LEXSEE 71 F.E.R.C. 61269,AT 62080

Southern California Edison Company San Diego Gas & Electric Company

Docket No. EL95-16-001, Docket No. EL95-19-001

FEDERAL ENERGY REGULATORY COMMISSION - COMMISSION

71 F.E.R.C. P61,269; 1995 FERC LEXIS 1061

June 2, 1995

ACTION:
[1]** ORDER ON REQUESTS FOR RECONSIDERATION

JUDGES: Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

OPINION:
[*62,075]

Introduction

On February 23, 1995, the Commission issued an order responding to separate petitions for enforcement under section 210(h) of the Public Utility Regulatory Policies Act of 1978 (PURPA), *16 U.S.C. § 824a-3(h)*, filed by Southern California Edison Company (Edison) and by San Diego Gas & Electric Company (San Diego). See *Southern California Edison Company and San Diego Gas & Electric Company, 70 FERC P61,215 (1995).* Both utilities challenged orders of the California Public Utilities Commission (California Commission) which they alleged required the utilities to purchase significant amounts of unneeded qualifying facility (QF) capacity at prices far in excess of their avoided costs. The Commission found that the California Commission's process of determining avoided costs did not comply with PURPA. The Commission concluded that because the California Commission procedure was unlawful under PURPA, Edison and San Diego could not lawfully **[**2]** be compelled to enter into purchase contracts resulting from that procedure.

As explained below, we will deny reconsideration of our view, articulated in the February 23 order in this proceeding, that the California Commission, by failing to consider all sources of generation capacity in determining the avoided cost of the purchasing utilities, violated the directives of section 210 of PURPA and this Commission's implementing regulations. In response to requests for additional guidance from the parties, we also clarify briefly our views on the scope of state authority, both within and outside the confines of PURPA, to make resource planning decisions and to encourage renewable or alternative sources of generation.

Background

The California Program

As we explained in our February 23 order, the California Commission's Biennial Resource Plan Update (BRPU) was intended to implement this Commission's rules governing the purchase by electric utilities of electricity from QFs. The BRPU was conducted in three stages. First, following the latest projections of energy and capacity needs of California utilities (Edison, San Diego, and Pacific Gas and Electric Company (PG&E)) **[**3]** made by the California Energy Commission (CEC), the utilities filed a resource plan identifying potential resource additions. The California Commission examined these plans and determined what new resources the utilities would add. Second, after the utilities supplied certain data, the California Commission determined the utilities' assumed costs, known as "benchmark prices," for these resource additions, and determined which of the additions could be avoided. Third, QFs were then allowed to bid against the utilities' benchmark prices for each of the avoided resources. The winning bidders were paid the price bid by the second lowest bidder with respect to each avoided resource. (This procedure is referred to as a second-price auction.) Certain winning bidders received additional payments to reflect the assumed value to society of reduced air emissions.

Based on the CEC's 1990 electricity report, the California Commission concluded in 1992 that Edison would construct 624 MW of new generation from 1997 to 1999 as follows: two new geothermal plants, one wind farm, and the repowering of an existing steam plant. Invoking the same procedure, the California Commission adopted a resource **[**4]** plan specifying four resources for San Diego: 100 MW of geothermal to come on line in 1997, 100 MW of geothermal to come on line in 1998, and 273 MW from the repowering of a two-unit plant. The California Commission also estimated Edison's and San Diego's costs for construction of each of the identified projects, which were given the name "Identified Deferrable Resources" (IDRs). n1

n1

In this regard, Edison and San Diego argued that even though the estimated costs were many times larger than the capital costs of constructing new gas-fired turbines, the California Commission concluded that the IDRs were economic by imputing massive environmental compliance costs to the alternative, gas-fired resources.

The California utilities subsequently solicited bids for the designated new capacity, broken down into separate IDRs. Only QFs were allowed to bid, despite the utilities' request that non-QFs be permitted to participate. The California Commission, in implementing a California statute, required **[**5]** that half of the capacity for certain of the IDRs be reserved solely for renewable bidders. The solicitation produced bids lower than the IDR benchmarks. According to Edison and San Diego, because of the set-aside requirement for renewable resources, and the fragmentation of capacity into separate blocks, they could not simply take the least-costly bids sufficient to meet their needs.

