

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Public Utilities Commission of the
State of California

Docket No. EL10-64-000

**MOTION TO INTERVENE AND COMMENTS OF
THE SOLAR ALLIANCE,
THE INTERSTATE RENEWABLE ENERGY COUNCIL, THE SOLAR ENERGY
INDUSTRIES ASSOCIATION, THE CALIFORNIA SOLAR ENERGY INDUSTRIES
ASSOCIATION AND THE VOTE SOLAR INITIATIVE**

Pursuant to Rules 212 and 214 of the Federal Energy Regulatory Commission's (the "Commission" or "FERC") Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.214 (2009), and the Commission's Notice of Filing dated May 7, 2010, the Solar Alliance, the Interstate Renewable Energy Council (IREC), the Solar Energy Industries Association (SEIA), the California Solar Energy Industries Association (CalSEIA), and the Vote Solar Initiative (collectively the "Joint Movants") hereby move to intervene and submit comments in the above-captioned docket initiated by the California Public Utilities Commission (CPUC) on May 4, 2010 to obtain a declaratory order from the Commission holding that the CPUC's decisions promoting combined heat and power (CHP) systems of 20 MW or less are not preempted by the Federal Power Act (FPA), the Public Utility Regulatory Power Act (PURPA), or FERC implementing regulations.¹

In support of this motion, the Joint Movants state as follows:

¹ See Petition of the Public Utilities Commission of the State of California for Declaratory Order and for Exemption from Paying Filing Fees, EL10-64-000 (May 4, 2010) ("CPUC Petition).

I. COMMUNICATIONS

All communications, notices, pleadings, orders and other documents related to this proceeding should be addressed to the following individuals:

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II. DESCRIPTION OF MOVING PARTIES

A. The Solar Alliance

The Solar Alliance is a state-focused alliance of solar photovoltaic (PV) manufacturers, integrators, installers and financiers dedicated to accelerating the deployment of solar electric power in the United States.² The Solar Alliance's members have a strong interest in the adoption and implementation of policies and programs that will accelerate the movement toward a low-carbon economy and stimulate the development and use of zero-carbon, renewable energy technologies such as solar PV.

B. IREC

IREC is a non-profit organization that has worked for nearly three decades to accelerate the sustainable utilization of renewable energy resources through the development of programs and policies that reduce barriers to renewable energy deployment. With funding from the United States Department of Energy's Solar Energy Technologies Program, IREC has participated in workshops, proceedings and rulemakings before over thirty-five state public utility commissions during the past three years. IREC addresses topics that directly impact the development of renewable energy resources, including net metering rules and interconnection standards for distributed renewable generation technologies.

C. SEIA

Established in 1974, the Solar Energy Industries Association is the national trade association of the solar energy industry. SEIA works with its 1,000 members to make solar a mainstream and significant energy source by expanding markets, removing market barriers, strengthening the industry and educating the public on the benefits of solar energy. SEIA

represents solar companies across a variety of solar energy technologies, including photovoltaic, solar water heating and concentrating solar power. SEIA members include manufacturers, distributors, contractors, installers, financiers and developers of solar energy projects on both the wholesale and retail level.

D. CalSEIA

CalSEIA is a non-profit solar industry trade association founded in 1977. For more than 30 years, CalSEIA's mission has been to expand the market for all solar technologies in California. CalSEIA works to accomplish its mission through activities such as, but not limited to, education; state legislation; state, local, and utility regulations; and policy development. The membership of CalSEIA consists of more than 200 solar companies actively doing business in California, including manufacturers, contractors, distributors, designers, engineers, and educational organizations. The livelihoods of these companies rely upon the adoption and implementation of policies and programs that will foster and stimulate the widespread use of distributed renewable generation, such as solar photovoltaic and solar thermal.

E. The Vote Solar Initiative

Vote Solar is a non-profit, 501(c) (3) advocacy organization working to fight global warming and foster economic development by bring solar into the mainstream. Vote Solar works principally at the state level, helping to implement the suite of policies necessary to build robust, sustainable and long-term solar markets. Vote Solar was founded in 2002, and has about 50,000 members nationwide. Vote Solar's members represent citizens interested in reducing the country's reliance on fossil fuels and the benefits of fostering development of renewable energy resources.

III. MOTION TO INTERVENE

The Solar Alliance, on behalf of its constituents, has been actively involved in proceedings before the CPUC aimed at designing the terms and conditions, including applicable rates, of a feed-in tariff program for renewable electric generation. One aspect of a comprehensive feed-in tariff program is implementation of California Senate Bill 32 (SB 32)³ which requires California's investor owned utilities (IOUs) to purchase power from renewable generators whose capacity is less than 3 MW. Presently the CPUC will establish a rate for such purchases consistent with the requirements of SB 32. California's three IOUs are currently challenging the CPUC's authority to set such rate on grounds comparable to those as they have asserted for challenging the CPUC's implementation of California state statute AB 1613 at issue in this proceeding.⁴ FERC's decision in this proceeding may have precedential impact on the ability of the CPUC and other state commission's to set the appropriate rates for feed-in-tariffs. Therefore, the interest of the Solar Alliance may be directly affected by the outcome of this proceeding. The interests of the Solar Alliance are not adequately represented by any other party. Accordingly, the Solar Alliance's timely motion to intervene in this proceeding is in the public interest.

