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BEFORE THE ARIZONA CORPORATION RECEIVED

COMMISSIONERS

GARY PIERCE, Chairman
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Arizona Corporation Commission

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SEP 30 2011

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IN THE MATTER OF THE APPLICATION OF)
ARIZONA PUBLIC SERVICE COMPANY FOR) DOCKET NO. E-01345A-10-0474
AUTHORIZATION FOR THE PURCHASE OF)
GENERATING ASSETS FROM SOUTHERN) ARIZONA COMPETITIVE
CALIFORNIA EDISON AND FOR AN) POWER ALLIANCE'S INITIAL
ACCOUNTING ORDER.) POST-HEARING BRIEF

Pursuant to Chief Administrative Law Judge ("CALJ") Farmer's September 1, 2011 oral directive from the bench, the Arizona Competitive Power Alliance ("Alliance") submits its Initial Post-Hearing Brief in the above-captioned and above-docketed matter.

I.

INTRODUCTION

The Alliance's Initial Post-Hearing Brief is organized in the following manner. Section I consists of this introductory text and overview.

Section II contains a discussion and demonstration of how Arizona Public Service Company ("APS") has failed to satisfy the requirements of (i) the "self-build" moratorium, which was approved by the Commission in Decision No. 67744, and (ii) related Commission decisions and regulations regarding procurement. As a consequence, APS is not entitled to that authorization for an exception to the "self-build" moratorium which is the subject of its November 22, 2010 Application ("Application") in the instant proceeding.

Section III demonstrates that the evidentiary record in the instant proceeding does not contain sufficient information to allow either CALJ Farmer or the Commission to make an informed decision as to whether or not it is in the public interest to authorize APS at this juncture

1 Tr. 1082, l. 20-22.

LAWRENCE V. ROBERTSON, JR.
ATTORNEY AT LAW
P.O. Box 1448
Tubac, Arizona 85646
(520) 398-0411

1 to proceed with consummation of the proposed transaction with Southern California Edison
2 Company ("SCE"). As therein noted, the CALJ's recommended opinion and order ("ROO") and
3 the Commission's final decision will entail consideration of a number of matters, including (i)
4 fuel costs and fuel price volatility, (ii) carbon "footprint(s)" and possible future carbon taxes
5 and/or related disincentives, (iii) known and prospective environmental compliance costs, (iv)
6 non-economic externalities associated with global warming, and (v) potential impact(s) upon the
7 Navajo Nation and its members. However, ultimately CALJ Farmer and the Commission must
8 determine whether the proposed transaction with SCE represents the best power resource
9 alternative for APS and its ratepayers from an economical perspective. As of this juncture, that
10 determination cannot be made upon an informed basis, because APS has not made the requisite
11 "effort to secure adequate and reasonably-priced long-term resources from the competitive
12 wholesale market"² for the amount of capacity it seeks to acquire through the proposed
13 transaction with SCE.

14 Section IV discusses why it would appear to be in APS' own interest to agree to conduct
15 a request for proposal ("RFP") prior to a final decision by the Commission as to whether or not
16 APS should be authorized to consummate the proposed transaction with SCE. Absent actual
17 knowledge as to the terms and conditions upon which one (1) or more members of the
18 competitive wholesale market would be willing to offer to provide an amount of capacity
19 equivalent to that which APS is proposing to acquire from SCE, it would appear that APS is
20 essentially "rolling the dice" as to whether or not the Commission will in fact determine in a
21 future rate case that APS' acquisition of SCE's ownership interest in Units 4 and 5 at the Four
22 Corners generating station was "prudent." As indicated in Section IV, APS should be in a
23 position shortly following the issuance of such an RFP to determine whether or not it has
24 received any proposals from the competitive wholesale market which are economically
25 comparable with or better than its proposed arrangement with SCE. This information could then
26 be provided to the Commission within the context of the instant proceeding, and thereafter CALJ
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28 ² See Section 75(b) of the 2005 Settlement Agreement, as approved (with modifications) by the Commission in Decision No. 67744.

LAWRENCE V. ROBERTSON, JR.
ATTORNEY AT LAW
P.O. Box 1448
Tubac, Arizona 85646
(520) 398-0411

1 Farmer could prepare a ROO and the Commission could determine whether or not to authorize
2 APS to proceed with acquisition of SCE's ownership interest in Units 4 and 5.

3 Section V discusses the conclusion(s) which the Alliance believes should be reached by
4 CALJ Farmer and the Commission, based upon the existing evidentiary record and the
5 discussion set forth in Sections II through IV of this Initial Post-Hearing Brief.

6 **II.**

7 **APS HAS FAILED TO COMPLY WITH THE APPLICABLE REQUIREMENTS**
8 **OF THE "SELF-BUILD" MORATORIUM AND RELATED**
9 **COMMISSION DECISIONS AND REGULATIONS**

10 **A. INTRODUCTION**

11 APS' Application requests authorization from the Commission to proceed with
12 acquisition of SCE's interest in Units 4 and 5 at the Four Corners Generating Station. In
13 essence, APS is requesting an exemption from or exception to the "self-build" moratorium, as
14 modified and approved by the Commission in Decision No. 67744.³ As a consequence, APS has
15 the burden of proof that it has satisfied the requirements of the "self-build" moratorium, as well
16 as subsequent related decisions and regulations of the Commission.

17 APS has failed to fully discharge the burden of proof required of it as of this stage in the
18 instant proceeding. As a consequence, its request for authorization to proceed with the
19 acquisition of SCE's interest in Units 4 and 5 should be "stayed" pending APS' conduct of an
20 appropriate form of RFP soliciting proposals from the competitive wholesale market for
21 generation capacity approximately equivalent to SCE's interest in Units 4 and 5. In that regard,
22 an appropriately structured and conducted RFP would provide APS and the Commission with
23 timely knowledge as to whether or not any comparable or better proposals from the competitive
24 wholesale market currently exist. Based upon results of an appropriately structured RFP, the
25 Commission then would be in a position to make an informed decision as to whether (i) APS'

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28 ³ Application at page 4, lines 6-9; Tr. 471, l. 1-5 (Dinkel).

1 Application should be granted as to SCE's interest in Units 4 and 5, or, (ii) APS' Application
2 should be denied.

3 **B. APS HAS FAILED TO SATISFY SEVERAL REQUIREMENTS OF THE "SELF-**
4 **BUILD" MORATORIUM**

5 *1. Overview*

6 The provisions of the "self-build" moratorium are set forth in Article IX ("Competitive
7 Procurement of Power") of the 2005 Settlement Agreement ("Settlement Agreement"), which
8 was approved (as modified by the Commission) in Decision No. 67744. Of particular relevance
9 to APS' authorization request which is the subject of its Application are Sections 74 and 75 of
10 the Settlement Agreement, which provide as follows:

11
12 74. APS will not pursue any self-build option having an in-service date
13 prior to January 1, 2015, unless expressly authorized by the Commission. For
14 purposes of this Agreement, "self-build" does not include the acquisition of a
15 generating unit or interest in a generating unit from a non-affiliated merchant
16 or utility generator, the acquisition of temporary - generation needed for
17 system reliability, distributed generation of less than fifty MW per location,
18 renewable resources, or the up-rating of APS generation, which up-rating shall
19 not include the installation of new units.

20
21 75. As part of any APS request for Commission authorization to self-build
22 generation prior to 2015, APS will address:

- 23 a. The Company's specific unmet needs for additional long-term
24 resources.
- 25 b. The Company's efforts to secure adequate and reasonably-
26 priced long-term resources from the competitive wholesale
27 market to meet these needs.
- 28 c. The reasons why APS believes those efforts have been
unsuccessful, either in whole or in part.
- d. The extent to which the request to self-build generation is
consistent with any applicable Company resource plans and
competitive resource acquisition rules or orders resulting from
the workshop/rulemaking proceeding described in paragraph 79.

- 1 e. The anticipated life-cycle cost of the proposed self-build option
2 in comparison with suitable alternatives available from the
3 competitive market for a comparable period of time.

