**BEFORE THE PUBLIC UTILITIES COMMISSION**
**OF THE STATE OF CALIFORNIA**

| | |
|---|---|
| Application of Southern California Edison Company (U338E) for Applying the Market Index Formula and As-Available Capacity Prices adopted in D.07-09-040 to Calculate Short-Run Avoided Cost for Payments to Qualifying Facilities beginning July 2003 and Associated Relief. | Application 08-11-001<br>(Filed November 4, 2008) |
| And Related Matters. | Rulemaking 06-02-013<br>Rulemaking 04-04-003<br>Rulemaking 04-04-025<br>Rulemaking 99-11-022 |

# JOINT REPLY OF THE ENERGY PRODUCERS AND USERS COALITION AND THE COGENERATION ASSOCIATION OF CALIFORNIA TO ALJ YACKNIN'S RULING SOLICITING FURTHER INFORMATION


Michael Alcantar
Alcantar & Kahl LLP
33 New Montgomery Street
Suite 1850
San Francisco, CA 94105
415.421.4143 office
415.989.1263 fax
mpa@a-klaw.com

Counsel to the
Cogeneration Association of California

Evelyn Kahl
Alcantar & Kahl LLP
33 New Montgomery Street
Suite 1850
San Francisco, CA 94105
415.421.4143 office
415.989.1263 fax
ek@a-klaw.com

Counsel to the
Energy Producers and Users Coalition


July 31, 2014

**BEFORE THE PUBLIC UTILITIES COMMISSION**
**OF THE STATE OF CALIFORNIA**

| | |
|---|---|
| Application of Southern California Edison Company (U338E) for Applying the Market Index Formula and As-Available Capacity Prices adopted in D.07-09-040 to Calculate Short-Run Avoided Cost for Payments to Qualifying Facilities beginning July 2003 and Associated Relief. | Application 08-11-001<br>(Filed November 4, 2008) |
| And Related Matters. | Rulemaking 06-02-013<br>Rulemaking 04-04-003<br>Rulemaking 04-04-025<br>Rulemaking 99-11-022 |

# JOINT REPLY OF THE ENERGY PRODUCERS AND USERS COALITION AND THE COGENERATION ASSOCIATION OF CALIFORNIA TO ALJ YACKNIN'S RULING SOLICITING FURTHER INFORMATION

Pursuant to ALJ Yacknin's July 15 ruling soliciting further information, the Energy Producers and Users Coalition,[1] joined by Cogeneration Association of California (CAC),[2] respond to the questions presented.

[1] EPUC is an ad hoc group representing the electric end use and customer generation interests of the following companies: Aera Energy LLC, Chevron U.S.A. Inc., ExxonMobil Power and Gas Services Inc., Phillips 66 Company, Shell Oil Products US, Tesoro Refining & Marketing Company LLC, THUMS Long Beach Company, and Occidental of Elk Hills, Inc.

[2] CAC represents the combined heat and power and cogeneration operation interests of the following entities: Coalinga Cogeneration Company, Mid-Set Cogeneration Company, Kern River Cogeneration Company, Sycamore Cogeneration Company, Sargent Canyon Cogeneration Company, Salinas River Cogeneration Company, Midway Sunset Cogeneration Company and Watson Cogeneration Company.

## I. INTRODUCTION

EPUC and CAC appreciate the uncommon outreach by ALJ Yacknin to seek clarity over aspects of the EPUC petition under consideration by the Commission.[3] Indeed, it is refreshing to have an ALJ engage the parties to address concerns affecting the Commission's assessment of the issues presented. The outreach from the ALJ may be uncommon, but welcomed by EPUC and CAC to address any uncertainty represented by the specific inquires presented.

