BEFORE THE PUBLIC UTILITIES COMMISSION OF THE

STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.	**Proceeding: R0808009** **Rulemaking 08-08-009** **(Filed August 21, 2008)**

CALIFORNIA ATTORNEY GENERAL'S RESPONSE TO ALJ'S REQUEST FOR BRIEFS REGARDING JURISDICTION TO SET PRICES FOR A FEED-IN TARIFF

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INTRODUCTION

California has long been a world leader in energy efficiency, energy planning, and, now, in tackling climate change. California adopted the first statewide program mandating reductions in greenhouse gas emissions. AB 32 (Chapter 488, Statutes of 2006) requires reductions to 1990 emissions levels by 2020, and by executive order, the Governor has extended that goal to achieve emission reductions of 80% below 1990 levels by 2050. (Governor's Exec. Order No. S-3-05 (June 1, 2005).) As a result, states throughout the country look to California for global warming solutions. In addition, many are following California's lead by adopting programs comparable to California's Renewable Portfolio Standards (RPS), first enacted in 2002. The federal government appears poised to do so as well.

Despite California's requirement for an RPS of 20% by the end of 2010 and a goal of 33% renewable power by 2020, the actual percentage of renewable generation has hovered for several years near 13%. To meet the AB 32 and executive order emissions reductions goals, as well as the RPS and other energy efficiency goals, to continue driving the market for renewable energy, and to maintain its leadership role, California must ensure the viability of distributed renewable power sources, such as roof-top solar systems on homes and buildings. This proceeding, which will help define the appropriate payment for renewable power produced by homeowners and businesses when sold to utilities — called "Feed-in Tariffs" or "FITs" —is an essential element of that effort.

Southern California Edison has raised legal questions about the Commission's authority to set feed-in tariff rates. It is the Attorney General's view that the Commission has sufficient legal authority to set feed-in tariff rates to promote the adoption of distributed generation, and authority to modernize its Feed-in Tariff as proposed. Distributed energy is important for reaching the RPS requirements and for reducing greenhouse gas emissions. We encourage the Commission to proceed with its efforts and to set the feed-in tariff rate at a level that encourages a significant increase in the megawatts of distributed renewable energy available in California.

We have set forth below the views of the Attorney General on specific questions posed in Administrative Law Judge Mattson's May 28, 2009 Ruling requesting briefs regarding Commission jurisdiction to set prices in an expanded FIT program.

Question 1: What is the scope of the Commission's authority to establish the price level in an expanded FIT?

Answer 1: The Commission has ample authority to establish an effective FIT price level.

The Commission has authority to accomplish the goals set forth in the expanded FIT Proposal in several ways. First, the Commission can establish an effective feed-in tariff by proceeding under PURPA. Alternatively, the Commission can use its authority to allow tradable Renewable Energy Credits (RECs) to set an effective feed-in tariff that is not preempted by federal law. The Commission should select the approach that best meets its needs. Determination of the optimum approach may require some additional research and review by the Commission and the stakeholders.

If the Commission proceeds under PURPA, it can still establish an effective feed-in tariff, provided that payments cannot be clawed back in future years. PURPA empowers the State, through the PUC, to set avoided cost rates. (16 U.S.C. §824a-3(f).) Nevertheless, federal law loosely governs the rate-setting method. The rate at which a utility must purchase power from a qualified facility (QF) must (1) be "just and reasonable" to consumers, (2) be in the public interest, (3) not discriminate against QFs, and (4) not exceed the purchaser's incremental alternative cost. (16 U.S.C. § 824a-3(b)(2).) The rate fulfilling those requirements is referred to as the "avoided cost" rate. PURPA itself defines avoided cost as "the cost to the electric utility of the electric energy which, but for the purchase from such . . . [QF], such utility would generate or purchase from another source." (16 U.S.C. § 824a-3 (d).) The corresponding regulation

essentially parrots the statute. (18 C.F.R. § 292.101(b)(6).) A State's method for setting the rate may not conflict with PURPA or the cited FERC regulation.