The February 23 Order

As explained in the February 23 order, Edison and San Diego challenged the California BRPU program as, allegedly, requiring them to sign long-term, fixed-priced contracts with QFs to purchase significant amounts of unneeded QF capacity at prices far in excess of their avoided costs. They argued that this directive was in violation of PURPA and this **[*62,076]** Commission's implementing regulations. The California Commission responded that the two utilities challenged only a small part of a complex and comprehensive resource plan that was entirely within its purview under PURPA.

In the February 23 order, the Commission found that the California program violated PURPA and the Commission's implementing regulations. The Commission reasoned that sections 210(b) and 210(d) of **[**6]** PURPA n2 require that any determination of avoided cost must take into account all potential sources of capacity, and that the California program improperly limited itself to only certain sellers (QFs). Without deciding the matter, the Commission also expressed serious concern as to the need of the California utilities for additional capacity and the staleness of the data upon which the California Commission relied in finding a need for capacity.

n2

Section 210(b) of PURPA explicitly provides that no Commission rule on QF rates "shall provide for a rate which exceeds the incremental cost to the electric utility of alternative energy." *16 U.S.C. § 824a-3(b)* (1988). The "incremental cost of alternative electric energy" is defined in section 210(d) of PURPA as "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." *16 U.S.C. § 824a-3(d)* (1988).

The Commission's regulations, tracking the statutory language, in turn expressly provide that QF rates must "be just and reasonable to the electric consumers of the electric utility" and that "nothing in [the Commission's regulations] requires any electric utility to pay more than the avoided cost for purchases." *18 C.F.R. § 292.304(a)(1)*-(2) (1994). The Commission's regulations define "avoided costs" as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." *18 C.F.R. § 292.101(b)(6) (1994)*.

[7]**

The Commission nevertheless acknowledged (70 FERC at p. 61,676) California's ability to favor particular generation technologies. The Commission noted that resource planning and resource decisions remain the prerogative of state commissions and that states may wish to diversify their generation mix to meet environmental goals in a variety of ways. It stated that its decision does not, for example, preclude the possibility that, in setting an avoided cost rate, a state may account for environmental costs of all fuel sources included in an all-source determination of avoided cost. The Commission emphasized that its decision "simply makes clear that states can pursue policy choices concerning particular generation technologies consistent with the requirements of PURPA and the Commission's regulations, so long as such action does not result in rates above avoided cost." Id.

Requests for Reconsideration

On March 23, 1995, Oxbow Power Corporation filed a request for rehearing of the Commission's February 23 order. On March 24, 1995, Niagara Mohawk Power Corporation, the Electric Generation Association, and American Wind Energy Association and Zond Systems, Inc. filed requests **[**8]** for "rehearing" of the Commission's February 23, 1995 order. On March 24, 1995, AES Pacific, Inc. filed a motion to intervene out-of-time in this proceeding and a motion for clarification or, in the alternative, for "rehearing" of the Commission's February 23 order. On March 27, 1995, as revised on April 3, 1995, the California Commission filed a request for "rehearing" of the Commission's February 23 order. On March 27, 1995, the National Association of Regulatory Utility Commissioners, the National Independent Energy Producers, and Pacific Gas and Electric Company filed requests for "rehearing" of the Commission's February 23 order. On March 27, 1995, Air Products and Chemicals, Inc., the Independent Energy Producers Association (IEP), Magma Power Company (Magma), and U.S. Generating Company and Fellows Generating Company, L.P. filed requests for "rehearing" or reconsideration of the Commission's February 23 order. On March 27, 1995, Seawest Energy Corporation filed a request for clarification or "rehearing" of the Commission's February 23 order. On March 27, 1995, San Diego filed a request for clarification of the Commission's February 23 order, and Edison filed a notice in support **[**9]** of Edison's filing. On March 27, 1995, the Pennsylvania Public Utility Commission and, separately, the Innes Avenue Coalition and the Morgan Heights Homeowners Association (which state that they are neighborhood associations located in San Francisco, California) filed motions for late intervention in this proceeding.

On April 10, 1995, Congressman Edward J. Markey filed a letter commenting on the Commission's February 23 order and raising issues regarding the future of federal-state relations concerning state resource planning decisions.

On April 11, 1995, Edison, San Diego, and Magma filed responses to the pleadings earlier filed in this proceeding in response to the Commission's February 23 order.