As reflected by this reply, EPUC and CAC have responded to each ALJ question, but the nature and themes reflected in the questions raise concerns that the key issue raised by the EPUC petition may be misconstrued. The critical issue presented is to elicit clarity over the California Commission's intent relative to its jurisdictional actions at the time it rendered D.12-10-035. As the pleadings from EPUC have amply pointed out,[4] the key issue is the Commission's intent to use its delegated authority under PURPA in establishing the pertinent pro forma contracts. Succinctly stated, if the California Commission did not act under its delegated authority under PURPA, its actions establishing the CHP Program contracts are suspect under the Federal Power Act. If the California Commission did act under PURPA, then the contracts carry the rights, obligations and exemptions to the Federal Power Act requirements imposed on non-PURPA, market sales by generators.

---

[3] Petition of the Energy Producers and Users Coalition for Modification of Decision 10-12-035, Application 08-11-001, filed February 6, 2014.

[4] The petition, *supra*, and the Reply of the Energy Producers and Users Coalition on Responses to the Petition of the Energy Producers and Users Coalition for Modification of Decision 10-12-035, Application 08-11-001, filed March 27, 2014.

An instructive note on the focused issue raised by the EPUC petition is presented is a few passages from the California Commission's amicus brief filed on November 30, 2012 before the Federal Energy Regulatory Commission (FERC) in *Berry Petroleum Company*, FERC Docket ER12-2233-001.[5]

> *The adoption of the QF/CHP Program Settlement is the CPUC's most recent action in its* ***ongoing implementation of PURPA****.*[6]
>
> *The CPUC currently has numerous utility procurement requirements as part of* ***its implementation of PURPA****, including the QF/CHP Program Settlement.*[7]
>
> *The* [Short Run Avoided Cost (SRAC) capacity and energy price] *established in the QF/CHP Program Settlement* [footnote omitted] *is applicable to Transition PPAs, Legacy PPAs, and new QF contracts for facilities of 20 MW or less,* ***and new Optional As-Available PPAs****. The QF/CHP Program Settlement's SRAC differs from, but is based on, the former SRAC pricing formula in effect at the time the Settlement became effective and achieves the goal of ultimately transitioning to an SRAC based on a market heat rate by January 1, 2015.*[8]

The contract at issue in the EPUC petition is the Optional As-Available PPA with CPUC established SRAC pricing. These passages from the CPUC's amicus brief should answer any questions about the intent of the CPUC in adopting such contracts under PURPA. EPUC and CAC acknowledge the fact that the Investor-Owned Utilities are taking jurisdictional positions relative to other contracts under the QF/CHP Settlement, particularly RFO based PPAs. However, those contracts are not at issue in

---

5 Note that this is the California Commission's amicus brief, and not CPUC staff's brief.

6 *Amicus Brief of the California Public Utilities Commission*, FERC Docket ER-12-2233-001, November 30, 2012, at p. 4.

7 *Id.* at p. 5 [footnote omitted].

8 *Id. a*t pp. 7-8 [footnote omitted].

this petition. For now, the question presented is the PURPA jurisdiction over the Optional As-Available PPAs.

While it may be redundant to the hopefully clear statements in the EPUC petition and reply, it is also important to note what is not at issue in the petition. EPUC and CAC are not repudiating in any way the termination of specific PURPA rights under Section 210(m). In short, the petition does not seek the establishment or reestablishment of a mandatory purchase obligation through the EPUC petition.

The reason to present this background is to give focus to the issue presented by the EPUC petition. Again, EPUC and CAC are thankful for the opportunity to address questions posed by the ALJ; however, the ALJ's questions raise questions about the focus or scope of the CPUC's assessment.

Many of the ALJ's questions address the parties' contracting interests, costs or prices that may be affected by the Commission's decision on the petition. EPUC and CAC do not question the ALJ's interest in these matters, but the central issue presented by the EPUC petition is the Commission's jurisdictional intent at the time it established the QF/CHP Program. Subsequent contract rights, obligations or pricing should not affect the resolution of this issue. The questions presented seem to stray from this central issue. Regardless, EPUC and CAC provide responses to each of the presented questions.

