

**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)

**MOTION FOR INTERLOCUTORY RELIEF OF THE QF PARTIES  
AND REQUEST FOR SHORTENED RESPONSE TIME**

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**MOTION FOR INTERLOCUTORY RELIEF OF THE QF PARTIES  
AND REQUEST FOR SHORTENED RESPONSE TIME**

The QF Parties<sup>1</sup> move for interlocutory relief from an ALJ bench ruling on November 29, 2005 which denied the QF Parties' Motion to Strike the Testimony of Dr. Peter Fox-Penner (Motion to Strike) in the above-captioned consolidated dockets. This motion is made pursuant to Rules 45 and 65 of the Rules of Practice and Procedure of the California Public Utilities Commission (Commission). The QF Parties also request an order to shorten response time to this motion to 6 days, with responses due at the pre-hearing conference on Thursday, January 12, 2006. Such an order would enable oral arguments at the

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<sup>1</sup> The QF Parties include the California Cogeneration Council, the Renewables Coalition, the Independent Energy Producers Association, the Cogeneration Association of California, and the Energy Producers and Users Coalition. California Cogeneration Council, the Renewables Coalition, the Independent Energy Producers Association have give CAC/EPUC permission to file this motion on their behalf.

January 12, 2006 pre-hearing conference. A proposed ALJ order is appended as Attachment A.

## **I. INTRODUCTION**

The QF Parties filed their Motion to Strike on August 31, 2005.<sup>2</sup> The basis for the Motion to Strike was a simple one. The Commission has sponsored Dr. Fox-Penner's testimony in a FERC proceeding, which is on-going. Dr. Fox-Penner's testimony concerns the California electricity market and the California energy crisis. The Commission's success in the FERC proceeding depends in large part upon the credibility of Dr. Fox-Penner as an expert on the California market. It would therefore be very difficult for the Commission to determine in this proceeding that Dr. Fox-Penner is less than expert, that his insights are ill-informed or that he has ignored certain evidence. Nevertheless, this is the position in which Pacific Gas & Electric Company (PG&E) and Southern California Edison Company (SCE) have placed the Commission. PG&E and SCE have positioned the Commission to have a pecuniary interest in the outcome of its own adjudication. Accordingly, to preserve the fairness of these proceedings and the QF Parties' due process right to an impartial administrative adjudication, the QF Parties requested that Dr. Fox-Penner's testimony be stricken.

On November 29, 2005, ALJ Halligan denied the QF Parties' Motion to Strike through a bench ruling. The entirety of the rationale for the ruling is as follows:

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<sup>2</sup> Motion of the California Cogeneration Council, the Renewables Coalition, the Independent Energy Producers Association, the Cogeneration Association of California, and the Energy Producers and Users Coalition to Strike the Testimony of Dr. Peter Fox-Penner Submitted on Behalf of Pacific Gas & Electric Company and Southern California Edison Company.

*We found no legal authority to strike it, and we believe that any vice that you think may be present in Mr. Fox-Penner's testimony can be explored on cross-examination, and we would expect you to do so.*

Transcript of November 29, 2005 Prehearing Conference at 380:6-10. The ruling misses the point. As Commissioner Brown clearly recognized in a similar situation:

*We have, if we take up that issue, a conflict of interests ... If nothing else, it does give the appearance that this place is a kangaroo court.*

I.02-11-040 Tr., 96, Dec. 22, 2005 (Comr. Brown). This Commission, currently sponsoring Dr. Fox-Penner's testimony on California markets in an ongoing FERC proceeding, simply cannot sit as an impartial arbiter on Dr. Fox-Penner's testimony here. In I.02-11-040, Commissioner Brown recently asked, "*here I am, [in another forum] sitting as a party ... I'm sitting here [at the Commission], listening to the evidence. Now, can this party over here feel confident that I can objectively view this matter?*" The exact same question arises here, with the exact same response, "No."

The prejudice to the QF Parties' interests occurs due to the inherent conflict that is present when the Commission is placed in a position to have to evaluate the credibility of its own witness. This conflict cannot be cured through an opportunity to cross-examine Dr. Fox-Penner.

Rule 65 of the Commission's Rules of Practice and Procedure allows a ruling to be reviewed by the Commission in extraordinary circumstances and where necessary to promote substantial justice. This is such a case. The QF Parties cannot be assured of an impartial administrative adjudication as long as PG&E and SCE are allowed to rely upon the testimony of Dr. Fox-Penner. The

QF Parties therefore request interlocutory relief from the November 29, 2005 bench ruling and that the Commission grant their Motion to Strike.