4 **2. Section 75(b) Discussion**

5 APS admittedly did not seek any proposals from the competitive wholesale market,⁴ as
6 contemplated and required by Section 75(b) of the Settlement Agreement. In that regard, APS'
7 unsuccessful response to two (2) RFP's conducted by merchant generators in early 2010 does not
8 provide a legitimate basis for APS' attempt to use its offer(s) to purchase capacity from those
9 entities as a "proxy" for the price owners of existing wholesale generation capacity would be
10 willing to offer APS in response to an RFP from APS in the current market.⁵ Moreover, even if
11 APS' "reverse RFP" analogy was deemed to be analytically equivalent to an RFP issued by APS,
12 the early 2010 data on which APS seeks to rely is more than a year old, and thus does not reflect
13 current conditions in the competitive wholesale market. Further, APS has presented no evidence
14 that the circumstances and generation capacity amounts surrounding those RFPs were at all
15 analogous or relevant to the capacity amount or "need" APS proposes to satisfy through the
16 transaction with SCE.

17 During the evidentiary hearing, APS endeavored to suggest that SCE constituted the
18 "competitive wholesale market" for purposes of compliance with Section 75(b).⁶ However, that
19 same witness did not attempt to suggest that APS had conducted an RFP or undertaken some
20 form of procurement effort involving "other" members of that market. And, properly so,
21 because APS admittedly did not.⁷ Moreover, APS' suggestion that SCE is the equivalent of that
22 "competitive wholesale market" contemplated by the parties to the Settlement Agreement and
23 the Commission in Decision No. 67744 is disingenuous, at best.

24 Given the preceding background, it is abundantly clear that APS has not undertaken those
25 "efforts to secure adequate and reasonably-priced long-term resources from the competitive
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27 ⁴ Tr. 465, l. 8-14 (Dinkel).

⁵ Tr. 462, l. 10 – Tr. 465, l. 7 (Dinkel). Also, see Tr. 993, l. 18 – Tr. 996, l. 2 (Patterson).

⁶ Tr. 707, l. 24 – Tr. 708, l. 7 (Guldner).

⁷ Tr. 465, l. 8-14 (Dinkel).

1 wholesale market” contemplated by both Section 75(b) and Decision No. 67744.⁸ In fact, as
2 previously noted, it has admittedly undertaken no such effort.⁹ As a consequence, APS cannot
3 be credibly said to have satisfied the requirements of Section 75(b).

4 **3. Section 75(c) Discussion**

5 Having failed to conduct the requisite competitive procurement required by Section 75
6 (b), APS is not in a position to provide that explanation of why its solicitation efforts were
7 “unsuccessful,” as contemplated and required by Section 75 (c) of the Settlement Agreement.
8 Critical to this analysis is the word “efforts” as it appears in both Sections 75(b) and 75(c). The
9 Merriam-Webster Dictionary defines “effort” as follows:

10 “exertion; endeavor; a product of effort; active or applied force.”

11 Clearly, APS made no “effort” in this instance to “secure adequate and reasonably-priced long-
12 term resources from the competitive wholesale market” to meet the “need”¹⁰ it is now proposing
13 to satisfy through the proposed purchase of SCE’s ownership interest in Units 4 and 5. Having
14 made no “effort” at all within the contemplation and meaning of Section 75(b), it inexorably
15 follows that APS cannot explain why “those efforts have been unsuccessful” within the
16 contemplation and meaning of Section 75(c). Hence, it cannot satisfy the requirement of Section
17 75(c).

18 **4. Section 75(d) Discussion**

19 APS also cannot demonstrate that consistency with the Commission’s resource
20 acquisition rules and decisions, resulting from the workshop/rulemaking described in Section 79
21 of the Settlement Agreement, which is required by Section 75(d) of the Settlement Agreement.
22 The Recommended Best Practices for Procurement (“Best Practices”) adopted by the
23 Commission in Decision No. 70032 are a direct result of workshops conducted by the ACC
24 pursuant to Section 79 of the Settlement Agreement.¹¹ In that regard, the Best Practices provide
25

26 ⁸ In this regard, see the Commission’s discussion at page 25, lines 13-19 and 23-25 of Decision No. 67744 of the
importance of the “self-build” moratorium to the viability of the competitive wholesale market.

27 ⁹ Tr. 465, l. 8-14 (Dinkel).

28 ¹⁰ Both Section 75(a) and 75(b) specifically refer to APS’ “needs” which are the subject of any request for an
exception to the “self-build” moratorium which APS may have occasion to seek.

¹¹ Tr. 469, l. 4 – Tr. 470, l. 25 (Dinkel).

1 that "Utilities should seek to use an RFP as the primary acquisition process," subject to six (6)
2 exceptions therein enumerated.¹² [emphasis added] The circumstances surrounding APS'
3 proposed power resource acquisition in this instance do not satisfy any of these exceptions. In
4 particular, APS cannot satisfy the "genuine, unanticipated opportunity" exception in Section 2
5 (E) of the Best Practices, upon which it seeks to rely.¹³

6
7 **a. "Genuine, Unanticipated Opportunity."**

8 The Resources Planning and Procurement Regulations ("Regulations") adopted by the
9 Commission in Decision No. 71722 also are a direct result of the rulemaking proceeding
10 contemplated by Section 79 of the Settlement Agreement. R14-2-705 (B) of the Regulations
11 provides a "load-serving entity shall use an RFP as its primary acquisition process for the
12 wholesale acquisition of energy and capacity," unless one of the seven (7) exceptions therein
13 enumerated apply. [emphasis added] The circumstances surrounding APS' proposed power
14 resource acquisition in this instance do not satisfy any of those exceptions. In particular, APS
15 cannot satisfy the "genuine, unanticipated opportunity" requirement of R14-2-705 (B)(5).

16 More specifically, all three (3) criteria in R14-2-705 (B)(5) must be satisfied;¹⁴ and,
17 assuming for discussion purposes that APS could satisfy the "clear and significant discount" and
18 "unique value" criteria in subsection (B)(5), it still does not qualify for this exception to the RFP
19 requirement, because the "genuine, unanticipated opportunity" criterion cannot be satisfied in
20 this instance.¹⁵ It is indisputably clear from the evidentiary record in the instant proceeding that
21 APS (and presumably the other non-SCE owners of Units 4 and 5) had effective notice as early
22 as January 2008, if not in 2006 or 2007, that there was reason to believe that SCE would have to
23 terminate or divest its ownership interest in Units 4 and 5, due to legislative and regulatory
24

25 ¹² Decision No. 70032, at page 3, lines 5.5-18.5.

26 ¹³ Decision No. 70032, at page 3, lines 15.5-17.

27 ¹⁴ See Tr. 1004, l. 16 – Tr. 1005, l. 5 (Patterson).

28 ¹⁵ During the evidentiary hearing, APS explicitly acknowledged that in order to comply with Section 75(d), APS is
". . . relying upon its characterization of the transaction with Edison as a genuine, unanticipated opportunity, et
cetera, within the language of the recommended best practices for procurement. . ." and the Regulations. Tr. 476, l.
14 – Tr. 477, l. 3 (Dinkel).

1 environmental developments in California.¹⁶ Significant in that regard is the following
2 testimony of one of APS' witnesses during the evidentiary hearing:

3 "I think the most relevant point that you were just referring to was the CPUC
4 preliminary rule in September of 2008 that was, I think the word that I remember
5 hearing was, cautioning SCE about making life extending capital improvements
6 to Four Corners." Tr. 438, l. 17-21 (Dinkel) [emphasis added]

7 Also significant is the testimony of another APS witness discussing SCE's December 2009
8 written communication announcing its intentions with respect to a future withdrawal from
9 participation in Units 4 and 5, in light of the aforementioned legislative and regulatory
10 developments in California:

11 "... So that's when we all got formally told that Southern Cal Edison will no
12 longer be a part of that project going forward. Up to that point, yes, I mean there
13 were many [previous] discussions about that potential." Tr. 287, l. 12-15.
14 (Schiavoni) [emphasis added]

15 **b. CPUC's September 2, 2008 Proposed Decision.**

16 Particularly illustrative of "that potential" for SCE's future withdrawal are the following
17 excerpts from the September 2, 2008 Proposed Decision ("Proposed Decision") of the California
18 Public Utilities Commission's ("CPUC") Assigned Commissioner and Administrative Law
19 Judge on SCE's January 28, 2008 Petition for Modification of Decision No. 07-01-039, which
20 had adopted regulations implementing SB 1368, as the same affected SCE's ownership interest
21 in Four Corners Units 4 and 5:

22 "While we find that these capital expenditures are not new ownership
23 investments, we note that SCE has indicated that additional expenses will likely
24 be required after 2011 to maintain the safety and reliability of Four Corners.
25 However, regulations adopted by the California Air Resources Board (CARB)
26 pertaining to GHG emission limits and emission reduction measures will be

27 ¹⁶ See Tr. 434, l. 1 – Tr. 440, l. 1 (Dinkel) and Tr. 442, l. 19 – Tr. 446, l. 2 (Dinkel). In addition, see APS' responses
28 to Data Request 1.1 through 1.5 of the Alliance's First Set of Data Requests to APS, which has been admitted into
evidence as Exhibit Alliance-2. Also, see Exhibit Alliance-4 and Late Filed Exhibit Alliance-5, which respectively
are the October 24, 2010 and January 2007 decisions of the CPUC (i) implementing the requirements of SB 1368,
and (ii) applying the same to SCE and its ownership interest in Units 4 and 5. In that regard, see Tr. 711, l. 25 – Tr.
712, l. 24 (Guldner) which confirms the accuracy of the CPUC's summary in Decision D. 10-10-016 (October 14,
2010) of "the history of Edison's various petitions before the [California] Commission as they relate to SB 1368 and
the [CPUC's] Emission Performance Standards." Tr. 712, l. 9-13.