## II. REPLY TO SPECIFIC QUESTIONS

***1. How, if at all, would this determination affect the ability of QFs/CHPs to enter into these PPAs? Would a denial of the petition limit the ability of QFs/CHPs to enter into these PPAs? Would a grant of the petition enhance the ability of QFs/CHPs to enter into these PPAs?***

**Responses**: *How, if at all, would this determination affect the ability of QFs/CHPs to enter into these PPAs?* A determination that imposes unwarranted and additional regulatory or administrative burdens can adversely affect the ability of QFs/CHPs to enter into these PPAs.

First, it is important to remember that the PPAs at issue all require the QF/CHP sellers to establish or retain qualifying facility (QF) status under FERC regulations promulgated under PURPA. Since the facilities will be QFs, they should retain the rights and obligations as a PURPA PPA. These rights include exemptions under PURPA to identified requirements under the Federal Power Act, particularly the burden of securing Market Base Rate Authority (MBRA) and associated compliance requirements. Second, as a state PURPA program under a delegation of authority from FERC, there is an obligation to support the maintenance of existing and the development of new QF/CHP resources. Accordingly, the Commission program should not establish, sustain or increase obligations that serve as barriers to entry. These barriers include the imposition of unwarranted and unnecessary regulatory and administrative obligations like requiring Market Base Rate Authority on PURPA resources. Third, PURPA exempts QFs from such Federal Power Act obligations imposed on other market generators. The reason is straightforward; the state oversees and approves the prices under the PURPA PPAs as just and reasonable under its delegation of authority. No additional federal oversight is required.

Regulatory and administrative compliance has associated costs and risks. These costs can be material and daunting for any QF/CHP resource. The clearest example of a well-identified regulatory and administrative compliance cost is the imposition of Market Based Ratemaking Authority obligations from the Federal Power Act on PURPA PPAs.[9] Even large companies that have secured FERC MBRA have regular, quarterly filing and compliance obligations that are material. For smaller QF/CHP resources, these costs and risks reflect an ever-greater share of the total financial revenues and burden for the facility, and raise barriers to entry to sustain existing or develop new QF/CHP resources.

*Would a denial of the petition limit the ability of QFs/CHPs to enter into these PPAs?* Yes, because it would allow the improper and unwarranted imposition of regulatory and administrative burdens on PURPA PPAs exempt from such Federal Power Act requirements.

*Would a grant of the petition enhance the ability of QFs/CHPs to enter into these PPAs?* Yes. There is no basis for imposing Federal Power Act, MBRA regulation on PPA transactions under PURPA. The Commission established a state QF/CHP program, and contracts under that program, pursuant to the CPUC's delegated authority under PURPA. The state's program under PURPA presents no reason or justification to impose federal regulatory obligations beyond PURPA, *e.g.*, MBRA and associated EQR filings for prices established under state review.

---

[9] Imposing this burden on PURPA PPAs under the QF/CHP Settlement is undeniably a barrier that the state's IOUs have sought – *Order Granting Rehearing and Dismissing Refund Report*, 143 FERC ¶ 61,223 (2013) (*Berry*); *Southern California Edison, Order Dismissing Filing*, 143 FERC ¶ 61,222 (2013) (*Watson*).

Erecting or reinforcing inappropriate and unwarranted barriers to entry limits the interest of existing and new QF/CHP resources in securing state contracts. At least one reason for PURPA's limitation on state-imposed regulation on QFs is to facilitate the retention of existing and the development of new CHP resources. Imposing these obligations inflicts administrative burdens and costs on all projects, big and small, and is a cost, risk and burden to these facilities. The state should not seek to impose unnecessary obligations for MBRA compliance under a state jurisdictional PURPA program.

For all of these reasons the granting of the EPUC petition would enhance the ability of QF/CHP projects to enter into the PPAs established by the state program.