But the resulting rate is not determined by the federal regulation, and FERC has disavowed control or expertise as to what is the correct price. Indeed, FERC has shown great deference to State rate setting under PURPA. In *Southern California Edison Co.,* 70 FERC ¶ 61,215, at 61,677 (1995), the Commission gives great latitude to State commissions as to procedures selected to determine avoided costs. "The Commission has not, and does not intend in the future, to second-guess state regulatory authorities' actual determinations of avoided costs (i.e., whether the per unit charges are no higher than incremental costs)." (*Id.*)

That deference is consistent with the broad role Congress gave to the States. Accordingly, FERC has given the States "wide latitude in implementing PURPA." (*Southern California Edison Co.,* 70 FERC ¶ 61,215, at 61,675 & n.17 (1995). See also *FERC v. Mississippi* (1982) 456 U.S. 742, 751; *Indep. Energy Producers Ass'n v. Cal. Pub. Util. Comm'n* (9th Cir. 1994) 36 F.3d 848, 856; *Metro. Edison Co. and Pa. Elec. Co.*, 72 FERC ¶ 61,015, at 61,051-52, *reconsideration denied*, 72 FERC ¶ 61,224 (1995).)

Deference is also appropriate for practical reasons. Rate setting is an imperfect exercise. The process attempts to create a rate that will fulfill state policy goals while staying within federal constraints into the future. Thus QF rates are necessarily estimated for the purposes of entering long-term contracts. Such estimates do not violate the avoided cost upper limit. (18 C.F.R. § 292.304(b)(5).[1])

A. Allowable Factors and Methods for establishing an "avoided cost" rate.

The Commission can accomplish the FIT Proposal's objectives consistent with federal law, because federal law provides sufficient flexibility. The pertinent FERC regulation requires several factors to be considered "to the extent practicable" in determining avoided cost. 18 C.F.R. § 292.304(e) sets forth the following factors, paraphrased and quoted here ("FERC factors"):

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[1] 18 C.F.R. § 292.304(b)(5) provides: "In the case in which rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery."

(1) Data regarding the utility's cost structure and plans to add capacity;

(2) "The availability of capacity or energy from a qualifying facility during daily and seasonal peak periods, including:"
- (i) The ability of the utility to dispatch the qualifying facility;
- (ii) The reliability of the QF;
- (iii) Contract terms;
- (iv) The extent to which scheduled outages of the qualifying facility can be coordinated with scheduled outages of the utility's facilities;
- (v) The usefulness of energy and capacity supplied from a qualifying facility during system emergencies;
- (vi) The individual and aggregate value of energy and capacity from QFs on the electric utility's system;
- (vii) The smaller capacity increments and the shorter lead times available with additions of capacity from QFs.

(3) The relationship of the availability of energy or capacity from the QF to the ability of the electric utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use.

(4) "The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from a qualifying facility, if the purchasing electric utility generated an equivalent amount of energy itself or purchased an equivalent amount of electric energy or capacity."

Application of the FERC factors could yield an avoided cost rate for a particular technology that encouraged construction of that technology. Using the FERC factors to set an avoided cost rate that reflected the many benefits of distributed, renewable generation would be in keeping with PURPA's intent. Congress enacted PURPA to encourage the development of small power production facilities and to reduce American dependence on fossil fuels. Congress also sought to eliminate barriers to the development of alternative energy sources. (*FERC v. Mississippi* (1982) 456 U.S. 742, 750-51; *Indep. Energy Producers Ass'n v. CPUC* (9th Cir. 1994) 36 F.3d 848, 850.)

Moreover, FERC's regulations plainly state that a utility's avoided cost rates "may differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies." (18 C.F.R. § 292.304(c)(3)(ii).) Thus the Commission may indirectly consider the cost of alternative renewable energy in determining "avoided cost" rates for purchases from QFs.

California's efforts to address global warming are changing the market in which an IOU purchases power. The Global Warming Solutions Act (AB 32) and Executive Order S-03-05 (setting GHG emission reduction targets) have set California on a path that relies on cleaner power. The ARB's Scoping Plan under AB 32 anticipates that California will have 33 percent of its electricity provided by renewable resources by 2020, and include greenhouse gas reductions based on this level. (California Air Resources Board (2008), *Climate Change Proposed Scoping Plan*, http://www. Arb.ca.gov/cc/scopingplan/document.) The RPS Program more specifically obliges utilities to obtain an increasing percentage of power from renewable sources. (See Pub. Util. Code §§399.11-399.20; see also §701.3.) As a result, "incremental alternative energy" increasingly does not come from fossil-fuel-based generators. What really matters is the avoided cost of alternative renewable energy.

Thus, a utility's avoided cost can be set based on the cost to the utility of obtaining renewable energy. FERC's longstanding regulations governing avoided-cost rate setting are sufficiently flexible to accommodate the realities of the RPS Era, and provide the Commission with discretion to set the FIT on this basis.