1 operative on January 1, 2012. Therefore, SCE's continued ownership interest in
2 Four Corners after that date could subject SCE's ratepayers to potential financial
3 risk for GHG-compliance costs. Consequently, we believe it would be appropriate
4 for SCE to conduct a study on the feasibility of continuing to maintain its interest
5 in Four Corners after 2011. This study would include consideration of the
6 following:

- 7 1. Estimated costs of future investments in Four Corners if SCE maintains its
8 interest in Four Corners. This would include estimated costs to bring Four
9 Corners into compliance with the EPS.
- 10 2. Costs of GHG allowances or other GHG compliance costs beginning
11 January 1, 2012, and thereafter, if SCE maintains its interest in Four
12 Corners.
- 13 3. Cost impacts of selling SCE's interest in Four Corners either by December
14 31, 2011, or in 2016 (the end of its current operating agreement).

15 SCE shall submit a report on its findings and a proposed course of action
16 with respect to Four Corners to the Commission within six months after this
17 decision is issued. The Commission would then have sufficient time to consider
18 the best course of action to take before any additional capital expenditures would
19 need to be made in Four Corners. Finally, since we will be considering whether it
20 would be in the ratepayers' best interest for SCE to maintain its interest in Four
21 Corners, SCE shall not extend any of its existing Agreements or enter into any
22 new Agreements without first obtaining Commission approval. [Proposed
23 Decision at pages 10-11] [emphasis added]

24 * * *

25 **"Conclusions of Law**

- 26 1. SCE's proposed modification is too broad and should be denied.
- 27 2. Pub. Util. Code § 8341(b)(3) authorizes the Commission to adopt rules to
28 implement the provisions of SB 1368.
3. SCE's requested capital expenditures in Four Corners do not fall under the
Commission's definition of "new ownership investments."
4. After January 1, 2012, SCE's ratepayers would be exposed to potential
financial risks to bring Four Corners into compliance with the pollution control
requirements established by CARB.
5. It would be unreasonable to allow SCE to make any further capital
investments in Four Corners without first determining whether SCE should
continue to maintain its interest in Four Corners after 2011.

6....

LAWRENCE V. ROBERTSON, JR.
ATTORNEY AT LAW
P.O. Box 1448
Tubac, Arizona 85646
(520) 398-0411

1 7. . . .” [Proposed Decision at pages 13-14] [emphasis added]

2 * * *

3
4 **“O R D E R**

5 **IT IS ORDERED** that:

6 1. Southern California Edison Company’s (SCE) petition to modify Decision 07-01-039 is denied.

7 2. SCE’s requested capital expenditures are not subject to the emission
8 performance standard. Therefore, SCE may seek rate recovery of these
9 expenditures in Application 07-11-011.

10 3. SCE shall conduct a study on whether it should continue to maintain its
11 interest in Four Corners Generation Station (Four Corners) after December 1,
12 2011. SCE shall file a report on its findings and a proposed course of action with
13 respect to Four Corners with the Commission’s Energy Division within six
14 months after this decision is issued. This report shall also be served on the service
15 list in this proceeding.

16 4. SCE shall not extend any of its existing Agreements or enter into any new
17 Agreements concerning its ownership in Four Corners without first obtaining
18 Commission approval.

19 5. Rulemaking 06-04-009 remains open.” [Proposed Decision at page 14]
20 [emphasis added]

21 A copy of the Proposed Decision is attached hereto as Appendix “A” and is incorporated herein
22 by this reference.

23 **c. CPUC’s October 23, 2008 Ruling.**

24 On October 23, 2008 the CPUC’s Assigned Commissioner and Administrative Law
25 Judge issued a Ruling Entering Additional Information in the Record and Seeking Comments
26 (“Ruling”) in the same docket, which (i) suspended the aforesaid Proposed Decision, (ii) directed
27 SCE to file complete copies of the agreements governing ownership and operation of Units 4 and
28 5, and (iii) castigated SCE for previously having been less than completely candid with the
CPUC as to the ability of SCE to influence capital improvements to Units 4 and 5. The

1 following excerpts clearly indicate that SCE's request for an exemption was in jeopardy, as was
2 SCE's ability for any future long-term participation in Units 4 and 5:

3
4 "After the PD [Proposed Decision was] mailed, Energy Division staff requested
5 and received full copies of the Co-Tenancy Agreement and the Operating
6 Agreement between SCE and its co-owners, a copy of the "Four Corners Units 4
7 & 5 Capital Improvements Design and Construction Agreement" (Capital
8 Improvements Agreement), as well as additional information on the capital
9 expenditures listed in A.07-11-011. Upon review of this additional information,
we have discovered several discrepancies that cause us to question whether the
Petition should have been more comprehensive in its explanation of SCE's rights
and obligations under its Agreements and whether this additional information
would have led us to reach a different outcome than recommended in the PD.
Among other things, we find the following information troubling:

- 10 1. We are unsure why SCE states that its "financial obligation with regard to
11 Four Corners is not one over which it has much discretion or choice" when
12 there are provisions for unanimous consent for approval of capital
13 expenditures as follows:
- 14 (a) ...
15 (b) ...
- 16 2. Under the Operating Agreement, the E&O Committee may only approve
17 Capital Addition, Capital Betterment and Capital Replacement projects of \$5
18 million or less. (Operating Agreement, ¶¶ 5.12, 5.13 & 5.14.) All Capital
19 Addition, Capital Betterment or Capital Replacement projects that are over \$5
20 million come under the Capital Improvements Agreement. (Operating
21 Agreement, ¶ 7.2.4.) Although there are a number of individual expenditures
22 of more than \$5 million, there is no reference to the Capital Improvements
23 Agreement in the Petition or the GRC Testimony (Exh. C).
- 24 3. Despite the requirement that the Coordination Committee approve capital
25 projects over \$5 million, there is no discussion of the Coordination Committee
26 and its function in the Petition or the GRC Testimony (Exh. C). This is
27 particularly troubling since SCE's subsequent emails to Energy Division staff
28 show that the Coordination Committee has approved a large number of the
capital expenditure projects.
4. In its response to questions asked by Energy Division staff, SCE provided a
list of Four Corners Co-Owner approved projects through October 10, 2008.
... We do not understand why SCE believed it was contractually obligated for
the entire \$178.6 million in capital expenditures when only approximately
\$94.4 million had been approved by these Committees when it filed its
Petition.