On April 12, 1995, the Commission, having concluded that formal rehearing does not lie, either on a mandatory or a discretionary basis, in cases that involve solely PURPA section 210 issues, issued a notice in this proceeding. The **[*62,077]** notice stated that while many of the parties in the instant proceeding have styled their pleadings as requests for rehearing, the Commission will treat them as requests for reconsideration and will address the issues raised by the various parties' **[**10]** pleadings, including the requests for clarification and motions to intervene out-of-time, at a later time. See *Southern California Edison Company and San Diego Gas & Electric Company, 71 FERC P61,090 (1995).*

Discussion

As an initial matter, we find good cause to grant all of the motions to intervene out-of-time in the proceedings in Docket Nos. EL95-16-000 and EL95-19-000, and we will consider all pleadings filed in light of the interests the parties raise and in order to complete all of the arguments of the parties.

The arguments raised on reconsideration fall into three general categories: first, that the Commission lacks jurisdiction to issue a substantive order on a petition for enforcement; second, that the Commission was in error when it concluded that the California process improperly determined avoided costs; and third, that the Commission's decision improperly intrudes into what are properly state decisions regarding utility resource planning. We address each of these general concerns below.

1. Jurisdiction

A number of parties argue, with varying degrees of complexity and support, that the Commission entirely lacked jurisdiction to review **[**11]** the California QF program. IEP, in particular, argues strongly that there were no PURPA implementation issues to be resolved because the California Commission did include all sources of generation capacity in its determination of the utilities' avoided costs, that its implementation of this Commission's rules was consistent with PURPA, and that the principal issue raised by the utilities is whether the California Commission's methodology for reviewing all sources was the most effective way to consider all sources.

As explained in the February 23 order and as explained further below, the ultimate method of determining price for California QF power was in the auction process following administrative determination of the IDR benchmarks. The auction process did not include all sources of power and, as Edison and San Diego continue to explain in their answers to the requests for reconsideration, did not allow for the selection of the lowest cost bidders. We conclude that the utilities did in fact raise an implementation issue that this Commission has authority to address.

The California Commission, IEP, EGA, and others also argue that the February 23 order is of no legal or binding effect **[**12]** because section 210(h)(2) of PURPA provides no authority for the Commission to make a final determination as to whether the California Commission violated PURPA. They argue that PURPA only gives the Commission the authority to bring an action in federal district court against state agencies for violation of PURPA section 210(f) (state implementation) and the prosecutorial discretion to choose whether to do so on the complaint of a person aggrieved by the actions of a state regulatory authority.

We have no need to opine further at this time as to the scope of the February 23 order's effect, other than to reiterate our belief that the California procedure violates PURPA and our implementing regulations because of its failure to account for all sources of capacity. As we explained in the February 23 order, the legal status and ultimate fate of the California program rests in the first instance with the California Commission and the parties themselves. Significantly, the Commission decided not to institute a judicial action to enforce the appropriate implementation of PURPA's avoided cost limitation; instead, we encouraged (70 FERC at pp. 61,677-78) the California Commission to **[**13]** stay the effectiveness of its program before the date of contract execution by Edison and San Diego, and encouraged the utilities and QFs to reach a settlement that would be consistent with PURPA.

Further, we do not share the views of IEP and others that we are without authority to do anything other than to decide without elaboration whether to institute or not to institute an enforcement action under the procedures of section 210(h) of PURPA. These procedures (see *16 U.S.C. § 824a-3(h)(2)(A)*-(B)) create an enforcement scheme by which either the Commission or a private party may act to compel a state regulatory authority to comply with PURPA. The Commission can initiate an enforcement action in federal district court either upon its own motion or upon the petition of private party. If the Commission does not initiate an enforcement action within 60 days of such a petition, as here, then the petitioning party may do so.

However, these statutory procedures nowhere state (or imply) that the Commission is without authority to explain its decision whether or not to initiate an enforcement action. We disagree strenuously with the argument that, generally, we **[**14]** have no ability to explain our decision and, specifically, to respond to arguments that implicate the complementary responsibilities of the Commission and state authorities in implementing section 210 of PURPA. Any uncertainty in this regard was resolved by a recent decision of the D.C. Circuit **[*62,078]** issued after issuance of the February 23 order. See Industrial Cogenerators v. FERC, No. 93-1372 (D.C. Cir. March 7, 1995). In Industrial Cogenerators, the court, after reviewing the particular judicial review and enforcement provisions of PURPA section 210(h), characterized a Commission order explaining its reason not to initiate an enforcement action, and providing additional explication of the Commission's position, as having the effect of a declaratory order which does not fix the rights of the parties, but merely advises the parties of the Commission's position. The court did not determine that the Commission's articulation of its "pre-enforcement position" was inappropriate, but only that it could not be reviewed in the first instance without prior recourse to a federal district court.

