



*Pacific Gas and
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January 3, 2006

BY HAND DELIVERY

DOCKET OFFICE
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: R.04-04-003 and R.04-04-025

Dear Docket Clerk:

Enclosed for filing are an original and five (5) copies of:

**APPLICATION OF PACIFIC GAS AND ELECTRIC COMPANY (U 39 E)
FOR REHEARING OF DECISION 05-12-009**

Please file the original and return an endorsed stamped copy in the envelope provided. Thank you for your assistance with this matter.

Sincerely,

/s/
Edward V. Kurz

EVK/dl

Enclosure

cc: Administrative Law Judge Carol A. Brown
Administrative Law Judge Julie Halligan
All Parties of Record in R.04-04-003 and R.04-04-025

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

Order Instituting Rulemaking to Promote Policy
and Program Coordination and Integration in
Electric Utility Resource Planning.

Rulemaking 04-04-003
(Filed April 1, 2004)

Order Instituting Rulemaking to Promote
Consistency in Methodology and Input
Assumptions in Commission Applications of
Short-run and Long-run Avoided Costs,
Including Pricing for Qualifying Facilities.

Rulemaking 04-04-025
(Filed April 22, 2004)

**APPLICATION OF PACIFIC GAS AND ELECTRIC COMPANY (U 39 E)
FOR REHEARING OF DECISION 05-12-009**

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I. INTRODUCTION.

Pursuant to Rule 85 et seq. of this Commission's Rules of Practice and Procedure, Pacific Gas and Electric Company (PG&E) files this application for rehearing of Decision 05-12-009 (Decision), which was mailed on December 2, 2005. "This decision continues the interim relief as provided in Decision (D.) 04-01-050 for Qualifying Facilities (QFs) with expired or expiring contracts from January 1, 2006 until the Commission issues a final decision in the combined two dockets, Rulemaking (R.) 04-04-003 and R. 04-04-025."^{1/} The Decision requires the utilities to enter into five-year standard offer number one (SO1) agreements with QFs at short-run avoided cost (SRAC) energy and as-delivered capacity prices. The Commission is reviewing the current SRAC energy formula and as-delivered capacity prices in this proceeding to determine whether each accurately reflects the utilities' avoided costs.

PG&E presented testimony in 2003 indicating that its SRAC energy payments exceeded market prices. The Commission agreed the evidence indicated the SRAC formula produced prices above spot-market prices and the Commission determined the SRAC formula should be

^{1/} D.05-12-009, mimeo p. 1.

reviewed on an expedited basis.^{2/} Delays in the procedural schedule of the above-captioned dockets have precluded the Commission from issuing a decision regarding SRAC before 2006. Recognizing that there are a number of existing QFs whose contracts will expire in 2006, the Commission adopted a solution the Commission has previously employed in similar circumstances:

We find that it is reasonable to order the IOUs to continue purchasing power pursuant to a five-year SO1 contract from any QF with a contract set to expire post January 1, 2006, and to have the pricing terms of that contract consistent with the SRAC policy [set] forth in D.01-03-067, as modified by D.02-02-028, subject to a revised pricing policy by this Commission.^{3/}

The Decision further states that “[t]he pricing terms for any such contract should be consistent with existing SRAC policy..., provided that the pricing terms of the contract shall be modified to reflect said revised QF pricing policy as of the effective date of the Commission decision adopting a revised pricing policy.”^{4/}

The Decision errs in applying any new SRAC formula prospectively only and in failing to include a conclusion of law that makes explicit the Commission’s obligation to order a true up in the event the Commission determines that payments made pursuant to the Commission’s existing SRAC policy yields prices that exceed utilities’ avoided costs.

II. DISCUSSION.

A. PURPA Requires The Commission To Ensure Payments To QFs Do Not Exceed The Utilities’ Avoided Costs.

The Commission lacks jurisdiction to order utilities to enter into QF contracts exceeding the avoided cost rate set in accordance with PURPA.^{5/} PURPA prohibits this Commission from

^{2/} D.04-07-037, mimeo p. 24, Ordering Paragraph No. 1.

^{3/} Decision, mimeo p. 10; Findings of Fact No. 8.

^{4/} *Id.*, mimeo p. 11, Ordering Paragraph No. 2.

^{5/} Connecticut Light and Power Company (1995) 70 FERC ¶ 61,012 at 61,028; see also, Independent Energy Producers Ass’n Inc. v. CPUC (9th Cir. 1994) 36 F.3d 848, 858 (“QF rates may not exceed the utility’s avoided costs so that ratepayers will not pay more for QF power than traditional sources.”)

requiring a utility to pay prices for QF energy exceeding the utility's avoided costs.^{6/} A utility's full-avoided cost is the "maximum rate that the Commission may prescribe."^{7/} If QF prices are set appropriately under PURPA, ratepayers are indifferent as to whether the utilities generate the power or purchase it from another source.^{8/}

In this docket, the utilities have presented testimony indicating that the SRAC energy prices and the SRAC capacity payments paid pursuant to SO1 agreements exceed the utilities' avoided costs.^{9/} The Commission however has not admitted the testimony into evidence, and therefore there is no factual basis on which to determine that the prices in the SO1 agreements comply with PURPA's avoided cost limitation. Nevertheless, the Commission has ordered the utilities to enter into new agreements at these disputed prices.