1 5. In its comments to the proposed decision that was ultimately voted out as
2 D.07-01-039, SCE had argued that the definition of “covered procurements”
3 might result in impairing its contract with its co-tenants concerning
4 maintenance of Four Corners and proposed that the EPS not apply to
5 “financial contributions required by contracts with third party co-owners.”
6 (SCE Comments to Proposed Decision of President Peevey and ALJ
7 Gottstein, January 2, 2007, p. 13.) The Decision rejected SCE’s proposal and
8 stated: “If SCE anticipates that the EPS will prevent it from complying with
9 its contractual obligations at Four Corners, it should file an application or
10 petition for modification, together with adequate supporting information,
11 documentation, and analysis, and request appropriate relief.” (D.07-01-039, at
12 p. 46.) Thereafter, SCE filed this Petition to modify D.07-01-039. However,
13 Edison’s e-mail and the list of approved projects show that SCE, through its
14 participation in the E&O Committee and the Coordination Committee, has
15 continued to approve capital expenditures at Four Corners after D.07-01-039
16 was issued and even after it filed its Petition. Until a determination has been
17 made concerning the Petition, SCE must comply with the requirements of
18 D.07-01-039, including the requirement to obtain pre-approval of all
19 procurements subject to the EPS. (D.07-01-039, at p. 278, OP 3.(b).) We are
20 unaware of any filings by SCE for Commission approval to authorize capital
21 expenditures at Four Corners after January 25, 2007. Furthermore, SCE has
22 stated: “without modification of the EPS Decision or a reliability or
23 ‘extraordinary circumstances’ exception, SCE cannot make future investment
24 in Four Corners.” (Petition p. 6.) Accordingly, we are unsure under what
25 authority SCE believes it could authorize these expenditures without first
26 obtaining approval from the Commission if these expenditures are considered
27 covered procurements. [Ruling at pages 3-6] [emphasis added]

17 Clearly troubled by SCE’s behavior and its representations to the CPUC, the Ruling by
18 the Assigned Commissioner and Administrative Law Judge provided as follows:
19

20 “In order to fully understand this new information and its impact on SCE’s
21 Petition, we will withdraw the PD and shall enter into the record the following
22 documents:

- 23 1. Four Corners Project Co-Tenancy Agreement, Including Amendment No.
24 6, . . .
- 25 2. Four Corners Project Operating Agreement, Including Amendment No. 12
26 and Letter Agreement Dated December 29, . . .
- 27 3. Four Corners Units 4 & 5 Capital Improvements, Design and Construction
28 Agreement . . .
4. Email correspondence between Scott Murtishaw, CPUC Energy Division
Staff, and Nancy Chung Allred, SCE Attorney, concerning follow-up
questions on the capital expenditures and the Agreements.

LAWRENCE V. ROBERTSON, JR.
ATTORNEY AT LAW
P.O. Box 1448
Tubac, Arizona 85646
(520) 398-0411

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5. Four Corners Co-Owner-Approved Projects to Date – October 10, 2008.

In order to develop a full record, we seek comments from parties on these documents and their relevance to resolving the Petition. In particular, parties are asked to comment on the following:

1. How, if at all, should the PD's original conclusion that the capital expenditures at Four Corners do not fall under the definition of "new ownership investment" change as a result of this new information? Why or why not?
2. Should SCE be allowed to recover any of the requested capital expenditures for Four Corners? Which expenses and why?
3. Are evidentiary hearings necessary and what issues need to be addressed through hearings?" [Ruling at pages 6-7] [emphasis added]

* * *

"Finally, we are concerned that by failing to include the full Agreements and the history of project approvals in its initial Petition, SCE sought to mislead the assigned ALJ and this Commission in direct contravention of the Commission's Rules of Practice and Procedure. Therefore, SCE is directed to explain the discrepancies noted above, including why in light of the additional information entered into the record by this Ruling, its statements in the Petition should not be considered misleading. Further, SCE shall explain why it believed the additional information was not relevant or necessary for the Commission to address the Petition. Finally, SCE shall explain why the Commission should not initiate an investigation into whether it violated Rule 1 of the Commission's Rules of Practice and Procedure. SCE shall submit this filing by November 6, 2008." [Ruling at pages 7-8] [emphasis added]

A copy of the Ruling is attached hereto as Appendix "B" and is incorporated herein by this reference.

d. APS' Monitoring of CPUC Proceeding.

APS' witnesses have acknowledged in sworn testimony that they were monitoring the CPUC proceedings relating to implementation of SB 1368 and SCE's Petition. Accordingly, APS can be deemed to have been aware of both the content of the Proposed Decision and the Ruling, which indicate that SCE's ability to continue its ownership and participation in Units 4 and 5 was in serious jeopardy, at best. The Proposed Decision and the Ruling were each issued

1 more than two (2) years in advance of APS' Application in the instant proceeding, and more than
2 one (1) year in advance of SCE's formal notice to the non-SCE owners of Units 4 and 5 that SCE
3 would be terminating its interest in those generating facilities. Moreover, APS also had the prior
4 knowledge of similar circumstances which had required SCE to terminate its ownership interest
5 in the Mohave Generation Station in 2005, because of environmental compliance issues.¹⁷
6 Hence, to contend that SCE's December 2009 announcement that it wished to divest its
7 ownership interest in Four Corners Units 4 and 5 was a "genuine, unanticipated opportunity"
8 strains credulity. In order to satisfy the requirement of R14-2-705 (B)(5), the "opportunity" in
9 question must be both "genuine" and "unanticipated." Clearly, in this instance the likelihood
10 that SCE would need to dispose of its interest in Units 4 and 5 was foreseeable more than 1-2
11 years in advance; and, thus, SCE's formal notice in December 2009 was not "unanticipated"
12 development within the meaning of R14-2-705 (B)(5) and its regulatory predecessor, Section
13 2(E) of the Best Practices. As Mr. Schiavoni testified, prior to December 2009

14 "... there were many discussions about that potential." [Tr. 287, l. 12-15]

15 Because of (i) its failure to conduct an RFP approximately equivalent to the amount of
16 capacity APS proposes to acquire through its purchase of SCE's ownership interest in Units 4
17 and 5, and (ii) its failure to fully satisfy the criteria for an exemption from the RFP requirement
18 as set forth in the Best Practices and R14-2-705 (B)(5), respectively, APS cannot demonstrate
19 that consistency with the Commission's "competitive resource acquisition rules or orders"
20 contemplated and required by Section 75(d).

21 5. Summary

22 In light of the preceding discussion, it is abundantly clear that APS has not satisfied that
23 burden of proof required of it in connection with Section 75(b), Section 75(c) and Section 75(d)
24 of the Settlement Agreement. As a consequence, APS is not entitled at this time to that
25 exception from the "self-build" moratorium which it seeks.
26
27

28 ¹⁷ Tr. 461, l. 2-16 (Dinkel). Also, see Tr. 955, l. 12-15 (Patterson); and, Tr. 977, l. 11 – Tr. 981, l. 21 (Patterson).

1 **C. SECTION 76 OF THE SETTLEMENT AGREEMENT DOES NOT “OVERRIDE”**
2 **THE NECESSITY FOR APS TO SATISFY THE REQUIREMENTS OF SECTION**
3 **74 AND 75 OF THE SETTLEMENT AGREEMENT.**

4 During the evidentiary hearing, APS appeared at one point to suggest that the provision
5 of Sections 74 and 75 of the Settlement Agreement are subordinate to the language of Section
6 76,¹⁸ which provides as follows:

7 “76. Nothing in this section shall be construed as relieving APS of its existing
8 obligation to prudently acquire generating resources, including but not limited to
9 seeking the above authorization to self-build a generating resource or resources
10 prior to 2015.”

11 To the contrary, Section 76 does not “override” the necessity of APS to satisfy the requirements
12 of Sections Page 74 and 75 of the Settlement Agreement. In fact, such a suggestion conveniently
13 ignores the fact that the “self-build” moratorium was the Settlement Agreement’s “quid pro quo”
14 for the willingness of the merchant generator signatory parties to withdraw their previous
15 opposition to the Redhawk and West Phoenix 4 and 5 Generating Units be included in APS’ rate
16 base. In that regard, and as Alliance witness Greg Patterson testified during the evidentiary
17 hearing in connection with Section 76,

18 “It does not weaken [Sections] 74 and 75. Otherwise, there would be no self-
19 build moratorium at all . . .” [Tr. 943, l. 19-21]

20 The Commission’s recognition of this fact, and also the Commission’s desire to continue its
21 policy support for maintaining a viable and strong competitive wholesale market, was manifested
22 by its adoption of the Gleason Amendment, which enlarged the scope of the “self-build”
23 moratorium to include existing generation units.¹⁹

24 Against this background, to accept APS’ seeming suggestion that Section 76 “overrides”
25 the requirements of Section 75 would completely eviscerate this policy objective of the

26 _____
27 ¹⁸ Tr. 705, l. 21 – Tr. 706, l. 16 (Guldner). Also, see Tr. 473, l. 24 – Tr. 474, l. 5 (Dinkel). Also, counsel for APS
28 unsuccessfully endeavored to advocate such a proposition during her cross-examination of Alliance witness
Patterson. See Tr. 941, l. 23 – Tr. 943, l. 22.