2. The California Process

The California Commission, as well as others, suggest **[**15]** that this Commission did not understand the California process when it found that the California method of determining avoided costs did not comply with PURPA because it excluded potential sources of capacity from which the utilities could purchase. The California Commission explains that its determination of the benchmark price, against which the QFs bid, was its determination of avoided costs. The California Commission states that it took all sources of capacity into account in determining the benchmark price. The California Commission further explains that the subsequent bidding process was used not to set avoided cost, but to allocate the contracts where available capacity exceeds the amount of capacity deemed deferrable by the utility. In order to obtain a contract, the QFs had to meet or beat the benchmark price. The California Commission explains (Rehearing at p. 7) that "in order to minimize 'gaming' of bids and to assure that the ultimate prices paid closely reflect the actual cost of the capacity included in the approved resource plan, the [California Commission] determined it appropriate to require that winning QFs be paid the price bid by the lowest losing bidder." **[**16]**

Contrary to the California Commission's argument, the benchmark, by itself, was not a determination of avoided cost as defined by PURPA. The benchmark considered only the purchasing utility's cost of generating energy but did not take into account fully what it would cost to purchase such energy from another source, as required by PURPA's definition of avoided (incremental) cost. While the benchmark process may have taken all technological sources into account, it did not consider all types of sellers (QFs, IPPs, IOUs, etc.).

We recognize that the California Commission orders purport to consider all sources, both all technological sources and all types of sellers. However, the California Commission required that any purchased power resource claimed in a utility resource plan be shown to be available for the relevant period and at a price attributed to it by the purchasing utility. n3 The California utilities have claimed, with considerable validity, that in order to demonstrate that a non-QF purchase option was indeed available, it would be necessary to negotiate with potential non-QF sellers as to price and terms, and that non-QF suppliers would not, in reality, negotiate seriously **[**17]** if the resulting "sale" would simply result in a benchmark price to be used as a target for QF bidders. n4 Indeed, under the California Commission process, the California Commission assumed that non-QFs would not be willing to compete vigorously for the California market. n5 Thus, the California Commission, in setting the benchmark price, may have provided for consideration of purchases from all available sources in theory, but in fact did not provide for consideration of all types of sellers.

n3

See, e.g., D.90-03-060, slip op. at p. 104.

n4

See San Diego Petition for Enforcement at pp. 7-8.

n5

See D.86-07-004, slip op. at p. 86.

Moreover, based on the California Commission's own description of the BRPU process, it is clear that the auction was used not only to allocate contracts, but also was used to set the price for the power. However, this process, too, failed to take into account all potential sellers as required by PURPA.

On these facts, it was the **[**18]** combination of the benchmark determination and the auction that set the purchasing utilities' avoided cost rate, and we cannot conclude that they took into account, either alone or in combination, all sources, i.e., all technologies and all potential types of sellers (QFs and non-QFs). Whether a benchmark process alone, a bidding process alone, or a combination benchmark-bidding process is used to establish the actual price paid for QF power, it must take into account all sources, i.e., all technologies and all types of sellers.

All but one of the California Commission's remaining arguments have been thoroughly addressed in other portions of this order or in the February 23 order. Thus, we have no reason to respond further to the California Commission's arguments on reconsideration that: if bidding is used to establish avoided cost, PURPA does not require all source bidding; the California process is in full compliance with the Commission's PURPA regulations; the February 23 **[*62,079]** order amounts to a new policy which should not have been established on a case-by-case basis and should have been given prospective effect only; and the February 23 order unlawfully prevents consideration **[**19]** of renewable resources.

We continue only with respect to the California Commission's argument that the enforcement petitions were filed too late for Commission consideration and are thus barred by the equitable doctrine of laches. We recognize that the Edison and San Diego petitions were filed many years into the California BRPU process, and that the California Commission has, to date, expended considerable time and effort over the years in conducting this ongoing process. But we reject any suggestion that we are, on our own initiative, belatedly and unnecessarily upsetting this process, or are somehow foreclosed from considering the petitions for enforcement simply by virtue of the date of their filing.