## II. DISCUSSION

The QF Parties' Motion to Strike fully sets forth the legal authority and rationale supporting QF Parties' request to strike the testimony of Dr. Fox-Penner. In summary: (1) due process guarantees an impartial and unbiased decision maker in administrative proceedings (Motion to Strike at 3); (2) due process prohibits a decision maker from adjudicating a proceeding in which it has an interest in the results of its own ruling (Motion to Strike at 4); and (3) the Commission should strike Dr. Fox-Penner's testimony to protect the QF Parties' right to a fair hearing (Motion to Strike at 5).

PG&E and SCE filed an opposition to the Motion to Strike on October 24, 2005 (Opposition). The Opposition misstated and mischaracterized the basis for the QF Parties' Motion to Strike. For instance, PG&E and SCE suggested that if the Commission grants the Motion to Strike, it could not conduct the current rulemaking,<sup>3</sup> and it could not "*fairly address any California proceeding in which utility rates are at issue.*"<sup>4</sup> This is a ridiculous statement. Although the Commission often participates in FERC dockets as a party, it is rare for the Commission to sponsor a witness. In the rare instance that it does sponsor a witness, s/he is usually from Commission staff. It is extremely unusual for the Commission to sponsor an outside consultant as a witness who then appears before the Commission as an expert in a separate case on behalf of litigants

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<sup>3</sup> Opposition at p. 10.

<sup>4</sup> Opposition at p. 2.

while the first case is still pending. A finding by the Commission that it has, or may have, a bias in favor of Dr. Fox-Penner's credibility and expertise does not require the Commission to disqualify itself from any rate case or from any rulemaking. This is an isolated, unique case, and the Commission should consider it so.

Moreover, this Commission has previously strongly supported removing any indication of bias from its deliberative proceedings. In Decision 00-02-047, the Commission stated:

*[T]he Commission "take[s] very seriously allegations of bias and pre-judgment." (Re Pacific Telesis Group (1994) 53 CPUC 2d 344, 347.) It is important not only that fairness in the Commission's process be maintained, but also that the proceedings be conducted in such a manner as to avoid the suspicion of unfairness, and, if possible, inspire public confidence and trust.*

The Commission found that the ORA as an advocate might be biased and unable to provide independent supervision of a utility audit. The Commission ordered responsibility for the audit transferred to the Telecommunications Division.

SCE and PG&E in their Opposition assert that this decision was later vacated by the Commission. However, that is misleading. On rehearing, the Commission determined that *"[t]he rationale in that decision relies on an issue that did not have to be engaged."*<sup>5</sup> The Commission found that it had the inherent authority to assign functions among its offices. However, the order on reconsideration did not vacate the reassignment of the audit, and it did not rescind the finding that ORA may have been biased. The Commission's

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<sup>5</sup> D.01-02-041, issued February 8, 2001, *mimeo* at p. 3.

commitment to an objective, bias-free proceeding was never retracted or qualified.

Indeed, the Commission's commitment to the removal of any indication of bias was strongly reaffirmed by Commissioner Brown at last month's prehearing conference in the Natural Gas Border Price Spike investigation, I.02-11-044.

*Out of a sense of fairness -- and every judicial body, whether it's a regulatory judicial body or a pure judicial body, has to be in a position where it is above reproach, and not – and where it can entertain matters objectively, and it can fashion remedies to do that.*

I.02-11-040 Tr., 100-101, Dec. 22, 2005 (Comr. Brown).

The judge in that proceeding had asked for parties' reactions to the recently-filed lawsuit by the Attorney General and the Commission against Sempra Energy, SoCalGas and SDG&E. The lawsuit alleged that the utilities misled the Commission in 1998, when SDG&E and SoCalGas applied to the CPUC for permission to provide natural gas service to Gasoducto Rosarito at the California-Mexico border. Sempra said the system had excess capacity and no new capacity would be needed to serve Rosarito. Internal (confidential) memos recently surfaced indicating that Sempra was aware of the potential for capacity constraints. The complaint alleges that there was not sufficient pipeline capacity and as a result, SDG&E had to curtail service to its large business customers, mainly electricity generators, for 17 days in 2000/2001. Sempra Energy and SoCalGas/SDG&E have argued that the Commission cannot maintain the appearance of fairness by presiding over Border Price Spike investigation and advocating another position in court. SCE claimed that while the two cases overlap, the lawsuit and Commission proceeding clearly differ in form and

function and the lawsuit should not act as a bar to the concurrent Commission investigation.

Commissioner Brown agreed that the lawsuit “*is different in nature and purpose and objective*” than the investigation. See I.02-11-040 Tr., 97, Dec. 22, 2005. Despite the differences, Commissioner Brown still found the appearance of bias troubling:

*Here I am, a named participant in the lawsuit, and I'm sitting here listening to the evidence. Can any party have confidence that I can be impartial?*

*We have, if we take up that issue, a conflict of interests, because we are, in effect, facilitating our own lawsuit through discovery mechanisms, through the admission of proof. If nothing else, it does give the appearance that this place is a kangaroo court. Okay? So we have to avoid that appearance of impropriety, but even in the best of situations, I don't think that any party could walk away with this feeling that we could be totally objective.*

I.02-11-040 Tr., 96, Dec. 22, 2005 (Comr. Brown).