¹⁹ See Decision No. 67744 at page 25, lines 13-19 and lines 23-25; also, see Decision No. 67744 at page 26, lines 8-
9.

1 Commission. Further, Section 75(c) actually harmonizes Sections 74 and 75 with Section 76,
2 because it contemplates an exemption from or exception to the “self-build” moratorium may be
3 obtained, provided that (i) APS has made a bona fide (albeit unsuccessful) effort to secure long-
4 term power resources for the “need” it seeks to meet from the competitive wholesale market, and
5 (ii) APS otherwise satisfies the requirements of Section 75.²⁰ Accordingly, there is no need for
6 an “override” provision. However, in this instance, APS has admitted it did not make the
7 solicitation effort required by Section 75(b); and, the Alliance has demonstrated that APS also
8 has failed to satisfy the requirements of Section 75(c) and 75(d) as of this juncture.

9 **D. SECTION 77 OF THE SETTLEMENT AGREEMENT DOES NOT EXCUSE APS**
10 **HAVING FAILED IN THIS INSTANCE TO UNDERTAKE THAT POWER**
11 **RESOURCE PROCUREMENT EFFORT FROM THE COMPETITIVE**
12 **WHOLESALE MARKET CONTEMPLATED AND REQUIRED BY SECTION**
13 **75.**

14 During the evidentiary hearing, APS also appeared to suggest that Section 77 of the
15 Settlement Agreement allows for APS to avoid full compliance with the requirements of Section
16 75.²¹ In that regard, Section 77 of the Settlement Agreement provides as follows:

17 “The issuance of any RFP or the conduct of any other competitive solicitation in
18 the future shall not, in and of itself, preclude APS from negotiating bilateral
19 agreements with nonaffiliated parties.” [emphasis added]

20 APS’ Application requests authorization from the Commission to proceed with the
21 acquisition of SCE’s interest in Units 4 and 5 at the Four Corners Generating Station. In
22 essence, APS is requesting an exemption from or exception to the “self-build” moratorium, as
23 modified and approved by the Commission in Decision No. 67744. As a consequence, and as
24 previously noted, APS has the burden of proof that it has satisfied the requirements of the “self-
25 build” moratorium, as well as subsequent related decisions and regulations of the Commission.

26 ²⁰ In fact, during cross-examination, APS acknowledged that

27 “. . . the effect of 74 and 75 is to provide APS with the means for approaching the Commission
28 and seeking authorization to self-build. . .” Tr. 706, l. 17-20 (Guldner).

²¹ Tr. 707, l. 3 – Tr. 708, l. 18 (Guldner)

LAWRENCE V. ROBERTSON, JR.
ATTORNEY AT LAW
P.O. Box 1448
Tubac, Arizona 85646
(520) 398-0411

1 APS has failed to fully discharge the burden of proof required of it as of this stage in the
2 instant proceeding. As a consequence, its request for authorization to proceed with the
3 acquisition of SCE's interest in Units 4 and 5 should be "stayed" pending APS' conduct of an
4 appropriate form of RFP soliciting proposals from the competitive wholesale market for
5 generation capacity approximately equivalent to SCE's interest in Units 4 and 5. In that regard,
6 an appropriately structured and conducted RFP would provide APS and the Commission with
7 timely knowledge as to whether or not any comparable or better proposals from the competitive
8 wholesale market exist. Based upon results of an appropriately structured RFP, the Commission
9 then would be in a position to make an informed decision as to whether (i) APS' Application
10 should be granted as to SCE's interest in Units 4 and 5, or (ii) APS' Application should be
11 denied.

12 Section 77 does not excuse APS from having failed in this instance to undertake that
13 power resource procurement effort from the competitive wholesale market contemplated and
14 required by Section 75 (b) of Settlement Agreement and Decision No. 67744. Rather, Section
15 77 contemplates by its express language that APS shall have first issued an RFP or conducted
16 some other form of competitive solicitation, as contemplated by Section 75 (b). Only thereafter,
17 and only in the event the results of such RFP or other form of competitive solicitation have been
18 received and properly determined by APS to be unsatisfactorily responsive to the "need" it seeks
19 to meet, may APS consider proceeding to negotiate a bilateral agreement with a non-affiliated
20 party. Since APS did not undertake the requisite solicitation effort, it cannot satisfy the threshold
21 requirement of Section 77. To conclude otherwise would also result in an evisceration of that
22 policy objective of the Commission that the "self-build" moratorium was intended to advance.

23 **E. CONCLUSION**

24 As indicated by the discussion set forth in Sections II(A) through (D) above, APS has not
25 satisfied several of the requirements of Section 75 of the Settlement Agreement; and, Section 76
26 and 77 do not excuse APS' failure to satisfy the requirements of Section 75. As a consequence,
27 APS is not entitled to that exception from the "self-build" moratorium which is the subject of its
28 Application in the instant proceeding.

LAWRENCE V. ROBERTSON, JR.
ATTORNEY AT LAW
P.O. Box 1448
Tubac, Arizona 85646
(520) 398-0411

III.

THE EVIDENTIARY RECORD DOES NOT CONTAIN SUFFICIENT INFORMATION TO ALLOW EITHER CALJ FARMER OR THE COMMISSION TO MAKE AN INFORMED DECISION AS TO WHETHER OR NOT IT WOULD BE IN THE PUBLIC INTEREST TO AUTHORIZE APS AT THIS JUNCTURE TO PROCEED WITH CONSUMMATION OF THE PROPOSED TRANSACTION WITH SCE.

A substantial portion of the hearing time was spent on legal issues. Generally stated, and as discussed in detail in Section II above, it is the legal position of the Alliance that APS should not be granted an exemption from the “self build” moratorium and the RFP required by both the Best Practices and the Regulations at this time, because (i) APS has not adequately tested the competitive wholesale market and (ii) the SCE Four Corners purchase isn’t a “genuine, unanticipated opportunity” which would warrant an exception to the RFP requirement in this instance. Conversely, APS and several other parties contend that APS has satisfied the applicable requirements for an exception or exemption.

Setting aside the aforesaid legal argument(s) for discussion purposes, it is further the position of the Alliance that the instant proceeding should be “stayed” so that APS can conduct an actual RFP. APS characterizes this position as being overly concerned about “process.” However, the Alliance isn’t arguing for an RFP as a mere legal technicality. Rather, the Alliance believes that the current process - including hundreds of pages of testimony, a dozen witnesses and six (6) days of hearings - doesn’t answer the fundamental question: Should APS be allowed to consummate the proposed transaction with SCE? Ultimately, this is the question that the Commissioners will have to answer... unfortunately, much of the testimony serves to cloud the issue.²² APS witness Judah Rose argued that the current transaction is a “once in a lifetime deal” and is comparable to buying a billion dollar asset for \$294 million. Yet the other non-SCE owners in Units 4 and 5 did not invoke their right of first refusal. Mr. Rose conjectures that the other owners did not exercise that right because of regulatory hardships such as tribal

²² In that regard, see testimony of Alliance witness Patterson at Tr. 952, l. 12 – Tr. 955, l. 9.

LAWRENCE V. ROBERTSON, JR.
ATTORNEY AT LAW
P.O. Box 1448
Tubac, Arizona 85646
(520) 398-0411

1 sovereignty, multiple owners and dealing with various regulatory commissions. In essence, he
2 contends that they are leaving a \$700 million economic opportunity on the table because of
3 regulatory inconveniences. Such an assertion strains credulity.

4 APS is concerned that if the transaction with SCE doesn't go through, Units 4 and 5 will
5 close. Yet if the deal is as good as APS says - once in a lifetime, cents on the dollar, cheaper
6 than any gas plant has ever been sold - it would appear reasonable for the Commission to
7 consider the possibility, and perhaps likelihood, that Warren Buffett, Boone Pickens, KKR or
8 some other group of knowledgeable investors would swoop in and buy the plant if APS does not.
9 In essence, APS is asking the Commissioners to believe that the purchase has tremendous
10 economic benefit, but that sophisticated parties such as the other plant owners and Wall Street's
11 legendary investors would be unwilling to buy the plant in its entirety or at least SCE's interest
12 in Units 4 and 5.²³ So, is the proposed purchase a good deal or not? Without an RFP, which
13 actually tests the market, the Commissioners won't know.