The California Commission made modifications to the original California implementation plan, as reflected in the BRPU process, that implicate the incremental/avoided cost cap on utility PURPA rates in sections 210(b) and 210(d) of PURPA. The California utilities filed their enforcement petitions with this Commission (in January, 1995) only after the BRPU orders they challenge became final, when the California Commission issued its order on rehearing in the BRPU proceeding in December, **[**20]** 1994. Thus, the California utilities sought redress before this Commission only after exhausting their administrative remedies in California. It would be totally inappropriate for us to intercede in an ongoing state proceeding on the speculation that the state might violate PURPA. In these circumstances, the Commission appropriately exercised its statutory responsibility to respond to Edison's and San Diego's enforcement petitions and to evaluate whether the state implementation process violates the PURPA requirement that purchase rates do not exceed the incremental/avoided cost of the purchasing utilities.

While the California Commission chastises Edison and San Diego for the lateness of their filings, the utilities filed with this Commission before the date they otherwise would have been compelled to execute purchase contracts with the winning bidders in the BRPU process. As the Commission has explained in recent orders, issued after the date of the February 23 order, it does not intend to entertain belated challenges to executed PURPA purchase contracts and is extremely reluctant to upset the settled expectations of parties to, and to invalidate any of their obligations and **[**21]** responsibilities under, executed PURPA purchase contracts. n6 Here, however, the expectations of the parties had not yet been settled in signed contracts codifying Edison's and San Diego's purchase obligations, and the challenge to the California Commission's orders was timely.

n6

See *New York State Electric & Gas Corporation, 71 FERC P61,027 (1995);* West Penn Power Company, 71 FERC P ____ (1995).

3. Guidance

A significant concern expressed by a number of parties on reconsideration is that while the Commission acknowledged states' general authority concerning resource planning and resource decisions (70 FERC at p. 61,676), the Commission did not provide adequate guidance as to how states can implement resource planning decisions in light of the February 23 order. They argue that the California BRPU was a comprehensive program intended both to implement PURPA and to implement state policies concerning resource planning and allocation. A number of issues have been **[**22]** raised concerning how states can encourage renewable and other alternative resources, as California is obligated to do under state law (see sections 701.1, 701.3, and 701.4 of the California code) through set-asides for renewable generation.

In the February 23 order, we noted that the issues raised in this proceeding arise against a background of a utility industry that has changed greatly since enactment of PURPA in 1978, in part as a result of the implementation of PURPA. PURPA was enacted in an era of rapidly rising fossil fuel prices; because natural gas and oil were thought to be in short supply, a principal goal of PURPA was to reduce reliance on fossil fuel sources. In fact, the Fuel Use Act, which was passed concurrently with PURPA, but which subsequently was repealed, prohibited the construction of new gas-fired generating plants.

With PURPA, Congress was seeking to diversify the Nation's generation fuel mix and promote more efficient use of fossil fuels when they were used for generation by encouraging renewable technologies and cogeneration, in order to cushion against further price shock and reduce dependence on fossil fuels. In promoting greater fuel diversity, however, **[**23]** Congress was not asking utilities and utility ratepayers to pay more than they otherwise would have paid for power. As we explained in the February 23 order, PURPA requires an electric utility to purchase power from a QF, but only if the QF sells at a price no higher than the cost the utility would have incurred for the power if it had not purchased the QF's energy and/or capacity, **[*62,080]** i.e. would have generated itself or purchased from another source. The intention was to make ratepayers indifferent as to whether the utility used more traditional sources of power or the newly-encouraged alternatives.

In the February 23 order, we found that PURPA literally means that in calculating avoided cost rates for QF power, state authorities must determine the cost the utility avoids by considering the cost of all alternative sources of power available to the utility, not just the cost of a select group of resources. Many have commented in this proceeding that this determination will make it impossible for states to achieve resource diversity, environmental goals or resource planning objectives because they no longer will be able to use PURPA to encourage renewable generation.

The **[**24]** Commission believes that states have numerous ways outside of PURPA to encourage renewable resources. As a general matter, states have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction. States may, for example, order utilities to build renewable generators themselves, or deny certification of other types of facilities if state law so permits. They also, assuming state law permits, may order utilities to purchase renewable generation.

In this regard, we note that renewable generators do not have to be QFs. Also they can apply for exempt wholesale generator (EWG) status under the Energy Policy Act of 1992 -- in fact, many QFs have done so already. See, e.g., *Richmond Power Enterprise, L.P., 62 FERC P61,157 (1993).* Their rates for wholesale sales in interstate commerce will be considered by the Commission on a cost-of-service or market basis.