Consider distributed solar PV, for example, in terms of the FERC factors. Such energy can be viewed as ideal in terms of FERC factor (2), because solar PV is most effective at the time of year and time of day when the peak load is high – when strong sunshine drives increased air conditioner use. In many parts of California, solar PV should be considered reliable, and is immune to volatile fuel costs and supply shortages [FERC factor (2)(ii)]. Compared to thermal power plants, solar PV is also easily taken on and offline, making it useful in terms of scheduling outages [FERC factor (2)(iv)] and useful during system emergencies [FERC factor (2)(v)]. The "aggregate value" of solar PV is also high for any utility subject to RPS requirements [FERC factor (2)(vi)]. Similarly, solar PV can be added in small increments with short lead time, assisting with grid management [FERC factor (2)(vii)].

Continuing the solar PV example, such generation would both reduce fossil fuel use, and could help a utility avoid buying expensive energy during peak seasons and peak hours [FERC factor (3)]. Finally, like any distributed generation, solar PV from systems 10MW or less could feed into local distribution systems so as to reduce the need for extensive transformer equipment or long-range transmission, reducing line losses associated with transmission [FERC factor (4)].

We note that SCE cites to *Southern California Edison Co.*, 70 FERC at 61,677-78, and 71 FERC at 62,078, which sets some limits on avoided costs rate determination under PURPA based on the price of energy from a limited selection of sources. In that case, FERC ruled that California's determination of avoided cost using a particular auction system was inconsistent with FERC's interpretation of PURPA because those particular auctions did not take into account "all sources" of alternative energy. Today, however, the climate change state laws discussed above change the practical realities faced by a utility when purchasing power. The 'alternative energy' to be acquired is different – at the margin it no longer comes indiscriminately from any source – so the avoided cost calculation should be modified accordingly. In our view, the Commission has authority to set the expanded FIT as proposed. This approach is consistent with the plain language of FERC's regulations.

B. Commission authority over RECs.

In suggesting that PURPA provides the only way forward, SCE ignores other promising regulatory possibilities. For example, the Commission can encourage renewable generators to "feed in" to the grid using Renewable Energy Credits (RECs). FERC has ceded to the states jurisdiction over RECs as a mechanism of state policy. (FERC Docket No. EL03-133-000, October 1, 2003). As FERC has explained, "[s]tates, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded." (*American-Ref Fuel Co.*, 105 FERC ¶ 61,004, at P23 (2003), *request for reh'g denied*, 107 FERC ¶ 61,006 (2004), *appeal dismissed*, *Xcel Energy Servs., Inc. v. FERC* (D.C. Cir. 2005) 407 F.3d 1242.)[2]

Accordingly, federal law does not preempt the Commission from implementing a REC market as a component of a feed-in tariff for distributed generation in order to meet AB 32 and

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[2] The Legislature has exercised this authority in the context of the RPS program. Under California law, the Commission may permit the use of RECs to satisfy RPS requirements and provide for the sale of RECs bundled with electricity generation. (Pub. Util. Code §§ 399.16(a), .399.14(a)(2)(d).) Consistent with that authority, the Commission is currently considering rules that would allow tradable RECs ("TRECs") to be used for RPS compliance. (Proposed Decision Authorizing Use of Renewable Energy Credits for Compliance with the California Renewables Portfolio Standard, Proceedings on Rulemaking 06-02-012 (Pub. Util. Comm'n Mar. 26, 2009).)

other renewable energy and climate change goals. If a REC market is implemented, bundled RECs would have significant value independent of the associated wholesale power. Contracts between a purchasing utility and a generator should reflect that value in addition to the value of electric power. This could represent an important way for owners of renewable generating facilities to receive appropriate returns on their investments.

The use of RECs to implement FIT Proposal goals would facilitate meeting the Commission's mandate to develop an electric generation procurement methodology that takes into account the environmental costs and benefits as well as the costs and benefits of a diversified energy portfolio. (Pub. Util. Code, §§ 701.1(c), 701.3.) In addition, state law requires the Commission to reserve a portion of future electrical generation capacity for renewable resources until the Commission can develop such a methodology. (Pub. Util. Code, § 701.3.) While the details related to the use of RECs are considerable and will need to be fully explored by the Commission,[3] it is incorrect to suggest that the Commission is without authority to pursue this approach to implement the FIT Proposal goals.

