is not eligible. ~~Specifically: with an operating capacity of 561 MW for LMEC and 120 MW for Gilroy, both facilities exceed the 5 MW threshold; both facilities satisfy the definition of "CHP Facility" in their respective agreements; both facilities are certified as Qualifying Facilities with the FERC.~~

~~As a condition of both the facility's agreements, Calpine states that LMEC and Gilroy are CHP Facilities, as defined in the QF/CHP Settlement, as of the agreement's Effective Date; both agreements also provide that if LMEC or Gilroy are unable to maintain Qualifying Cogeneration Facility status, because either facility lost its steam host, SCE will have the option to terminate that agreement at that time.~~

~~As eligible QF CHP resources per Section 4.2.2 of the Term Sheet, LMEC and Gilroy bid into SCE's CHP RFO as qualifying CHP facilities, and were shortlisted and selected in SCE's competitive CHP solicitation.~~ For these reasons, we find both the LMEC and the Gilroy facilities are consistent with the Settlement Term Sheet's Section 4.2.2 eligibility requirements in isolation. However, this does not sustain the eligibility of or~~,~~ allow~~ing~~ LMEC and Gilroy to participate in the utility's CHP requests for offers under the QF/CHP Settlement taken as a whole.

Section 4.2.2 of the Term Sheet must be harmonized with the express provisions regarding the objectives and goals of the program relative to an integrated CHP operation providing thermal energy, capacity and energy consistent with the pro forma CHP RFO contract. Moreover, the QF/CHP Settlement recognizes a separate RA-only and CHP market. Harmonizing all of these provisions compels the conclusion that the LMEC and Gilroy RA-only contracts are ineligible under the QF/CHP Settlement.

We now turn our attention to the eligibility of SCE to procure an RA-only contract with LMEC and Gilroy.

Protesting Parties' Protests

Among other things, in their protest, the Protesting Parties raise a number of arguments for why RA-only contracts are ineligible under the QF/CHP Settlement and why the MWs associate with either project should not be counted towards SCE's QF/CHP Settlement MW Targets. While we discuss in greater detail below, we agree with protesting parties that RA-only contracts are ineligible. Here we address the three protests as they relate to this issue jointly. Each of the arguments identified by the Protesting Parties has been identified below along with a response.

Protest Issue #1: The Settlement does not expressly indicate that capacity-only contracts are allowed. Capacity only contracts should not be considered under the Settlement because this type of contract was never anticipated.

The Joint Parties are correct that capacity-only contracts were not expressly called for under the terms of the Settlement Term Sheet~~Agreement~~. They also were not expressly prohibited. Therefore, parties, while not conceding an ambiguity, offer that this asserted ~~there is an~~ ambiguity in the Settlement Agreement ~~that~~ is open to interpretation by the Commission.[5]

In adopting D.10-12-035, we agree that the Commission was silent on if capacity-only contracts are eligible for the QF/CHP program, although the segregation of an RA and CHP market was an identified feature of the program filing at FERC. We take this opportunity to speak to this point as it pertains to the initial and future RFOs conducted for CHP.

[5] The Commission recognizes its authority and duty to harmonize the QF/CHP Settlement as a whole, and not simply a single, isolated provision of the Settlement Term sheet. California Civil Code §1641; *Universal Sales Corp., supra*, p. 775, *citing Homer Laughlin Engineers Corporation v. J. W. Leavitt & Co.*, 116 Cal.App. 197, 200, 201, 2 P.2d 511, 512 *"[the] court [is] to construe the contract from a reading of the whole thereof, and, where any word or phrase was subject to different meanings, then such meaning should be given as would harmonize with the provisions of the instrument in its entirety, and, in arriving at a true construction of the instrument, all of the surrounding circumstances should be considered."*

Going forward, IOUs should not solicit RA-only contracts as part of their CHP solicitations. We will reject any contracts that are brought forward as capacity-only in the context of the QF/CHP Program. The reasons for this are multi-faceted. The most important reason is that a Resource Adequacy program already exists for capacity-only resources seeking revenues from utilities. The purpose of the RA program is to provide available capacity to utilities for reliability purposes. The RA program is robust and routinely yields successful procurement of capacity. Soliciting an RA-only product in the CHP program could lead to 'forum shopping' in the RA market. There could also be increased difficulty in assessing just and reasonable rates in approving RA contracts by having a multiple different concurrent solicitations with different contracts, program goals and evaluation requirements.

