

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

Application of Southern California Edison
Company (U 338-E) 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

And Related Matters

Application 08-11-001
(Filed November 4, 2008)

Rulemaking 06-02-013
Rulemaking 04-04-003
Rulemaking 04-04-025
Rulemaking 99-11-022

**COMMENTS OF THE ENERGY PRODUCERS AND USERS COALITION
ON THE PROPOSED DECISION**

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SUBJECT MATTER INDEX

The Commission has legal, designated authority to determine its jurisdiction under PURPA and to explicitly describe that jurisdiction in approving contracts under PURPA.

The fact that granting the Petition removes significant additional regulatory and cost burden for CHP contracts, and the clarification of such burdens will facilitate the retention of existing and formation of new PURPA contracts consistent with State policy.

The Petition seeks Commission declaration that its Decision Adopting the QF Settlement was an exercise of its jurisdiction under PURPA; it is not a request for the Commission to rule on or circumscribe FERC's jurisdiction.

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Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, the Energy Producers and Users Coalition (EPUC)¹ submits these comments on the proposed decision of ALJ Yacknin. The proposed decision would deny EPUC's Petition for Modification of Decision 10-12-035, which adopted the *Qualifying Facility and Combined Heat and Power Program Settlement Agreement* (Settlement). EPUC takes exception to the proposed decision, and identifies errors of law and fact that, once corrected, compel adoption of the Petition.

I. INTRODUCTION

The proposed decision misconstrues the Commission's legal authority to implement PURPA, mischaracterizes the effect of not granting the Petition, and

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., Phillips 66 Company, Shell Oil Products US, Tesoro Refining & Marketing Company LLC, THUMS Long Beach Company, and Occidental of Elk Hills, Inc.

misstates the Petition's request for relief. Once these errors are corrected, the proposed decision will provide the basis for granting the Petition. Specifically, the proposed decision should recognize:

- The Commission has legal, designated authority to determine its jurisdiction under PURPA and to explicitly describe that jurisdiction in this proceeding; in doing so, the Commission would not be inappropriately issuing an advisory opinion because the Petition directly pertains to the issue of the regulatory status of procurement under the Settlement;
- The fact that granting the Petition removes significant additional regulatory and cost burden for parties to CHP contracts, and the clarification of such burdens will facilitate the retention of existing and formation of new PURPA contracts consistent with State policy; in this respect, contrary to the proposed decision, the issue raised by the Petition does indeed impact contract rights, obligations and costs of the CHP parties; and
- The Petition seeks Commission declaration that its Decision Adopting the QF Settlement was an exercise of its jurisdiction under PURPA; it is not a request for the Commission to rule on or circumscribe FERC's jurisdiction.

II. THE COMMISSION HAS THE AUTHORITY TO RULE ON ITS JURISDICTION UNDER PURPA

The Petition sought an explicit confirmation from the Commission that Decision 10-12-035 was an exercise of the Commission's authority under PURPA in approving the Optional As-Available *Pro Forma* Contract (As-Available PPA). As the Commission held in the *Valencia Water* case, it has the inherent authority to determine the scope of its jurisdiction.² This is consistent with the

² *In the Matter of the Application of Valencia Water Company*, D.14-02-041; A.13-01-003 (February 27, 2014):

It is a longstanding rule that this Commission has the power to determine for the purpose of the exercise of its jurisdiction all questions of fact essential to the proper exercise of that jurisdiction. Its jurisdiction cannot be affected by the circumstance that these facts are denied. We are vested with power to determine facts upon the existence of which we are authorized to exercise jurisdiction.

well-accepted rule that administrative agencies generally have jurisdiction to determine their own authority.³

There is no conflict with FERC's jurisdiction as the proposed decision suggests. The authority to implement PURPA has been clearly delineated and split between FERC and the States. As FERC ruled, it has the jurisdiction to develop and enforce regulations under PURPA. FERC's role is then generally:

*limited to ensuring that the ... implementation plan is consistent with section 210 of PURPA and the Commission's regulations. Once this is ensured, State judicial forums are available.*⁴

The implementation of those regulations becomes the responsibility of State commissions. This is also made clear, for example, in Section 292.601(c) of FERC's PURPA regulations which sets forth the QF exemption from the rate filing provisions of the FPA for QF sales "made pursuant to a *state regulatory authority's implementation*" of PURPA.⁵ This regulation specifically references implementation of PURPA by the States, and this Commission should therefore be able to clarify in this proceeding that it has done so for QF procurement under As-Available PPAs.