***2. How, if at all, would this determination affect the contracting parties' respective rights and obligations under these PPAs? Would a denial of the petition reduce payments to QFs/CHPs under these PPAs? Would a grant of the petition increase payments to QFs/CHPs, or enhance their ability to make deliveries, under these PPAs? Would a denial of the petition allow the Investor-owned Utilities to refuse deliveries under these PPAs?***

**Responses**: *How, if at all, would this determination affect the contracting parties' respective rights and obligations under these PPAs?* Except for the question of whether MBRA is required, it would not affect the parties' rights under the PPAs. The determination would clarify the rights and obligations for QF/CHP parties under the contracts and eliminate the unfounded claims to impose Federal Power Act obligations on these PURPA PPAs. The rights and obligations under PURPA for these QF/CHP PPAs would remain consistent with PURPA. The unwarranted need to seek clarification over the rights of parties under the contracts relative to MBRA requirements would be resolved.

*Would a denial of the petition reduce payments to QFs/CHPs under these PPAs?* SRAC capacity and energy payments contemplated by the Settlement for the PPAs would not change. There would be neither a reduction in payments to QFs/CHPs, nor an increase in payments made by ratepayers contemplated by the Settlement. However, QF/CHP providers could secure reduced cost and risk exposure to inapplicable administrative and regulatory burdens.

*Would a grant of the petition increase payments to QFs/CHPs, or enhance their ability to make deliveries, under these PPAs?* There would be no increase in the SRAC pricing or payments to QF/CHP resources. Lowering or eliminating inapplicable administrative and regulatory cost burdens and compliance risks would indeed enhance the ability of QF/CHP resources to deliver power under these PPAs. *Berry, supra,* reflects potential restrictions on the delivery of power from these PPAs. In that case, the IOUs sought refunds from Berry for power deliveries made under a PURPA PPA based upon the assertion that MBRA obligations applied to those deliveries. FERC rejected this claim related to the Settlement Transition PPAs determining that those contracts are PURPA transactions. However, the issue remains uncertain for other PPAs. The IOUs could endeavor to reject deliveries from similar resources or under uncertain PPAs absent clarification sought by the EPUC petition. This issue warrants clarification, and the potential challenge to QF/CHP delivery rights eliminated. The EPUC petition seeks to eliminate this issue from misuse as a barrier to entry (and delivery). Accordingly, grant of the petition will enhance the ability to make deliveries under these PPAs.

*Would a denial of the petition allow the Investor-owned Utilities to refuse deliveries under these PPAs?* The long history of IOU efforts to maintain barriers for QF/CHP resources suggests that the IOUs would indeed use denial of the petition, and leaving an ambiguity in the PPAs obligations, as a basis to reject deliveries. Of course, it is impossible to predict precisely what actions the IOUs would undertake, but left unresolved there is an apparent risk for deliveries from these resources. As an example, the IOUs might assert that the failure to secure MBRA under the federal law could be used as a justification to refuse to accept power deliveries. The lack of certainty presented by this issue should encourage the Commission to clarify rights and obligations associated with the state PURPA program.

***3. How, if at all, would this determination affect the QFs/CHPs' rights and obligations apart from the PPAs? How, if at all, would a denial of the petition increase QFs/CHPs' costs or grant of the petition decrease their costs?***

**Responses**: *How, if at all, would this determination affect the QFs/CHPs' rights and obligations apart from the PPAs?* As PURPA PPAs, the parties should hold the same respective rights and obligations consistent with the federal law. Whatever rights or obligations these facilities hold under PURPA should remain the same under the PPAs. There should be no change in those rights. As noted, the IOU position is that Federal Power Act obligations, particularly MBRA obligations, apply to these PURPA PPAs. The Commission in granting the EPUC petition should reject that position.

*How, if at all, would a denial of the petition increase QFs/CHPs' costs or grant of the petition decrease their costs?* A rejection of the EPUC petition and a failure to clarify the Commission's intent in establishing the state CHP program under PURPA would cloud the issue of Federal Power Act and MBRA requirements. Under PURPA

QFs are exempt from identified FPA requirements, including MBRA obligations. Experience from the *Berry*, *supra*, *Watson*, *supra*, and the related Sycamore/KRCC[10] FERC cases tell us that the IOUs will take an adversary position. The IOUs argued in each case that notwithstanding PURPA, Federal Power Act obligations associated with MBRA applied to the PPAs.

