

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

Order Instituting Rulemaking to Establish Policies and  
Cost Recovery Mechanisms for Generation Procurement  
and Renewable Resource Development.

Rulemaking 01-10-024  
(Filed October 25, 2001)

**RESPONSE OF THE INDEPENDENT ENERGY  
PRODUCERS ASSOCIATION TO PROTECT OUR  
COMMUNITIES' PETITION FOR MODIFICATION OF  
DECISION 06-09-021**

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The Petition for Modification of Decision (D.) 06-09-021 (Petition),<sup>1</sup> filed by the Protect Our Communities Foundation (POC) on November 13, 2018, asks the Commission to reach back over a decade to modify a 2006 decision in order to “remove any future contingent Commission authorization” for the exercise of options that were part of a power purchase agreement (PPA), negotiated by San Diego Gas & Electric (SDG&E) and Calpine Corporation (Calpine), that was approved by the Commission in D.06-09-021.<sup>2</sup> The Petition, if granted, would undermine the financial integrity of an existing, Commission-approved contract by altering the balance of risks and rewards agreed to by the contract parties and reflected in the contract, in order to effect POC-preferred outcomes. To achieve these outcomes, the Petition seeks to create an unjustified exception to Rule 16.4 of the Commission’s Rules of Practice and Procedure, which governs petitions for modification. Moreover, the Petition misreads state law governing procurement that

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<sup>1</sup> Although the title of the Petition refers only to D.06-09-021, the Petition also asks the Commission to modify D.06-02-031. Petition, p. 1.

<sup>2</sup> Petition, p. 1.

is undertaken under the auspices of the Commission. The Independent Energy Producers Association (IEP) addresses each of these points more fully below.

## **I. BACKGROUND**

The Petition concerns a PPA entered into by SDG&E and a subsidiary of Calpine<sup>3</sup> for the output of the Otay Mesa Energy Center. The Commission originally approved the PPA in D.04-06-011, after evidentiary hearings. In response to applications for rehearing of D.04-06-011, the Commission granted rehearing, held further evidentiary hearings, and re-approved the PPA in D.06-02-031.

In 2006, SDG&E and Calpine agreed to modify the terms of the PPA to include options that, if exercised, would result in SDG&E acquiring ownership of the Otay Mesa plant at the end of the PPA's ten-year term, either at Calpine's discretion (the Put Option) or at SDG&E's discretion (the Call Option). The terms of the Put Option provided that there would be no additional Commission review or approval required before Calpine exercised the option.

SDG&E presented the modified PPA to other interested parties and eventually negotiated a settlement. SDG&E then filed a petition for modification of D.04-06-011, seeking approval of the settlement agreement and the negotiated options. The Commission approved the settlement and the Put and Call Options in D.06-09-021.

In 2018, SDG&E chose not to exercise its Call Option, which has since expired. Calpine must notify SDG&E no later than April 1, 2019, if it intends to exercise the Put Option. In discussions in anticipation of this deadline, Calpine and SDG&E have come to an agreement under which the Otay Mesa facility would deliver necessary Resource Adequacy (RA) attributes to SDG&E for a term of 59 months, starting in October 2019. In exchange, Calpine will

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<sup>3</sup> For simplicity, IEP will use "Calpine" to refer both to Calpine Corporation and its Otay Mesa subsidiary.

relinquish its Put Option, which if exercised would require SDG&E to purchase the Otay Mesa plant. SDG&E has filed Advice Letter (AL) 3294-E seeking the Commission's approval of this agreement. If approved, AL 3294-E would also result in Calpine relinquishing its Put Option.

**II. THE PETITION SEEKS TO UNDERMINE THE PPA BY ALTERING THE PARTIES' NEGOTIATED BALANCE OF RISKS AND REWARDS**

The Petition makes the implausible claim that Calpine and SDG&E will not be prejudiced if the Commission steps in to alter the terms of the PPA.<sup>4</sup> POC, which is not a party to the PPA, appears to assume that because SDG&E's Call Option has expired and the parties have come to an agreement (which is contingent on the Commission's approval) that would result in the relinquishment of Calpine's Put Option, the options have no value. But the options were negotiated as one component of the overall value of the PPA. Eliminating the options, as POC proposes, upsets the balance of risks and rewards mutually agreed to by the parties. POC fails to understand that whether an option is exercised or not, the *potential* for a future action represented by an option has considerable value that is part of the balance of risks and rewards that the parties negotiate and ultimately agree to. Altering any element of that delicate balance results in a reallocation of risks and rewards that the parties did not intend.