States also may seek to encourage renewable or other types of resources through their tax structure, or by giving direct subsidies. Use of the tax structure may allow states to affect the price of renewables or other alternatives. By imposing a tax on fossil generators **[**25]** or by giving a tax incentive to alternative generation, states may allow the alternative generation to be more competitive in a cost comparison with fossil-fueled generation.

In our recent decision on an Illinois statute, we found that a rate for QF power under PURPA that would have been above avoided cost, but for the tax incentive provided by the state to the purchasing electric utility, was consistent with PURPA. *CGE Fulton, L.L.C., (Fulton) 70 FERC P61,290,* reconsideration denied, 71 FERC P , (1995). The tax credit in Illinois is a "dollar-for-dollar tax credit, calculated and credited to the utility on a month-by-month basis, that equals the amount by which rates . . . exceed the utility's avoided cost." Id. at p. 61,843.

Further, in our February 23 decision, we stated that "our decision today does not, for example, preclude the possibility that, in setting an avoided cost rate, a state may account for environmental costs of all fuel sources included in an all source determination of avoided cost." 70 FERC at p. 61,676. This means that environmental costs, if they are real costs that would be incurred by utilities, may be accounted for in a determination **[**26]** of avoided cost rates. Under section 210(b) of PURPA, "no rule . . . shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." (emphasis added). 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 charge on all generation produced by a particular fuel, and thus increase the costs which 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.

A state, however, may not set avoided cost rates or otherwise adjust the bids of potential suppliers by imposing environmental adders or subtractors that are not based on real costs that would be incurred by utilities. Such practices would result in rates which exceed the incremental cost to the electric utility and are **[**27]** prohibited by PURPA.

These are some ways in which states may encourage renewable resources and achieve planning goals. Others are possible. We do not here intend to give a definitive prescription for ways in which states may pursue these goals, but merely to reaffirm our conviction that such pursuit is not only possible but a reality. *Fulton, supra.*

In conclusion, we find that the arguments on reconsideration warrant no change to our February 23 order. While the California Commission must include all sources in determining avoided cost rates, either administratively, through an auction, or a process that combines both, there are means, both through PURPA and under more general state authority, to attain state goals of encouraging renewable and alternative technologies in generation.

The Commission orders:

(A) All motions to intervene out-of-time in this proceeding are hereby granted. **[*62,081]**

(B) Reconsideration of the February 23 order is hereby granted to the extent and denied to the extent discussed in the body of this order.

By the Commission. Commissioner Massey concurred in part and dissented in part with a separate statement attached.

CONCUR BY:
MASSEY

CONCUR:
[28]**

William L. MASSEY, Commissioner, concurring in part and dissenting in part:

I agree with the conclusion of today's order that the California BRPU process violated PURPA's avoided cost cap. The bidding phase of the California proceeding excluded non-QFs; the benchmark phase, while nominally open to purchases of non-QF power, in effect discouraged reliance on non-QF power. Thus, the avoided cost determination did not fairly consider non-QF sources of power.

I also agree with the order's guidance to states on how to promote renewable resources and implement other state policies outside of PURPA. n7 As I said in my concurrence to the initial order in this proceeding:

n7

Order, slip op. at p. 11-12.

> Our order in no way affects the authority of states to adopt and implement power supply policies outside of PURPA. Our order today construes only the requirements of PURPA, and does not (indeed, could not) purport to limit the authority of states beyond the context of PURPA. Our order says **[**29]** only that states cannot act under PURPA to require utilities to pay more than their avoided costs. [n8]

n8 *Southern California Edison Company and San Diego Gas & Electric Company, 70 FERC 61,215, at p. 61,679 (1995).*

But, I am not yet confident that today's order is right with respect to the guidance it offers to states on considering environmental factors, and by implication other non-price factors, under PURPA. The order states that environmental costs may be considered in an avoided cost determination only if they are real costs actually incurred by a utility, instead of so-called environmental adders or subtractors. n3 I agree that states should not have unlimited discretion to take into account environmental issues under PURPA. But I believe the majority's order on this issue, if strictly construed, may wrongly prevent consideration in the avoided cost determination of a range of non-price factors, factors that are important but very difficult to assign a dollar value to.

n3

Order, slip op. at p. 12.