The purpose of the QF/CHP program is different than the RA program. The QF/CHP settlement was designed to provide opportunities to CHP facilities that provide thermal energy to host facilities through cogeneration, and have electric power produced in that process. The electric power may be used to serve a host's electric demand, with any excess power sold to the electric utility or other demand, or both, consistent with Public Utilities Code Section 218. ~~whose primary, if not exclusive, purpose is to provide energy and heat to a host industrial facility, while also remaining interconnected to the grid and available to provide some benefits to the utilities.~~

Previous to the QF/CHP Settlement Agreement, CHP facilities in California relied on a must-take obligation on the part of the utilities under the terms of federal law Public Utilities Regulatory and Policy Act, (PURPA). In the context of the QF/CHP Settlement Agreement, those CHP parties agreed to remove the must-take obligation in return for opportunities to bid in CHP-only RFOs. In fact, in suspending the must-take obligation, the Commission recognized in its comments to the Federal Energy Regulatory Commission (FERC) that the RA only market is separate and distinct from the QF/CHP market. The majority of CHP facilities may have some flexibility to offer RA-only, additional dispatchable capacity or ancillary services products to the grid, but since the CHP operation ~~the majority of their capacity and energy~~ is devoted to their industrial host's thermal demands, these options are typically limited. Clearly, there are some exceptions to this, such as the Calpine facility at issue in this resolution, but it is not the majority of CHP facilities that have the ability to provide the majority of their capacity as RA-only. Thus, the CHP RFOs are

designed to work for the majority of CHP facilities for which the QF/CHP Settlement Agreement was intended to meet their needs to cover their steam host's demands while also providing some electricity to the grid. An RA-only product does not further these objectives. Section 1 of the QF/CHP Ssettlement enumerates multiple other objectives of the new QF/CHP program, and we observe that a capacity only product does not directly enhance any of those objectives.

In addition to this basic policy reasoning, the Commission also finds that the QF/CHP Settlement ~~Agreement~~ explicitly contemplates ~~some type of~~specific and carefully proscribed options for facilities providing RA with dispatchable power (capacity and energy) from ~~only contracts that might result from the CHP solicitations by defining~~ Utility Pre-Scheduled Facilities (UPFs) or Additional Dispatchable Capacity (ADC). While UPF and ADC operations can provide RA, they do not do so without other associated energy products, tolling energy delivery or dispatchable energy delivery. This product must be distinguished from an RA-only capacity offering. The latter does not comport with the QF/CHP program objectives, the CHP RFO pro forma contract or the FERC filings reflecting a separate RA market from CHP. ~~However~~In addition, neither of these Calpine facilities are eligible UPFs under the specific definitions of the Settlement Term Sheet. Accordingly, the fact that there is a contracting pathway for UPF or ADC facilities, is not a basis for establishing capacity-only contracts eligibility under the QF/CHP Settlement related to ~~that is not utilized for~~ the proposed agreements. Further, ~~and~~ in light of the overall purpose of the QF/CHP Settlement ~~Agreement~~, we are compelled to deny the opportunity for capacity-only contracts ~~that are not UPFs~~.

It would have been preferable for the Commission to have identified and ruled explicitly on eligibility of capacity-only contracts prior to the completion of the first RFO. However, this is the first occasion the Commission has had the opportunity to undertake this review after the utilities proceeded with the initiation of the first CHP RFO. In general, we are reluctant to modify terms of competitive solicitations after they have been completed. We value certainty in commercial transactions and it is unfortunate to reject these contracts, without prejudice, after time and money has been devoted to this process. However, we also recognize that all CHP RFO participating bidders, including eligible CHP, and ineligible RA-only bidders, devoted time and money to this process.

~~However~~Nevertheless, given the size of this contract (and several others currently before us) relative to the 3,000 MW capacity target that the utilities are required to procure during the first three RFOs, we cannot allow this Commission's goals for the QF/CHP program be eviscerated by approving such a large contract here in this Resolution.

To mitigate this situation, we deny these contracts without prejudice. However, SCE and Calpine may pursue an RA contract to satisfy SCE's RA program requirements; as a result, we deny these contracts without prejudice for re-submission for future consideration, as long as SCE does not proposed to count the MWs as part of the QF/CHP Program.

We reject, without prejudice, the current form of the LMEC and Gilroy Agreements in this Resolution. We also prohibit RA-only solicitations and contracts as part of the QF/CHP RFOs in future solicitations, including SCE's subsequent RFOs.

Protest Issue #2: As a capacity-only contract, the projects do not provide any GHG benefits and so are inconsistent with the Settlement given the GHG reduction targets the IOUs are required to meet.