IREC assists state policymakers in implementing net metering policies. A key aspect of net metering policy is determining how to compensate customer-generators for generation that is in excess of what is needed to supply on-site needs. The CPUC is currently establishing a net metering excess generation rate for annual excess generation pursuant to requirements

organization, but not necessarily the views of any particular member with respect to any issue.

³ SB 32 was signed into law in October 2009. See http://leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sb_32_bill_20091011_chaptered.pdf

⁴ See Petition for Declaratory Order, Southern California Edison, *et al.*, at pp. 5-6, FERC Docket EL10-66-000 (filed May 11, 2010)

established in California Assembly Bill 920. IREC is an active participant in the CPUC proceeding to establish that rate. California IOUs have challenged the CPUC's authority to set a rate for excess generation in that proceeding on identical grounds as they raise for challenging the CPUC's implementation of the state statute at issue in this proceeding.⁵ FERC's decision in this proceeding may impact the ability of the CPUC and other state public utility commissions to set rates for net metered excess generation. As such, the interest of IREC may be directly affected by the outcome of this proceeding. The interests of IREC are not adequately represented by any other party. Accordingly, IREC's timely motion to intervene in this proceeding is in the public interest.

SEIA and its members have a vital interest in ensuring that the Commission's policies properly facilitate the deployment of solar energy nationwide. SEIA thus has a direct and substantial interest in the outcome of this proceeding that cannot be adequately represented by any other party. Therefore, SEIA's timely motion to intervene in this proceeding should be granted.

CalSEIA, on behalf of its membership, has been actively involved in the implementation of a feed-in tariff in California through legislation enacted by the California Legislature and implemented by the CPUC. CalSEIA's focus has been on supporting feed-in tariffs in order to increase distributed renewable generation in California. CalSEIA sponsored the previously mentioned SB 32 which authorizes the CPUC to implement a feed-in tariff for distributed renewable generation. Given the direct relationship between the Petition filed by the CPUC and the Petition filed by the three California IOUs regarding the CPUC's authority to set rates for wholesale transactions such as those contemplated under a feed-in tariff, the FERC's decision on

⁵ *Id.*

the CPUC's petition will have direct impact on CalSEIA's efforts to increase the use of distributed renewable generation in California. The interests of CalSEIA are not adequately represented by any other party. Accordingly, CalSEIA's timely motion to intervene in this proceeding is in the public interest.

Vote Solar has been, and continues to be, an active participant in numerous proceedings before regulatory bodies across the country in matters concerning the development of wholesale solar energy programs. Vote Solar is intervening in the CPUC's efforts to expand renewable wholesale power sales options and programs in Rulemakings 06-05-027 and 08-08-009.⁶ Vote Solar has made similar interventions in New York, Arizona, and Nevada. The FERC's decision in this proceeding will impact the ability of the CPUC and other state regulatory commissions to develop wholesale solar energy programs, and as such, the interests of Vote Solar and its members may be directly impacted. The interests of Vote Solar are not adequately represented by any other party. Accordingly, Vote Solar's timely motion to intervene in this proceeding is in the public interest.

IV. COMMENTS

A. The CPUC's Implementation of AB 1316 is Consistent with the Federal Power Act, PURPA, and FERC Regulations

In its petition, the CPUC seeks a declaratory order from the FERC finding that the CPUC decisions which promote CHP systems of 20 MW or less⁷ are not preempted by the FPA, PURPA or FERC regulations. Boiled down to its essence, the CPUC's request is for confirmation by the FERC that the rate set by the CPUC for the purchase of power generated by

⁶ <http://docs.cpuc.ca.gov/proceedings/R0605027.htm> and <http://docs.cpuc.ca.gov/proceedings/R0808009.htm>

⁷ CPUC Decision 09-12-042 and CPUC Decision 10-04-055

CHP systems by CPUC regulated electric utilities does not run afoul of the FERC's exclusive authority over wholesale rates under the FPA, but rather is within the powers reserved to the states under the FPA to regulate utilities providing distribution or retail sales services⁸ or in the alternative is within the state's authority under PURPA. As set forth in the CPUC Petition and as further elucidated below, the CPUC has acted within its state and federal statutorily prescribed ratemaking authority.