[30]**

For example, if the only costs cognizable under PURPA are quantifiable costs actually incurred by the utility, how would the PURPA process reflect the value of fuel diversity? If a utility today owns only gas-fired generation and places a high value on diversifying its fuel mix by making its next capacity addition something other than gas-fired, does today's order require the avoided cost determination nonetheless to include gas-fired generation? If so, would PURPA prohibit even cost adders to the gas bids to reflect the lower relative value to the utility of gas-fired generation? Did Congress really intend in 1978 to limit the determination of avoided costs to a strict price comparison regardless of whether certain power sources meet the utility's needs or how far they deviate from the utility's needs? The majority's order moves perilously close to a rule that PURPA requires selection of the cheapest power regardless of the value of fuel diversity. I hope the order would not be construed this way, but it is unclear.

As another example, I fear that today's order also may eliminate from recognition under PURPA the dispatchability of capacity additions. If a utility wants its next **[**31]** capacity addition to be highly dispatchable, how would the avoided cost determination reflect this value? What about minimum load, ramp rate, startup costs, forced outage rate, plant location, or the developer's experience and track record? Each of these factors is relevant to the utility planning process but may be hard to quantify into actual, comparable costs. In other words, these factors are valuable in the context of a rational planning process, but very difficult to reduce to a specific dollar value.

Perhaps today's order would allow exclusion from the avoided cost determination of potential sources of power that do not meet pre-established criteria on these factors. For example, perhaps the avoided cost process could exclude all units with projected forced outage rates exceeding ten percent. This interpretation assumes, however, that each of these non-price factors can be reduced to a specific threshold of acceptability and that the cheapest power meeting each of these thresholds is the utility's appropriate "alternative energy" under section 210(b) of PURPA. n4 That may not be a rational process. For example, if the cheapest power barely meeting the pre-established criteria **[**32]** is three cents/kWh and the next cheapest power costs a mill more but is far and away better on the non-price factors, would a utility really choose the three cent power? And did Congress really intend the avoided cost determination to be driven by the cheapest, minimally acceptable piece of generation on the market, instead of the balancing process inherent in rational planning? I do not think so.

n4

16 U.S.C. § 824a-3(b) (1988).

[*62,082]

As I indicated in my prior concurrence in this proceeding, this Commission itself has acknowledged the need to consider non-price factors under PURPA. The Commission has said that the terms and conditions for electricity production and delivery cannot be described by a single facet of the sale such as price; that Congress was aware that many attributes must be considered in determining the value of purchases from QFs; and that there are severe drawbacks to focusing solely on price in making an avoided cost determination because **[**33]** of the multiple attributes of electricity. n5

n5

Regulations Governing Bidding Programs, IV FERC Stats. and Regs. para. 32,455 at pp. 32,034, 32,040 (1988), terminated, *64 FERC para. 61,364 (1993).*

Obviously, the wholesale competition FERC is encouraging is changing the way we look at PURPA. Nevertheless, these issues warrant much fuller consideration and discussion than the approach the majority takes today. Until a few months ago, FERC's approach to state processes under PURPA was hands off. Now, it is hands on. But the state and utility planning processes are complex, and I am convinced that our orders do not show that we appreciate this complexity. Congress in 1978 chose to promote more efficient fuel use and greater reliance on alternative energy. Before we adopt the view that may be implied in today's order, that price is the only relevant factor and that the cost of all considerations must be quantifiable, we should initiate a generic rulemaking and elicit input from all **[**34]** of the affected interests.

In the past week, the Commission has received two petitions for rulemakings on PURPA-related issues, one from the Edison Electric Institute and the other from the PURPA Reform Group. n6 I take no position today on whether those petitions adequately define the appropriate scope of any rulemaking we may conduct on PURPA, or on the merits of the positions advocated in those petitions. But, I do concur in their fundamental premise that the time has come for a broad-based rulemaking reevaluating PURPA in light of the increased competition in the industry since PURPA was initially enacted, and providing guidance to the states and utilities on how to implement PURPA's requirements. PURPA is the law of the land. Unless and until Congress repeals PURPA, this Commission will have to make these decisions, through either a forward-looking rulemaking or after-the-fact reviews of state decisions already made. I would strongly prefer the former instead of the latter.

n6

Docket Nos. RM95-14-000 and RM95-15-000.

[35]**

William L. Massey

Commissioner

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsU.S. Federal Energy Regulatory CommissionGeneral OverviewEnergy & Utilities LawPurchase ContractsPrice TermsEnergy & Utilities LawUtility CompaniesOwnership &

Restructuring