Joint Parties are correct that the QF/CHP Settlement includes both MW and GHG targets, however the fact that a given contract does not contribute toward the GHG goals does not render a project ineligible to participate in, or inconsistent with the QF/CHP Settlement. In calculating the embedded GHG benefit in D.10-12-035, the Commission used existing QF contracts to form the baseline and the double benchmark to establish the embedded GHG reductions from the existing QF contract fleet. Both of these Calpine facilities existed but were not under a QF contract at the time. Therefore, the Commission did not calculate the embedded GHG emissions (or potential GHG emissions reductions) against the double benchmark using the methodology in Section 7.3. Since we reject these capacity-only contracts, we do not calculate the GHG emissions reductions for the purposes of fulfilling the GHG targets set forth in D.10-12-035. However, if SCE were to execute a different eligible contract from these facilities, we recognize that we will need to re-visit how to count the potential GHG emissions reductions at that time. We also note that D.10-12-035 contemplates

projects that do not contribute toward the GHG targets, because one of the goals is to ensure the continued operation of existing CHP facilities. Section 7.3.3 of the QF/CHP Settlement Term Sheet enumerates the project types/circumstances whereby a given project is treated as neutral for GHG accounting purposes under the Settlement.

While IOUs are required to procure GHG reductions as part of the QF/CHP Settlement Agreement, not all contracts must deliver GHG benefits to be eligible for approval.

Issue #3: SCE should procure its RA needs through an RA only solicitation.

We agree with the Joint Parties on this point.

SCE has several existing methods to procure RA in order to meet its annual RA needs. We need not re-list them here. We do clarify, however, that it is not appropriate to use the QF/CHP Program to execute RA-only contracts.

We deny without prejudice these capacity-only contracts in this forum; if SCE were to bring these contracts back to the Commission for consideration using the existing RA framework, we shall evaluate them accordingly.

Consistency with MW accounting - Capacity-Only Agreements

Issue #4: RA Confirmation associated with these projects may not be properly accounted for as part of the 3,000 MW First Program Period target under the Settlement.

Because we deny these contracts and because of our clarification that no RA-only contracts shall be eligible for the QF/CHP program, this point is moot.

Consistency with cost recovery requirements

Issue #5: CAM treatment, involving the allocation of Net Capacity Costs, cannot be applied to an RA only contract because these contracts offer no energy or ancillary service value.

The Commission rejects these contracts; therefore, we need not discuss any issues regarding allocation of costs of these contracts. We also need not evaluate the costs of the contracts since we find them to be ineligible.

However, if SCE and Calpine renegotiate the Agreements and resubmit them using the existing RA framework, we will evaluate the costs at that time. Our rejection of these contracts should offer no commentary on the price of the contracts or on their reasonableness.

Public Safety

California Public Utilities Code Section 451 requires that every public utility maintain adequate, efficient, just, and reasonable service, instrumentalities, equipment and facilities to ensure the safety, health, and comfort of the public.

Rejecting these two contracts should not adversely impact SCE's operations of its system.

Project Viability

Since we reject the two contracts, we need not speak to the project's viability at this time. However, we note that Los Medanos Energy Center is an existing Qualifying Facility and has operated since 2001 and is interconnected to the CAISO-controlled grid at the transmission level. As an existing QF, the project faces minimal to no project development risk.

Similarly, Calpine's Gilroy facility is an existing Qualifying Facility and has operated since 1988 and is interconnected to the CAISO-controlled grid at the transmission level. As an existing QF, the project faces minimal to no project development risk.

Consistency with the Emissions Performance Standard

Since we reject these contracts as ineligible for participation in the QF/CHP program, we need not consider consistency with the Emissions Performance Standard.

Independent Evaluator Review

SCE retained Independent Evaluator (IE) Merrimack Energy Group, Inc ("Merrimack Energy") to oversee the filing of AL 2771-E and to evaluate the overall merits for Commission approval of the LMEC and Gilroy Agreements.

AL 2771-E included a public and confidential Independent Evaluator's report. In its report, the IE determined that the Calpine Agreements, in the IE's opinion, merit Commission approval. AL 2771-E included a public and confidential Independent Evaluator's report. In its report, the IE determined that:

i) SCE's 2011 CHP RFO was conducted consistent with the requirements set forth in the CHP Settlement Term Sheet~~Agreement~~.
ii) While there were certainly issues of interpretation regarding the meaning of the Settlement Term Sheet in various contexts SCE's interpretations and application of those interpretations in its administration of the RFO were reasonable.
iii) Evaluation framework and implementation of the RFO was fair and provided for fair and consistent comparisons between different types of projects and different types of counterparties. IE also stated that SCE did not provide preferential treatment to any affiliate that participated in the RFO.
iv) SCE acted reasonably in selecting the five offers for contract award and execution totaling over 800 MW, and the resulting contracts, including the Calpine Agreements, merit approval by the Commission.[6]

IE concludes that SCE selected the appropriate bids from the CHP RFO and acted without prejudice and therefore, recommends Commission approval of the two Calpine Agreements. While we appreciate the Independent Evaluator's views, ultimately it is up to the Commission to provide clarification about the reasonableness of the eligibility of these contracts. As stated above, we find these contracts to be ineligible with the requirements set forth in D.10-12-035.