At p. 20-21 (footnotes omitted).

³ *Gov't of Guam v. Sea-Land Service*, (DC Cir. 1992): "an agency has jurisdiction to determine the scope of its authority...." *County of Knox v. The Highlands*, 188 Ill. 2d 546 (S.Ct. Ill. 1999). "Administrative agencies often determine the scope of their jurisdiction. When an agency acts or refuses to act in a case, it necessarily determines whether the subject matter and its activity are or are not within the purview of the statute creating the agency."

⁴ *Policy Statement Regarding the Commission's Enforcement Role under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶61,304 at p. 61,644 (1983).

⁵ 18 CFR §292.601(c) (emphasis added).

The exercise of that authority includes the approval of contracts and pricing. FERC relied on these principles when it addressed California's AB 1613 program.⁶ In that case, FERC held that the CPUC had the authority to set prices for purchase from QFs that did not exceed the utilities' avoided costs.⁷ As the EPUC Petition in this case demonstrates, the Commission acted consistent with that authority in approving the As-Available PPA by limiting its applicability to QF sellers and approving pricing based on the utilities' Short-Run Avoided Costs. This is clearly an exercise of the Commission's authority under PURPA.

Similarly, FERC's decision on another contract approved in the Settlement confirmed that the SRAC-priced PPA at issue in that case (the Transition PPA) is an implementation of California's wholesale rate authority delegated under PURPA.⁸ FERC observed that *"the QF/CHP Settlement pursuant to which the [Transition] PPA was established is one of the California Commission's procurement programs established pursuant to PURPA."*⁹

FERC's finding that the Settlement is an implementation of PURPA is important. As FERC noted in clarifying its role under PURPA:

The Commission's regulations allow the States... a wide degree of latitude in establishing an implementation plan. Such latitude is necessary in order for implementation to

⁶ *Order on Petitions for Declaratory Order, EL10-64*, 132 FERC ¶61,047 (July 15, 2010).

⁷ *Id.* at ¶64.

⁸ *Southern California Edison, Order Dismissing Filing*, 143 FERC ¶61,222, ¶18 (2013).

⁹ *Id.*

*accommodate local conditions and concerns, so long as the final plan is consistent with statutory requirements....*¹⁰

The approval of the As-Available PPA is also a part of California's continued implementation of PURPA.

FERC confirmed the CPUC's authority to approve Transition PPAs under PURPA.¹¹ The EPUC Petition simply seeks the clarification that the same authority was relied on by the CPUC to approve the As-Available PPA. The proposed decision would forsake this precedent and defer to FERC to determine whether this Commission was acting pursuant to its authority to implement PURPA with regard to QF sellers under PPAs that include avoided-cost pricing. That seems both unnecessary and an abandonment of the Commission's responsibility to implement the use of PURPA in this State.

The Commission should affirm, rather than avoid, that it correctly relied upon its delegated authority under PURPA to establish the CPUC QF/CPUC Program. By doing so, the Commission would clarify that the As-Available PPAs are not subject to market-based rate authority (MBRA) obligations.

III. THE DENIAL OF THE PETITION WILL IMPOSE SIGNIFICANT BURDENS ON PROCUREMENT

The Proposed Decision states

as EPUC and CCC concede in their comments, the issue does not impact the rights and obligations of contracting parties under the SRAC-based PPAs, it does not impact the

¹⁰ *Policy Statement Regarding the Commission's Enforcement Role under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶¶61,304, at 61,646 (1983).

¹¹ 18 CFR §292.601(b) (2013); *Badger Creek Limited*, Dockets EL14-42-000, QF87-120-014, 148 F.E.R.C. ¶¶61,074 (July 30, 2014); *ORDER DISMISSING FILINGS*, Sycamore Cogeneration Co., Kern River Cogeneration Co., Dockets ER13-558-000, ER13-559-000, 143 F.E.R.C. ¶¶61,224, (June 7, 2013).

rights and obligations of the settling parties under the Settlement, and it has no impact on California ratepayer costs.