B. The Decision Commits Legal Error In Failing To Acknowledge The Commission's Obligation To Order A Retroactive True Up.

The Commission has already acknowledged that there "is evidence on the record in this proceeding [that] for some time periods the current SRAC energy pricing methodology has yielded prices in excess of spot market prices" and "the evidence... raises questions and supports the need to revisit [the] SRAC pricing system...."^{10/} Moreover, the Commission has recognized its "authority to consider retroactive adjustment of SRAC prices...."^{11/}

The Second District Court of Appeal has articulated the Commission's obligations more directly: "...if the evidence shows that the formula in Decision No. 01-03-067 should have been

^{6/} Southern Cal. Edison Co. v. Public Utilities Com. (2002) 101 Cal. App. 4th 982, 998 ("PURPA does not permit either the [Commission], or the States in their implementation of PURPA, to require a purchase rate that exceeds avoided cost.")

^{7/} American Paper Institute v. American Electric Power (1983) 461 U.S. 402, 413.

^{8/} Independent Energy Producers Ass'n. Inc. v. CPUC (9th Cir. 1994) 36 F.3d 848, 856.

^{9/} See PG&E and SCE Opening Testimony, dated August 31, 2005.

^{10/} D.04-07-037, mimeo p. 24, Ordering Paragraph 1, opinion modifying D.03-12-062.

^{11/} D.01-12-025, mimeo p. 4, opinion modifying D.01-03-067.

applied retroactively to arrive at a more accurate SRAC, then it is the Commission's duty to apply it retroactively."^{12/} The Court reiterated this point just last year, noting the Commission's declaration "that if a decision in R.04-04-025 shows a systematic violation of PURPA, then Edison is to be given credit for any PURPA violations by reason of Edison being required to enter into SO1 contracts with QFs...."^{13/}

Public Utilities Code section 1705 in pertinent part provides that a Commission "decision shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision." Such findings are necessary to "enable the reviewing court to determine whether the commission has acted arbitrarily."^{14/}

As discussed above, the Second District Court of Appeal has, on two occasions, reiterated the Commission's duty to apply a more accurate SRAC formula retroactively depending on the outcome of the Commission's review of the transition formula it adopted in Decision 01-03-067. Thus, the Court of Appeal has linked the Commission's duty to order a retroactive true up directly to the Commission's continued employment of the transition formula adopted in Decision 01-03-067. Because Decision 05-12-009 requires the new short-run avoided cost payments to be applied prospectively, but does not require a refund to the extent the payment exceed the utilities' avoided costs, the Decision fails to make all necessary and material findings in violation of Public Utilities Code section 1705.

III. CONCLUSION.

The Commission should grant rehearing of Decision 05-12-009 for the purpose of adding a conclusion of law to the Decision explicitly providing that QFs who enter contracts as a result of the Decision may be obligated to refund a portion of the payments made pursuant to those contracts if the Commission finds that the prices currently paid exceed the utilities' avoided costs.

^{12/} Southern Cal. Edison Co. v. Public Utilities Com., *supra*, 101 Cal.App.4th 982, 999; emphasis added.

^{13/} Southern Cal. Edison Co. v. Public Utilities Com. (2005) 128 Cal.App.4th 1, 12.

^{14/} California Motor Transport Co. v. Public Utilities Com. (1963) 59 Cal.2d 270, 274; citations omitted.

Respectfully submitted,

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MARY A. GANDESBERY

By: _____ /s/
EDWARD V. KURZ

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Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

Dated: January 3, 2006

CERTIFICATE OF SERVICE BY ELECTRONIC MAIL OR U.S. MAIL

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; and that my business address is Pacific Gas and Electric Company, Law Department B30A, 77 Beale Street, San Francisco, CA 94105.

I am readily familiar with the business practice of Pacific Gas and Electric Company for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service the same day it is submitted for mailing.

On the 3rd day of January 2006, I served a true copy of:

**APPLICATION OF PACIFIC GAS AND ELECTRIC COMPANY (U 39 E)
FOR REHEARING OF DECISION 05-12-009**

[XX] By Electronic Mail – serving the enclosed via e-mail transmission to each of the parties listed on the official service lists for R.04-04-003 and R.04-04-025 with an e-mail address.

[XX] By U.S. Mail – by placing the enclosed for collection and mailing, in the course of ordinary business practice, with other correspondence of Pacific Gas and Electric Company, enclosed in a sealed envelope, with postage fully prepaid, addressed to those parties listed on the official service lists for R.04-04-003 and R.04-04-025 without an e-mail address.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 3rd day of January, 2006 at San Francisco, California.

/s/

DONNA LEE