14 Meanwhile, APS estimates that an existing combined cycle replacement for Units 4 and 5
15 will cost around \$750 per KW. Is that a good price? And, does it actually reflect the current
16 competitive market? Mr. Rose thinks that price cannot match or better the per kW value of the
17 proposed transaction with SCE. However, the Entegra plant recently sold for about \$400 per
18 kW for 500 MW-550 MW of capacity. That's a recent transaction from a local combined cycle
19 plant, close to the Palo Verde Hub, with plenty of access to the Phoenix market...for about half
20 of APS' derived "proxy" price. Is that a comparable transaction? Without an RFP, the
21 Commissioners won't know. The Entegra gas plant and Units 4 and 5 can both be used as
22 baseload plants. They can both get to market, and they have similar capacity. However, that's
23 where the similarity ends.

24 APS argues that buying a gas plant would cause APS to be overexposed to natural gas
25 price volatility. Conversely, the Alliance and the Sierra club believe that buying SCE's interest
26 in the coal plant would cause APS to be overexposed to the risk of increased coal emission
27

28 ²³ As Alliance witness Patterson noted, in so doing, APS is trying "to have it both ways." Tr. 960, l. 17-22.

1 regulation and associated costs. How do these marginal economic factors affect the overall price
2 of the capacity APS seeks to acquire? Without an RFP, the Commissioners won't know.
3 Assuming that the Entegra deal is comparable to the proposed transaction with SCE, are there
4 other plants available at a lower per kW cost? And, would some bidders offer PPAs that could
5 mimic the output of Units 4 and 5 or Units 1-5 of the Four Corners Plant? Would gas plant
6 owners provide tolling arrangements that mitigate gas volatility risk? While it's certain that the
7 gas plant bids will eliminate the environmental risks associated with coal, will someone bid a
8 package that provides baseload capacity using existing transmission, while mitigating gas
9 volatility? And would that bid be at a price that the Commissioners find attractive? Without an
10 RFP, the Commissioners won't know.

11 To be sure, there are some questions that even an RFP can't answer. After all, the
12 Commissioners will have to assess non-economic factors such as the value to the Navajo
13 community of keeping Units 4 and 5 open compared to the value to the environment of closing
14 them - but without an RFP, the Commissioners will have no meaningful information base from
15 which to begin their evaluation of non-economic factors. To date, the hearing has focused in
16 large measure on the aforesaid legal arguments because in the absence of an RFP, that's all we
17 can do. RFP responses - not expert witnesses - will provide the information that the
18 Commissioners require in order to make an informed decision on APS' Application.²⁴

19 As Alliance witness Patterson observed, in summarizing the benefits that a properly
20 structured and serious RFP could provide the Commission in connection with a final decision in
21 the instant proceeding:

22 "The Commission needs to have enough information with which to make a
23 decision; and therefore, if the Commission is open to alternatives, then the
24 Commission is going to want to know what the economic factors are of those
25 alternatives. Then once it has that, it's going to take its noneconomic factors, such
26 as Tribal economic development or the future costs of coal, and it's going to
27 weigh them in.

28 ²⁴ In this regard, see testimony of Alliance witness Patterson at Tr. 955, l. 22 - Tr. 963, l. 24. Also, see his
testimony at Tr. 974, l. 20 - Tr. 975, l. 8; Tr. 985, l. 6 - Tr. 993, l. 17; Tr. 997, l. 5-13; and, Tr. 1005, l. 11 - Tr.
1008, l. 7.

1 But we believe that the Commission should have a real economic proposal in
2 front of them instead of simply debating experts who say what Mr. Rose says or
what other people say.” Tr. 963, l. 13-24²⁵

3 In that regard, he further testified that a properly conducted RFP would enable both APS and the
4 Commission to determine “fairly quickly” or within six months

5 “. . . whether this transaction should proceed or whether it should be a gas plant.”
6 Tr. 968, l. 2 – Tr. 969, l. 24. Also, see Tr. 976, l. 9 – Tr. 977, l. 3; and, Tr. 997, l.
7 14 – Tr. 998, l. 11 in this regard.

8 Finally, he noted that

9 “. . . the RFPs that APS has [i.e. usually conducts] are much broader than the
Alliance membership.” Tr. 975, l. 16-17.

10 Thus, both APS and the Commission would be in a position to determine what the response of
11 the entire competitive wholesale market was to the RFP which the Alliance believes should be
12 conducted in connection with the instant proceeding, and not just response(s) received from
13 members of the Alliance.

14 IV.

15 THE CONDUCT OF AN RFP OR OTHER FORM OF COMPETITIVE SOLICITATION 16 AT THIS TIME WOULD APPEAR TO BE BENEFICIAL FOR APS IN CONNECTION 17 WITH A FUTURE PRUDENCY DETERMINATION BY THE COMMISSION

18 The Alliance believes that the Commission should base all prudence determinations on
19 information that was available to the parties at the time of the transaction - not on information
20 that comes to light, or economic events that occur, between the time of the purchase and the
21 subsequent determination of prudence. When parties - or Commissioners - believe that a
22 transaction may risk being imprudent, they have the responsibility to raise that concern while the
23 utility is contemplating the transaction. That time is now and the Alliance is raising that
24 concern. APS' purchase of SCE's interest in Units 4 and 5 at Four Corners entails risk and could

25
26 ²⁵ Mr. Patterson's involvement with electric utility industry power issues for 20 years, coupled with his previous
27 service as (i) a member of the Arizona Legislature for four (4) years, (ii) Director of RUCO for five (5) years, (iii)
28 Chief of Staff in the Arizona Senate for two (2) years, and (iv) Executive Director of the Alliance for ten (10) years,
provides him with a uniquely qualified background as a witness in the instant proceeding to comment upon such
issues from a public policy and public interest perspective. In this regard, see Tr. 971, l. 22 – Tr. 972, l. 24. Also,
see Tr. 973, l. 14-19.

1 have unfortunate results for APS ratepayers absent an RFP, unless the Commission properly
2 conditions any decision authorizing APS to proceed with the transaction.

3 **A. SHOULD APS SHAREHOLDERS BEAR THE RISK OF INCREMENTAL**
4 **COAL-RELATED ENVIRONMENTAL COSTS THAT APS HAS REFUSED TO**
5 **QUANTIFY OR ACKNOWLEDGE?**

6 While APS is factoring in the costs of currently known environmental costs of
7 approximately \$300 million, the company has made no provision for the cost of as yet
8 unquantified future regulation. While much of the future cost of coal regulation is
9 unquantifiable, it is by no means unforeseeable. Congress may be less likely to impose a carbon
10 tax than it was a few years ago, however, the Environmental Protection Agency ("EPA") - with
11 the full backing of the United States Supreme Court - has the ability to impose substantial
12 additional carbon costs even in the absence of additional legislation. The EPA is currently using
13 that power to the fullest extent possible.²⁶ If APS insists on going ahead with this transaction
14 and continues to refuse to test the market through an RFP process, then the Commission should
15 consider requiring that any environmental costs over and above those which have been disclosed
16 in its Application should be borne by APS shareholders, not ratepayers - and the Commission
17 should make this fact clear in any order that authorizes APS to proceed with the transaction.

18 **B. IF NATURAL GAS PRICES REMAIN LOWER THAN APS' PROJECTIONS,**
19 **THEN SHOULD APS' SHAREHOLDERS BEAR THE DIFFERENCE BETWEEN**
20 **THE VALUE OF GAS PLANTS AT THE LOWER PRICE AND THE COST OF**
21 **SCE'S INTEREST IN THE FOUR CORNERS PLANT?**

22 In order to make its case that the Four Corners purchase is economically advantageous
23 when compared to capacity from a natural gas fired plant, APS has projected substantial
24 increases in gas prices. These price increases may indeed occur. However, if APS does not
25 conduct an RFP, then the Commissioners will never know if a seller was willing or able to
26 provide an alternative that would have mitigated these potential price increases. In the absence

27 ²⁶ In that regard, it should not be assumed that President Obama's recent communication to the EPA directing it to
28 suspend the previously contemplated promulgation of additional air quality regulations forever removes the prospect
of such regulations and related costs for coal-fired generation.

LAWRENCE V. ROBERTSON, JR.
ATTORNEY AT LAW
P.O. Box 1448
Tubac, Arizona 85646
(520) 398-0411

1 of an RFP, the Commission may wish to consider requiring that it should be APS shareholders
2 that bear the risk that APS' assumptions are wrong. If natural gas prices are lower - or even less
3 volatile - than those presented in the APS testimony, and absent an RFP, then the Commissioners
4 could deem the excess price paid for the Four Corners plant to be imprudent.