This statement is not an accurate reflection of EPUC's comments and is not substantively correct. EPUC stated in its comments that denial of the Petition would perpetuate the uncertainty as to whether the CHP suppliers – CHP sellers that are required to maintain QF status under the As-Available PPAs – would nonetheless be required to obtain FERC market-based rate authority. This would expose the suppliers to significant cost and time delay in obtaining MBRA, which is clearly not required under a contract approved pursuant to PURPA.¹² The added regulatory burden contemplated by the proposed decision is not appropriate for CHP facilities and sustains an unwarranted barrier to entry. The Commission should consider the two-step regulatory approval process outlined by the proposed decision. First, the CHP seller must secure regulatory approval of a PPA before this Commission. Second, the CHP seller must seek and secure further approvals – and subject themselves to ongoing regulatory compliance burdens – with FERC. This type of dual regulation was not the intent of the PURPA regulatory scheme and it serves no purpose for CHP resources making power sales under a State-authorized PURPA program.

Finally, it promotes confusion in the market regarding whether the pricing under these contracts is set by this Commission pursuant to PURPA or is subject to being set by the market under MBRA. It also clearly impacts the rights of parties under the Settlement, in that CHP suppliers can no longer rely on the

¹² *Id.*

Commission's authority to approve the contract terms under PURPA but must pursue additional approvals.

IV. EPUC'S PETITION SEEKS A CALIFORNIA COMMISSION DETERMINATION OF ITS OWN JURISDICTION, NOT FERC'S JURISDICTION

The proposed decision suggests that the EPUC Petition seeks a declaration of "*whether qualifying facilities are exempt from having to obtain market-based rate authority from FERC....*" That statement mischaracterizes the request of the Petition. The Petition seeks a specific and targeted determination by the Commission of its own jurisdiction. Although this would implicitly recognize the contours of FERC's jurisdiction, the CPUC, as the governing State commission, has certain authority under PURPA, distinct and separate from that of FERC. It has the jurisdiction to autonomously determine the scope of that authority and to act thereunder. Nothing requires the Commission to first seek leave of FERC before approving a contract under PURPA. The EPUC Petition asks the Commission to modify the Decision to recognize that it exercised such authority in approving the Settlement and the *pro forma* contracts.

V. CONCLUSION

The Proposed Decision should be modified, as indicated in the attached revised Findings of Fact and Conclusions of Law:

- To recognize that the Commission has authority to declare the scope of its jurisdiction under PURPA, and

- To confirm that the As-Available PPA, approved as part of the Settlement, was approved under the Commission's PURPA authority.

Respectfully submitted,

A handwritten signature in black ink that reads "Evelyn Kahl". The signature is written in a cursive style with a large initial 'E'.

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September 10, 2014

ATTACHMENT A

PROPOSED FINDING OF FACT

1. The issue of whether qualifying facilities are exempt from having to obtain market-based rate authority from FERC for power sold under the SRAC-based PPAs provided under the Settlement ~~does not~~would impact the rights and obligations of contracting parties under the SRAC-based PPAs, ~~it does not~~ impact the rights and obligations of the settling parties under the Settlement, and ~~it has no impact on~~ California ratepayer costs.

CONCLUSIONS OF LAW

1. ~~A Commission decision on the issue of whether qualifying facilities are exempt from having to obtain market-based rate authority from FERC for power sold under the SRAC-based PPAs provided under the Settlement would not be legally binding or preempt a FERC finding to the contrary.~~
2. ~~We do not have~~The Commission has the authority to issue a declaratory judgment ~~or cause to issue an advisory opinion~~ on the issue of its authority under PURPA to approve the terms of *pro forma* contracts.
2. The Commission exercised its authority under PURPA in approving the Optional As-Available Contract in Decision 10-12-035.
3. The petition should be ~~denied~~granted, and Decision 10-12-035 should be modified to state that the approval of the Optional As-Available Contract was issued pursuant to this Commission's authority under PURPA.