The QF/CHP costs and risks would be reduced by eliminating unwarranted filing under the Federal Power Act for MBRA, or make quarterly reports to FERC on "market" transactions. The granting of the EPUC petition would clarify that the QF/CHP sales under the Settlement are consistent with PURPA. This clarification would relieve the QF/CHP facilities of such costs and risks, as well as temper the IOU contentions challenging the PPAs on the grounds of compliance with the Federal Power Act.

A denial of the petition would increase the QF/CHP's costs by requiring unwarranted and unnecessary administrative burdens and costs associated with a MBRA filing and EQR obligations. Conversely, granting the petition would decrease the administrative burdens and risks associated with Federal Power Act regulatory obligations.

***4. How, if at all, would this determination affect ratepayer costs and benefits?***

**Response**: Ratepayers are indifferent to whether a CHP is required to have MBRA. If, however, the MBRA requirement discourages contracting by CHP facilities, it would undermine well-established state law providing policies favoring cogeneration. These policies certainly balance and consider ratepayer costs and benefits associated

---

[10] Sycamore Cogeneration Co. Kern River Cogeneration Co., *Order Dismissing Filings*, 143 FERC ¶ 61,224 (2013) (Sycamore/KRCC).

with such resources. Under the Settlement, SRAC pricing has been reviewed and adopted by the Commission. This pricing will not change with regard to the PPAs addressed in the EPUC petition (and it would not change for any PPA executed by parties and approved by the CPUC). Accordingly, if the petition is granted or denied, the ratepayer costs will remain the same. However, ratepayer benefits, as contemplated by state policies regarding QF/CHP resources would be placed at risk by permitting unwarranted costs and obligations on such resources. The following passages from the Public Resources Code and the California Public Utilities Code provide a succinct statement of the state's policies to favor and secure the benefits of QF/CHP resources for California

> Cal. Public Resources Code §25004.2:
>
> *The Legislature further finds that cogeneration technology is a potential energy resource and should be an important element of the state's energy supply mix. The Legislature further finds that cogeneration technology can assist meeting the state's energy needs while reducing the long-term use of conventional fuels, is readily available for immediate application, and reduces negative environmental impacts. The Legislature further finds that cogeneration technology is important with respect to the providing of a reliable and clean source of energy within the state and that cogeneration technology should receive immediate support and commitment from state government*.
>
> Public Utilities Code §372:
>
> *(a) It is the policy of the state to encourage and support the development of cogeneration as an efficient, environmentally beneficial, competitive energy resource that will enhance the reliability of local generation supply, and promote local business growth.*
>
> * * *
>
> *(f) To encourage the continued development, installation, and interconnection of clean and efficient self-generation and cogeneration resources, to improve system reliability for consumers by retaining existing generation and encouraging new generation to connect to the electric grid, and to increase self-sufficiency of consumers of electricity through the*

*deployment of self-generation and cogeneration, both of the following shall occur:*

*(1) The commission and the Electricity Oversight Board shall determine if any policy or action undertaken by the Independent System Operator, directly or indirectly, unreasonably discourages the connection of existing self-generation or cogeneration or new self-generation or cogeneration to the grid.*

*(2) If the commission and the Electricity Oversight Board find that any policy or action of the Independent System Operator unreasonably discourages the connection of existing self-generation or cogeneration or new self-generation or cogeneration to the grid, the commission and the Electricity Oversight Board shall undertake all necessary efforts to revise, mitigate, or eliminate that policy or action of the Independent System Operator.*

## III. CONCLUSION

EPUC and CAC appreciate the opportunity to respond to the ALJ inquiries related to the EPUC petition. For the reasons expressed in this response, as well as the EPUC petition and reply, EPUC and CAC seek the Commission's prompt granting of the pending petition.

Respectfully submitted,

Evelyn Kahl

Counsel to the
Energy Producers and Users Coalition

Michael Alcantar

Counsel to the
Cogeneration Association of California

July 31, 2014