*We have to sever that portion of the evidence out in entertaining this case. Otherwise, we put ourselves in an untenable conflict of interests. I mean, here I am, sitting as a party. ... I'm sitting here, listening to the evidence. Now, can this party over here feel confident that I can objectively view this matter? ... Irrespective of the ultimate conclusions of law, if -- the same basic facts may still be germane. That being so, I think we're put in a -- as I say, a conflict of interests.*

I.02-11-040 Tr., 97-98, Dec. 22, 2005 (Comr. Brown). While the Commission clearly recognizes the issue of impermissible bias in the Natural Gas Border Price Spike investigation, it appears to be ignoring it here, in the joint QF policy and pricing proceedings. This inconsistent approach does not conform to the Commission's decisions on the determination of improper bias.

PG&E and SCE, in fact, cite a decision in which the Commission sets forth the considerations for determining improper bias. The Commission's decision in Docket R.01-10-024 weighs whether a Commissioner has "prejudged" the issue or would he make his decision "based on evidence in the record."<sup>6</sup> In this current case, the Commission as one of the California Parties has already filed Dr. Fox-Penner's testimony. The Commission's commitment to Dr. Fox-Penner's credibility and expertise is already clearly established. The Commission's affinity has prejudged the issues of his expertise in this current case. The QF Parties submit that regardless of what evidence is presented in this proceeding, the Commission's commitment to Dr. Fox-Penner's credibility and expertise is already firmly established. This commitment biases the Commission's review of any such evidence.

On November 29, 2005, ALJ Halligan denied the QF Parties' Motion to Strike through a bench ruling. The entirety of the rationale for the ruling is as follows:

*We found no legal authority to strike it, and we believe that any vice that you think may be present in Mr. Fox-Penner's testimony can be explored on cross-examination, and we would expect you to do so.*

Transcript of November 29, 2005 Prehearing Conference at 380:6-10.

The ruling fails to see the point. The prejudice to the QF Parties' interests occurs due to the inherent conflict that is present when the Commission is placed in a position to have to evaluate the credibility of its own witness. This conflict cannot be cured through an opportunity to cross-examine Dr. Fox-Penner.

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<sup>6</sup> D.05-06-062, issued June 30, 2005, at p. 14.

Rule 65 of the Commission's Rules of Practice and Procedure allows a ruling to be reviewed by the Commission in extraordinary circumstances and where necessary to promote substantial justice. This is such a case. The QF Parties cannot be assured of an impartial administrative adjudication as long as PG&E and SCE are allowed to rely upon the testimony of Dr. Fox-Penner. The QF Parties therefore request interlocutory relief from the November 29, 2005 bench ruling and that the Commission grant their Motion to Strike.

### **III. CONCLUSION**

The Commission has a strong commitment to precluding bias or unfairness in its proceedings, or even the appearance thereof. This unusual situation is created because the Commission is sponsoring the testimony of an expert in one proceeding, while adjudicating that same witness's credibility and expertise in another. The Commission must be independent and objective in evaluating Dr. Fox-Penner's testimony, but that independence is threatened by the Commission's already-established support for his credibility and expertise. To eliminate the potential for prejudice, Dr. Fox-Penner's testimony should be stricken, and SCE and PG&E allowed time to submit replacement testimony from another witness.

For each and all of the foregoing reasons, the QF Parties respectfully request that the Commission grant this motion and request for shortened response time.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael Alcantar", with a long horizontal flourish extending to the right.

Michael Alcantar  
Donald Brookhyser

Counsel to the Cogeneration Association  
California

A handwritten signature in blue ink, appearing to read "Evelyn Kahl", with a long horizontal flourish extending to the right.

Evelyn Kahl  
Nora Sheriff  
Rod Aoki

Counsel to the Energy Producers  
And Users Coalition

Also on Behalf of the California  
Cogeneration Council, the  
Renewables Coalition, and the  
Independent Energy Producers  
Association

January 6, 2006

**ATTACHMENT A**

**PROPOSED ORDER**

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**(Proposed) Order**

For good cause shown, the Request for Shortened Response Time to the Motion of the QF Parties (California Cogeneration Council, the Renewables Coalition, the Independent Energy Producers Association, the Cogeneration Association of California, and the Energy Producers and Users Coalition) to strike is hereby granted. Responses must be filed before the Pre-Hearing Conference, Thursday, January 12, 2006.

Date: \_\_\_\_\_

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Administrative Law Judge