The state statute at issue is California's Assembly Bill (AB) 1613,⁹ the "Waste Heat and Carbon Emissions Reduction Act," which supports the utilization of excess waste heat through CHP systems for eligible customer-generators with a generating capacity of not more than 20 MW. The statute requires that every electrical corporation file with the CPUC a tariff for the purchase of excess electricity from eligible CHP systems. As set forth in the statute, such "tariff shall provide for payment for every kilowatt hour delivered to the electrical grid by the combined heat and power system at a *price determined by the [CPUC]*."¹⁰ The CPUC, however, is limited in its ratesetting ability by the statutory caveat that it "ensure that ratepayers not utilizing combined heat and power systems are held indifferent to the existence of this tariff."¹¹ As stated in the CPUC decision implementing AB 1613, "customer indifference is achieved when ratepayers not utilizing the CHP systems are no worse off, nor any better off, as a result of power purchased pursuant to AB 1613."¹² Customers can be held indifferent only if AB 1613-eligible CHP facilities are paid for the products they are providing at the price the utilities would

⁸ See 201(b) of the FPA, 16 U.S.C. § 824(b).

⁹ AB 1613 is codified as Cal. Pub. Util. Code §§ 2840, *et seq.* (Stats. 2007, ch. 713 § 1).

¹⁰ California Public Utilities Code Section 2841(b)(2) (emphasis added).

¹¹ California Public Utilities Code Section 2841 (b) (4).

¹² CPUC Decision 09-12-042, at p.16.

otherwise have had to pay for those products – i.e., avoided costs. Thus, by statutorily overlaying the customer indifference standard on the rate to be set, the California legislature ensured that the CPUC would not exceed its ratemaking authority under PURPA.¹³

B. The CHP Pricing Mechanism Reflects Utilities' Avoided Costs

As explained in detail in the CPUC's Petition,¹⁴ the State of California has recently enacted a series of new laws aimed at reducing greenhouse gas (GHG) emissions, including placing restrictions on long-term procurement choices (i.e., requiring contracts 5 years or longer) of the utilities. These laws and implementing regulations will result in the CPUC-regulated electric utilities not only entering into longer term contracts with facilities which contribute to the reduction in GHG, but also incurring higher environmental costs to comply with the new legislation.

Consequently, as explained by the CPUC,¹⁵ its previous determination regarding short-term avoided costs is not the appropriate avoided cost determination for the price that the utilities must offer for CHP systems under AB 1613. Specifically, because the CHP contracts will typically be 10-year contracts, the utilities would be avoiding a significant amount of environmental compliance costs, as well as the avoided costs associated with distribution and transmission upgrades when the CHP systems are located in congested transmission areas and

¹³ While this would require that the CHP systems obtain QF status, the highly efficient, thermally-balanced CHP projects that qualify under AB 1613 undoubtedly will meet the federal standards to be QFs. In addition, FERC has exempted small QFs such as these (20 MW or smaller) from the Federal Power Act. (*See* 18 CFR292.601(c)(1).)

¹⁴ CPUC Petition at pp. 21-22.

¹⁵ CPUC Petition at p. 36.

load pockets.¹⁶ Such avoided costs should be factored into the price which the utilities are required to pay the qualified CHP systems. Such is clearly consistent with FERC precedent. As explained by the FERC in *Southern California Edison Co.*:

Thus, in setting avoided cost rates, a state may only account for costs which actually would be incurred by utilities. A state may, through state action, influence what costs are incurred by the utility. Thus, accounting for environmental costs may be part of a state's approach to encouraging renewable generation. For example, a state may impose a tax or other charges on all generation produced by a particular fuel and thus increase the costs that would be incurred by utilities in building and operating plants that use that fuel. Conversely, a state may also subsidize certain types of generation, for instance wind, or other renewables, through, e.g., tax credits.¹⁷

AB 1613 contracts are available only to CHP systems that meet strict environmental compliance requirements.¹⁸ This will ensure that CHP facilities that receive AB 1613 pricing also display the supply characteristics necessary to deliver the avoided costs that are reflected in AB 1613 pricing. FERC's regulations allow states to set rates that "differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of different technologies."¹⁹ Therefore, the rate set by the CPUC for the purchase by CPUC regulated electric utilities of power from CHP systems complies with FERC's regulations and reflects all of the utilities' avoided costs over the life of the contracts. As such, the CPUC is within its ratesetting authority under PURPA.

¹⁶ Local load pockets are defined by physical transmission constraints. If the transfer capability into a load pocket is less than the load demand within the area, then, depending on reliability criteria, additional generation capacity within the load pocket will be needed to satisfy the load demand.

¹⁷ 71 FERC ¶ 61,269 (1995), 62,080.

¹⁸ CPUC Petition at pp. 3.

¹⁹ 18 C.F.R. § 292.304(c)(s)(ii).

V. CONCLUSION

For the reasons above stated, the Joint Movants respectfully request that the Commission grant their motion to intervene in this proceeding and grant the CPUC's request for a declaratory order that the CPUC's orders regarding the implementation of AB 1613 are not preempted.

Respectfully submitted on behalf of the
Joint Movants,

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