[6] Public IE Report p.38

COMMENTS

Public Utilities Code section 311(g)(1) provides that this resolution must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. Section 311(g)(2) provides that this 30-day period may be reduced or waived upon the stipulation of all parties in the proceeding.

The 30-day comment period for the draft of this alternate resolution was neither waived nor reduced. Accordingly, this draft resolution was mailed to parties for comments on _____, 2013. Comments on the draft were due _____, 2013.

FINDINGS AND CONCLUSIONS

1. The LMEC facility is an ~~eligible CHP~~ electric generating resource with two potential steam hosts; the hosts can also be served by industrial boilers when the generating facility is not operating in a cogeneration mode; ~~is a CHP facility with~~has a nameplate capacity larger than 5 MW; meets the definition of cogeneration facility under California Public Utilities Code §216.6; meets the federal definition of a qualifying cogeneration facility under 18 CFR §292.205 implementing PURPA; and meets the Emissions Performance Standard established by Public Utilities Code §8341 (Senate Bill 1368); ~~.~~ but raises issues of first impression regarding the eligibility of RA-only contracts under the QF/CHP Settlement.

2. The Gilroy facility is an ~~eligible CHP~~ electric generating resource with a potential steam host; the host can also be served by industrial boilers when the generating facility is not operating in a cogeneration mode; ~~is a CHP facility with~~has a nameplate capacity larger than 5 MW; meets the definition of cogeneration facility under California Public Utilities Code §216.6; meets the federal definition of a qualifying cogeneration facility under 18 CFR §292.205 implementing PURPA; and is exempt from the Emissions Performance Standard established by Public Utilities Code §8341 (Senate Bill 1368); but raises issues of first impression regarding the eligibility of RA-only contracts under the QF/CHP Settlement.

3. Pursuant to the single, isolated provision of the ~~QF/CHP~~ Settlement Term Sheet, Section 4.2.2, capacity-only products are not expressly authorized to compete in CHP-only RFOs. They are not expressly prohibited either. The Commission has the authority and responsibility for interpreting and applying the QF/CHP Settlement as a whole and to harmonize all aspects of the QF/CHP Settlement and surrounding circumstances.

4. A provision for Utility Prescheduled Facilities and Additional Dispatchable Capacity from CHP or UPF resources is expressly provided for in the QF/CHP Settlement Agreement. Such provisions contemplate the delivery of capacity and associated energy as a tolling or dispatchable facility. The provisions do not extend to LMEC or Gilroy facilities.

5. The ~~QF/CHP~~ Settlement ~~Agreement~~ Term Sheet does not expressly permit or exclude ~~is silent as to whether~~ capacity-only products, like the RA-only LMEC and Gilroy contracts, ~~other than from Utility Prescheduled Facilities, are invited in~~from CHP-only RFOs. However, in the context of the whole QF/CHP Settlement, RA-only contracts are not consistent with the harmonized terms of the entire QF/CHP Settlement and surrounding circumstances.

6. The current LMEC and Gilroy Agreements in Advice Letter 2771-E should be rejected because capacity-only contracts are ineligible to participate and because approval of the contracts would occupy too many reserved CHP MW with a capacity-only contract, removing opportunities for other CHP facilities to provide benefits to SCE.

7. The Commission should deny these contracts without prejudice. If SCE were to execute modified Agreements, consistent with the existing RA-only framework, the Commission shall consider them in due course.

THEREFORE IT IS ORDERED THAT:

1. The request of Southern California Edison (SCE) in Advice Letter 2771-E for Commission approval of the Los Medanos Energy Center and Gilroy Agreements with Calpine in its entirety are denied without prejudice.

2. Southern California Edison shall not invite or accept any capacity-only contracts in their existing or future Combined Heat and Power solicitations, except as Utility Prescheduled Facilities as defined in the Qualifying Facility/Combined Heat and Power Settlement Agreement adopted in Decision 10-12-035.

This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on July 25, 2013; the following Commissioners voting favorably thereon:

_____
Paul Clanon
Executive Director