5 C. IN THE ABSENCE OF AN RFP, IT IS CONCEIVABLE THAT APS MAY HAVE
6 A DIFFICULT TIME CONVINCING ITS ACCOUNTANTS THAT THE
7 REGULATORY ASSETS ASSOCIATED WITH THE PURCHASE MEET THE
8 REQUIREMENTS OF FAS 71.

9 APS witness Guldner appears to have testified that the conditions the Commission
10 imposed on the Sundance acquisition did not allow the company to satisfy the requirements of
11 FAS 71; and, as a consequence, APS' auditors forced the company to write off the deferral. If
12 APS insists on going forward in this instance without an RFP, then the Commission conceivably
13 could be justified in comparing actual events to APS' projections as part of the eventual
14 prudence determination. If APS' assumptions on environmental costs, gas price, gas volatility,
15 unit efficiency, maintenance costs and a host of other issues should prove to be incorrect, then
16 the Commission could reflect the implications of those faulty assumptions in the ultimate
17 "prudent" plant value that is recognized and recoverable in rates. If the amount of the regulatory
18 asset is uncertain and the extent to which it can be recovered is unknown, then the deferral is - by
19 definition - not a regulatory asset and APS' independent auditor conceivably could not allow the
20 company to book the "asset." By refusing to conduct an RFP, APS is creating uncertainty that
21 will reduce the benefits of the transaction and ultimately could weaken the company's balance
22 sheet.

23 D. THE RFP REQUIREMENT IN THE BEST PRACTICES AND REGULATIONS
24 PROVIDE A SAFE HARBOR TO ENSURE THAT THE COMMISSIONERS
25 WILL MAKE THEIR ULTIMATE PRUDENCE DETERMINATION ON
26 INFORMATION THAT WAS AVAILABLE AT THE TIME OF THE
27 TRANSACTION, NOT AT THE TIME OF THE SUBSEQUENT PRUDENCE
28 HEARING.

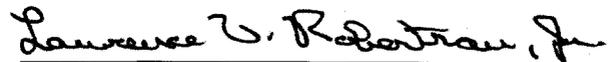
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ATTORNEY AT LAW
P.O. Box 1448
Tubac, Arizona 85646
(520) 398-0411

1 response(s) to such an RFP, or lack thereof, would provide the Commission with that
2 information necessary to reach a well-informed and final decision on APS' Application.²⁹

3 Alternatively, in the event that the Commission should determine to issue a decision
4 authorizing APS to proceed with consummation of the transaction with SCE, the Commission
5 may wish to consider incorporating as conditions some of the considerations discussed in Section
6 IV above.

7
8 Dated this 13th day of September 2011.

9
10 Respectfully submitted,

11 

12 Lawrence V. Robertson, Jr.
13 Attorney for Arizona Competitive Power
14 Alliance

15 Original and thirteen (13) copies of the foregoing
16 will be filed on the 30th day of September 2011 with:

17 Docket Control Division
18 Arizona Corporation Commission
19 1200 West Washington Street
20 Phoenix, Arizona 85007

21 A copy of the same will be served by e-mail or
22 First class mail that same date on:

23
24
25 ²⁹ In that regard, APS witness Guldner acknowledged during cross-examination that APS' contractual arrangement
26 with SCE does not automatically terminate if the proposed transaction does not close by either October 2012 or
27 December 2012. Tr. 873, l. 5 – Tr. 874, l. 16 (Guldner). Also, see Exhibit APS-16, Item Nos. 19 and 20 in this
28 regard. Further, while either APS or SCE could terminate the agreement any time after January 1, 2013, Mr.
Guldner agreed that

“... the then surrounding circumstances would be very pertinent to whether or not either party
was inclined to exercise their right to terminate the contract.” Tr. 874, l. 17 – Tr. 875, l. 19.

LAWRENCE V. ROBERTSON, JR.
ATTORNEY AT LAW
P.O. Box 1448
Tubac, Arizona 85646
(520) 398-0411

1 Lyn Farmer, Chief Administrative Law
Judge
2 Hearing Division
3 Arizona Corporation Commission
1200 West Washington Street
4 Phoenix, Arizona 85007

5 Steve Olea, Director
Utilities Division
6 Arizona Corporation Commission
1200 West Washington Street
7 Phoenix, Arizona 85007

8 Janice Alward, Chief Counsel
9 Legal Division
Arizona Corporation Commission
10 1200 West Washington Street
11 Phoenix, Arizona 85007

12 Meghan H. Grabel
Thomas L. Mumaw
13 Pinnacle West Capital Corporation
Law Department
14 400 N. 5th Street, P. O. Box 53999, MS 8695
15 Phoenix, Arizona 85072-3999

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25
26
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Travis Ritchie
Sierra Club Environmental Law Program
85 Second St., 2nd Floor
San Francisco, California 94105

Pamela Campos
Environmental Defense Fund
2060 Broadway
Boulder, Colorado 80302

Daniel Pozefsky
Residential Utility Consumer Office
1110 West Washington, Suite 220
Phoenix, Arizona 85007

Timothy Hogan
Arizona Center for Law in the Public
Interest
202 E. McDowell Rd. - 153
Phoenix, Arizona 85004

David Berry
Western Resource Advocates
P.O. Box 1064
Scottsdale, Arizona 85252-1064

Appendix “A”

**Arizona Competitive Power Alliance
Initial Post-Hearing Brief
September 13, 2011
Docket No. E-01345A-10-0474**

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298**FILED**

09-02-08

11:54 AM

September 2, 2008

Agenda ID #7889

Quasi-legislative

TO PARTIES OF RECORD IN RULEMAKING 06-04-009

This is the proposed decision of Commissioner Michael R. Peevey. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed either electronically pursuant to Resolution ALJ-188 or with the Commission's Docket Office. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ Yip-Kikugawa at ayk@cpuc.ca.gov and the assigned Commissioner. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ PHILIP SCOTT WEISMEHL for
Angela K. Minkin, Chief
Administrative Law Judge

ANG:lil

Attachment

Decision **PROPOSED DECISION OF COMMISSIONER PEEVEY**
(Mailed 9/2/2008)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement
the Commission's Procurement Incentive
Framework and to Examine the Integration
of Greenhouse Gas Emissions Standards
into Procurement Policies.

Rulemaking 06-04-009
(Filed April 13, 2006)

**DECISION DENYING PETITION OF
SOUTHERN CALIFORNIA EDISON COMPANY
TO MODIFY DECISION 07-01-039**

1. Summary

This decision addresses a petition filed by Southern California Edison Company (SCE) to modify Decision (D.) 07-01-039. SCE requests that D.07-01-039 be modified to state that financial contribution requirements under preexisting contractual obligations are not subject to the provisions of Senate Bill (SB) 1368. We find the requested modification to be too broad and deny SCE's request. However, we find that our definition of "new ownership investments" in D.07-01-039 was not intended to apply to the capital expenditures requested by SCE in Application (A.) 07-11-011 for Units 4 and 5 of the Four Corners Generation Station. Accordingly, these requested expenditures are not subject to the emissions performance standard under SB 1368 and SCE may seek rate

recovery of these costs in A.07-11-011.¹ This decision also directs SCE to conduct a study on future actions with respect to its ownership interest in Four Corners and to submit a report on its findings to the Commission within six months.

2. Background

Senate Bill (SB) 1368 (Stats. 2006, ch. 598), enacted in September 2006, directed the Commission to establish an interim greenhouse gas (GHG) emission performance standard (EPS) and to adopt rules to enforce this standard. On January 25, 2007, we adopted Interim Rules for Greenhouse Gas Emissions Performance Standard (Interim EPS Rules) in D.07-01-039 (Decision) pursuant to the requirements of SB 1368.² As part of the Decision, we identified those types of generation and financial commitments subject to the EPS (“covered procurements.”) We defined covered procurements to include new ownership investment in retained baseload generation “intended to extend the life of one or more units of an existing baseload powerplant for five years or more, or [that] results in a net increase in the existing rated capacity of that powerplant.”³

In its opening comments to the proposed decision that was ultimately voted out as D.07-01-039, SCE had expressed concern that the definition of “covered procurements” could impair its ability to comply with various agreements relating to its co-ownership in Units 4 and 5 of the Four Corners

¹ Although we find that the requested capital expenditures are not “new ownership investments” for purposes of complying with the EPS, we make no determinations concerning the reasonableness or necessity of the requested expenditures. These determinations shall be made in A.07-11-011.