Contrary to what POC alleges in the Petition, the parties to the contract will undeniably be prejudiced if the Commission acceded to POC's request to alter the terms of the PPA.

**III. THE PETITION UNDERMINES THE COMMISSION'S POLICY OF RESPECTING THE TERMS OF APPROVED CONTRACTS**

The Petition goes to great lengths to establish the principle codified in Public Utilities Codes section 1708, that the Commission may modify the decisions of earlier Commissions; thus, the Commission is not bound by the acts of earlier Commissions. But the proper question is not *can* the Commission modify an earlier decision; rather, the question is whether the

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<sup>4</sup> Petition, p. 31.

Commission *should* modify a decision of an earlier Commission. For good reasons, the Commission proceeds very carefully when it is asked to modify decisions that affect contracts and the rights of contract parties.

In particular, PPAs like the Otay Mesa agreement are the basis for attracting capital to build the facilities needed to meet California's energy and environmental goals. Billions of dollars have been invested in the modernization of the gas fleet and the construction of a diverse portfolio of renewable resources. Over the past forty years, the Commission has consistently honored the principle that the sanctity of contracts should be respected. In D.10-12-055, for example, the Commission stated, "We do not require parties to modify contracts that have already been executed because it is important to protect contract stability and the expectations of the contracting parties."<sup>5</sup>

The Petition now seeks to undermine that principle. Granting the Petition would send a chill to the private investment and development community about the stability of the California electricity market at a time when the costs of wildfires are threatening the financial health of the investor-owned electric utilities. If the Commission were to back away from its historic respect for the terms of approved contracts, it would create a huge hurdle to attracting investment capital necessary to meet future energy and greenhouse gas emissions-reduction goals.

The Petition asserts that the Commission is not bound by past Commission approvals of PPAs, including the Commission's approval of the Put and Call Options.<sup>6</sup> While the Commission is free to modify its earlier decisions,<sup>7</sup> the Commission is under no obligation to modify its decisions merely because a party disagrees with the outcome. The Commission

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<sup>5</sup> D.10-12-055, p. 10.

<sup>6</sup> Petition, p. 16.

<sup>7</sup> Pub. Util. Code § 1708.

should continue to hesitate before it considers modifying its past decisions, especially decisions that, if modified, would alter the balance of risks and rewards that parties to a contract have agreed to and would erode the Commission's principle of respecting the sanctity of contracts.

Moreover, the Legislature has required the Commission to follow a process that would eliminate after-the-fact reasonableness reviews of approved contracts of the sort that the Petition advocates. In the wake of the California Energy Crisis, Assembly Bill (AB) 57 was enacted to stabilize the investment market for energy projects. The entire point of Public Utilities Code section 454.5, added by AB 57, was to provide guidance to the Commission in prospectively determining the reasonableness of PPAs between utilities and private power producers. This structure was expressly designed to prohibit after-the-fact reasonableness reviews of approved PPAs and to avoid the destabilizing effects of retroactive reviews. The Commission thoroughly reviewed and approved, as just and reasonable, the Otay Mesa PPA over ten years ago. The Petition is a collateral attack on D.06-09-021 (and D.06-02-031), the Commission decisions that approved the contract, of the sort that AB 57 was designed to prohibit.

POC ignores these precedents because it appears to be more focused on its desired outcome than on the reasons behind the Commission's decision or the Legislature's intent in enacting AB 57. But those reasons are sound and should not be ignored, even if they are inconvenient to POC's desired result.

#### **IV. THE PETITION RAISES ISSUES THAT COULD HAVE BEEN RAISED WHEN THE DECISIONS WERE MADE**

The Petition asserts that in 2006, the Commission adopted a rushed decision without regard to standard Commission rules and procedures, and the Commission misused the petition for modification process to adopt a settlement even though no party had filed a motion for

approval of settlement.<sup>8</sup> But if POC had a problem with the procedure the Commission followed, it could have raised its concerns at that time using the standard Commission procedures. Under the Commission's Rules of Practice and Procedure, parties have 30 days after the date the Commission mails an order or decision to file Applications for Rehearing.<sup>9</sup> Parties have one year from the effective date of a decision to file Petitions for Modification, with limited exceptions.<sup>10</sup> Although POC argues for an exception to Rule 16.4 to justify its failure to raise its issues when D.06-09-021 was issued, as discussed below, the Petition presents no compelling reason for the Commission to reopen R.01-10-024 and the procedural record fully 12 years after the decisions in question were issued.