Question 2: Do you agree or disagree with SCE's argument regarding the scope of the Commission's price-setting authority?

Answer 2: The Commission has the authority SCE identifies and more.

SCE relies on the truism that the FERC generally sets rates for electricity sales at wholesale in interstate commerce. (SCE response to ALJ's Ruling, filed 4-10-09, pp. 10-12.) As discussed above, the Commission has good options for expanding its feed-in tariff program. The Commission may set appropriate avoided cost rates for purchases from QFs under PURPA, and may set prices and conditions relating to RECs. Those authorities provide sufficient discretion and flexibility for the Commission to set a FIT price that would ensure appropriate incentives and payments for the power generated.

For example, SCE cites to *Midwest Power Systems, Inc.* 78 FERC ¶ 61,067 (1997). In that case, Iowa set prices for capacity purchases from a class of "alternative" facilities, including some QFs, at 6 cents/kwh, even though the utility claimed its avoided cost rate was

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[3] *See, e.g.,* California Energy Commission, *California Feed-In Tariff Design and Policy Options*, May 2009, CEC 300-2008-009F.

approximately 1.5 cents/kwh. Iowa apparently had not set differential avoided cost rates for different technologies, as allowed by 18 C.F.R. § 292.304(c)(3)(ii). In that context, FERC's reference to a single figure for "avoided cost" made sense, as did its conclusion that the Iowa Utility Board's orders were "preempted to the extent that they require rates to QFs in excess of the purchasing utilities' avoided cost . . . ." The *Midwest Power Systems* ruling does not preclude California from setting avoided cost rates for distributed renewables.

Question 3: If the Commission expands the FIT program, on what basis should the Commission set the purchase price for the electricity (e.g., buyer's avoided cost, seller's cost of service, market price, market price referent, other)?

Answer 3: **The resulting rate should encourage additional distributed capacity.**

Whatever the mechanism, the rate should provide sufficient incentive for homeowners and businesses to install excess capacity, so the price should allow recoupment of costs and a modest rate of return over a reasonable time period. The rate should be subject to review periodically, and reset as the price of renewables comes down, so as not to over-compensate generators or overcharge ratepayers. We note in passing that market price referent might be an appropriate basis when combined with additional payment for RECs.

Pennsylvania has already adopted an "Alternative Energy Portfolio Standards Act," 73 P.S. § 1648.1 et seq. that requires customer-generators to be compensated for excess generation on an annual basis at full retail value for energy power. (73 Pa. Stat. Ann. § 1648.5 (West. 2008).) Pending legislation in various states may provide additional useful models. California, Hawaii, Indiana, Michigan, Minnesota, and Rhode Island all are reported to have pending Feed-in Tariff legislation. (E.g. AB 1106 (Fuentes); see generally J. Farrell, "Feed-in tariffs in America" (2009) available at http://www.newrules.org/sites/newrules.org/files/feed-in%20tariffs%20in%20america.pdf (viewed 6-17-09).)

Question 4: May the Commission require an RPS-eligible generator, in order to be eligible for the expanded FIT program, to be an exempt wholesale generator or to meet other specific conditions?

Answer 4: The Commission may have several options for including generators.

As discussed above in Answers 1.1 and 1.2, the Commission could institute a system based on QFs paid on an avoided cost basis, or non-QFs paid for both power and RECs.

CONCLUSION

The Commission should pursue the expanded FIT Proposal. The law provides adequate authority and flexibility to design an effective program.

Respectfully submitted,

Dated: June 25, 2009

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VERIFICATION

I, William N. Brieger, am a Deputy Attorney General in the Office of the Attorney General and am authorized to make this Verification on behalf of Edmund G. Brown Jr., Attorney General. I declare under penalty of perjury that the statements in the foregoing copy of California Attorney General's Response to ALJ's Request for Briefs Regarding Jurisdiction to Set Prices for a Feed-In-Tariff filed in R08-08-009, are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

Executed on June 25, 2009 at Sacramento, California.

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Certificate of Service

I hereby certify that I have this day served a copy of California Attorney General's Response to ALJ'S s Request for Briefs Regarding Jurisdiction to set Prices for a Feed-In-Tariff on all known parties to R08-08-009 by transmitting an e-mail message with the document attached to each party named in the official service list. Parties without e-mail addresses were mailed a properly addressed copy by first-class mail with postage prepaid. Executed on June 25, 2009 at Sacramento, California

/s/ *Tanisha N. Marshall*

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