**V. POC SEEKS AN UNJUSTIFIED EXCEPTION TO RULE 16.4**

POC argues that it should be granted an exception under Rule 16.4, which sets the procedure and requirements for petitions for modification. Rule 16.4 states that a petition for modification must be filed and served within one year of the effective date of the decision. If the petitioner was not a party to the proceeding in which the decision proposed to be modified was issued, the petitioner must justify why it did not participate earlier.<sup>11</sup> POC seeks an exception to Rule 16.4, stating that it was not a party because it did not exist at the time R.01-10-024 was opened.<sup>12</sup>

The Commission issued D.06-09-021 on September 7, 2006. POC states that it was formed in 2009. In the nine years since its formation, POC has had ample opportunity to present its Petition to the Commission, but it choose to not do so until November 13, 2018, nearly a decade after it was formed. POC has not justified why it took so long to file its Petition.

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<sup>8</sup> Petition, p. 3.

<sup>9</sup> Rule 16.1.

<sup>10</sup> Rule 16.4.

<sup>11</sup> Rule 16.4.

<sup>12</sup> Petition, p. 25.

In addition, the exception that POC seeks could have unintended and undesirable consequences. Under POC's proposed exception, any person or entity that was unhappy with a decision could evade the one-year limit of Rule 16.4 by forming a new organization. That possibility would severely diminish the stability of the Commission's decisions.

The one-year limit is in Rule 16.4 for good reason. The Commission should enforce the Rule and deny the Petition because POC did not file its Petition within the one-year limit or justify an exception to Rule 16.4.

**VI. RECENTLY ENACTED STATE LAW DOES NOT PROHIBIT UTILITY CONTRACTING WITH FOSSIL-FUELED RESOURCES**

The Petition declares that the passage of Senate Bill (SB) 350 and SB 100 prohibits utility contracting with fossil-fueled electric generation resources.<sup>13</sup> The Petition also asserts that SDG&E would violate SB 350 and SB 100 if it contracted to purchase Resource Adequacy capacity from the Otay Mesa facility beginning in 2019, as proposed in AL 3294-E.<sup>14</sup> Neither assertion is correct. SB 350 specifically directs the Commission (and by extension its regulated utilities) to “identify a *diverse* and *balanced* portfolio of resources needed to *ensure reliable electricity supply* that provides *optimal integration of renewable energy* in a cost-effective manner.”<sup>15</sup> While SB 350 directs the Commission to *minimize* reliance on system power and fossil-fueled resources, it does not prohibit all procurement of fossil-fueled resources.<sup>16</sup> Even SB 100's ambitious increases to the Renewables Portfolio Standard targets contemplate that up to 40% of energy consumed in this state in 2030 could come from non-renewable generators.<sup>17</sup> (Note that the Resource Adequacy agreement proposed in AL 3294-E would expire in August

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<sup>13</sup> Petition, p. 32.

<sup>14</sup> Petition, p. 2.

<sup>15</sup> PU Code § 454.51(a) (emphasis added).

<sup>16</sup> PU Code § 400(c).

<sup>17</sup> PU Code § 399.11

2024.) In setting RPS targets at less than 100%, SB 100 implicitly recognized that other resources, including clean and efficient natural gas-fueled resources, would be needed to reliably serve load during the transition to the higher renewable energy penetration goals cited by the Petition.<sup>18</sup>

## **VII. CURRENT PROCEEDINGS ADDRESS THE ISSUES RAISED BY THE PETITION**

The Commission should not reopen the long-dormant R.01-10-024.<sup>19</sup> As POC acknowledges, the issues raised in its Petition are currently being considered in AL 3294-E and the SDG&E General Rate Case.<sup>20</sup> The Petition was filed to pre-empt the Commission's consideration of the issues currently before the Commission.

If R.01-10-024 were reopened to review the underlying structure of the PPAs that derived from D.06-09-021, the Commission would risk undermining the integrity its decision-making and the model that has successfully supported infrastructure investment in California, *i.e.*, bilateral contracts approved by the Commission that are not subject to retroactive reconsideration. While the Commission may have the authority to reopen decisions that affect PPAs and other forms of financial commitments, the Commission should be wary of exercising that authority in a way that threatens its historical respect for approved contracts.

## **VIII. CONCLUSION**

For the reasons stated in this Response, the Independent Energy Producers Association respectfully urges the Commission to deny POC's Petition.

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<sup>18</sup> Petition, p. 14.

<sup>19</sup> R.01-10-024 was closed in 2006, although it has been reopened several times since (and quickly closed again) when petitions for modification were filed.

<sup>20</sup> Petition, p. 28.

Respectfully submitted December 13, 2018, at San Francisco, California.

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