² The Interim EPS Rules are in Attachment 7 of the Decision.

³ D.07-01-039 at p. 53.

Generation Station (Four Corners).⁴ Specifically, SCE expressed concern that the language, if adopted, could be construed to prevent SCE from making required financial investments under its Agreements to maintain Four Corners for the term of the existing contract, since Four Corners could not satisfy the EPS.⁵ Therefore, it had requested that the Commission "clarify that the EPS does not apply to contracts on existing baseload power plants or to provide an exemption for [load serving entities (LSEs)] that co-own existing generating plants with third parties with whom they have contractual obligations to pay for ongoing expenses."⁶

The Decision rejected this request. However, it noted "If SCE anticipates that the EPS will prevent it from complying with its contractual obligations at Four Corners, it should file an application for petition for modification, together with adequate supporting information, documentation, and analysis, and request appropriate relief."⁷

⁴ SCE owns a 48% co-tenancy interest in Units 4 and 5 of Four Corners. SCE's rights and obligations with respect to its ownership in Four Corners are stated in various agreements (Agreements). The current Agreements between SCE and its co-owners terminate in 2016. Under the Agreements, SCE is obligated to pay its share of expenditures for capital additions, improvements and replacements. (SCE Petition, Exhibit A.) If it fails to do so, SCE states that it would not receive power from Four Corners but would remain liable for unpaid costs. (SCE Petition, Exhibit B.)

⁵ Comments of Southern California Edison Company (U338E) on The Proposed Decision of President Peevey and ALJ Gottstein, filed January 2, 2007, p. 13.

⁶ *Id.*

⁷ D.07-01-039, at p. 46.

On January 28, 2008, SCE filed *Petition for Modification of Decision 07-01-039 of Southern California Edison Company* (SCE Petition).⁸ SCE states that as part of its General Rate Case Application for Test Year 2009, A.07-11-011, it has requested authorization to recover \$178,593,000 to cover its share of capital expenditures at Four Corners. SCE states that, as written, the Decision's language concerning new ownership investment in retained baseload power could be applied in a manner that would prevent it from fulfilling this financial obligation. Consequently, it requests that the Decision be modified "to find that financial contributions required under preexisting contractual obligations for generating units owned jointly with third parties are not 'covered procurements' under the EPS."⁹

Responses to SCE's Petition were filed by the Division of Ratepayer Advocates, the Western Power Trading Forum, and the Independent Energy Producers Association and jointly by the Natural Resources Defense Council, Union of Concerned Scientists, The Utility Reform Network, Environmental Defense Fund, Center for Energy Efficiency and Renewable Technologies and Western Resource Advocates. Although parties filing responses disagreed on whether investments in Four Corners should be exempt from the EPS, they all agreed that SCE's requested modification was too broad and should be rejected. In its reply to the responses, SCE clarified that it was not proposing generic relief,

⁸ SCE filed an amended Petition on February 13, 2008. This amended Petition corrected some minor errors, but did not modify the substance of its request.

⁹ SCE Petition, p. 5.

but rather wanted the Decision to specifically state that Four Corners is not subject to the EPS during its current contractual term.

3. Discussion

3.1. SCE's Request

SCE asserts that although the language in the Decision could be construed to apply to SCE's requested expenditures in Four Corners, the Commission did not intend to have the EPS apply to pre-existing co-ownership agreements such as Four Corners. First, SCE maintains that D.07-01-039 states that applying the EPS to required financial investments in existing facilities would "subject the millions of dollars SCE has already spent on preparing Four Corners to serve SCE's customers throughout its current term to a standard intended to affect future investment decisions."¹⁰ Additionally, SCE asserts that the Decision only intended for the EPS to be triggered by investments that would fundamentally alter the way in which an existing powerplant operates, not every required capital investment in a plant. Finally, SCE argues that under the Decision, covered procurements subject to the EPS include investments over which the LSE would have discretion and choice. As such, it contends that the EPS should not apply to its ownership in Four Corners since SCE is a minority owner and has no say over its financial obligations.¹¹ Based on these arguments, SCE requests that the definition of "covered procurement" in Attachment 7 of the Decision be modified to state:

¹⁰ SCE Petition, p. 7.

¹¹ SCE Petition, pp. 7-8.

Except for financial contributions required by existing contractual agreements (effective prior to January 25, 2007), new investments in the LSE's own existing non-Combined-cycle Gas Turbine (CCGT) baseload power plants that are: (1) intended to extend the life of one or more units by five years or more, (2) result in a new increase in the rated capacity of the powerplant, or (3) intended to convert a non-baseload plant to a baseload plant . . .¹²

All parties responding to the Petition maintain that SCE's proposed modification is too generic and would result in a blanket exemption from the EPS for all future spending required under existing contractual agreements. We agree. SCE's proposed modification is overly broad and there is a risk that if we granted the SCE Petition, other LSEs with existing contractual agreements would assert that their agreements were not "covered procurements" in order to avoid complying with the EPS. Therefore, we decline to modify D.07-01-039 as requested by SCE. However, for the reasons discussed below, we find that under the Interim EPS Rules, our definition of "new ownership investments" was not intended to apply to the situation presented in A.07-11-011. Therefore, the requested capital expenditures in Four Corners are not subject to the EPS.

Pub. Util. Code § 8341(b)(3) authorizes the Commission to "adopt rules to enforce the requirements of [Section 8341], for load-serving entities." In the Interim EPS Rules, we determined that under Section 8341(a), (b)(1), and (b)(2), "the EPS shall apply to all baseload generation in the event that the compliance requirement is triggered by a 'long-term financial commitment' as defined in

¹² SCE Petition, pp. 8-9, as amended [proposed modification underlined].

§ 8340(j)."¹³ Pursuant to § 8340(j), "[l]ong-term financial commitment means either a new ownership investment in baseload generation or a new or renewed contract with a term of five or more years, which includes procurement of baseload generation." As part of determining what would be considered a long-term financial commitment, we needed to define the term "new ownership investments."

In implementing the Interim EPS Rules, we defined "new ownership investments" as:

any investment that is intended to extend the life of one or more units of an existing baseload powerplant for five years or more, or results in a net increase in the existing rated capacity of that plant.¹⁴

As explained below, our definition of "new ownership investments" was not intended to apply to the capital expenditures requested in this instance. Further, we find that strictly applying this definition in this instance would result in an outcome that is inconsistent with our objectives in D.07-01-039. Therefore, as discussed below, we do not find SCE's requested expenditures for Four Corners to fall within the definition of "new ownership investments."

In defining "new ownership investments," we noted that "we are looking for the best and most workable approach to identifying changes in an existing powerplant that would increase the expected level of GHG emissions from the facility over the long-term."¹⁵ Thus, our definition of "new ownership

¹³ D.07-01-039, at p. 42.

¹⁴ D.07-01-039, at p. 53.

¹⁵ D.07-01-039, at p. 52.

investments" was intended to cover major refurbishments, such as those for repowering an existing powerplant, but not

every replacement of equipment or addition of pollution control equipment . . . Even after such changes, the plant and its operation may remain essentially unchanged. More importantly, this approach could reduce reliability as old parts are repaired rather than replaced.¹⁶

In this instance, SCE's requested expenditures are to ensure that Four Corners will continue to provide reliable power through the term of the Agreements. SCE's testimony in A.07-11-011, which was attached as Exhibit C of the Petition, explains why the replacements are necessary to ensure continued reliability of Units 4 and 5. This testimony also states that absent the requested replacements and refurbishments, Units 4 and 5 would be subject to lengthy service outages and present safety concerns.

Further, our implementation of the EPS is to ensure "that an LSE does not enter into long-term financial commitments with high-emitting baseload resources in the first place."¹⁷ This can only happen if the LSE is making a financial commitment. Here, due to the particular terms of the Four Corners Agreements, SCE would be contractually committed to paying for capital expenditures to Four Corners if the expenditures are approved by the Engineering and Operating Committee.¹⁸ Moreover, SCE points out that if it does not meet its financial obligations to cover its share of capital expenditures,

¹⁶ *Id.*

¹⁷ D.07-01-039, at p. 32.

¹⁸ SCE Petition, Exhibit A, ¶ 15.2 & Exhibit C, p. 9.

SCE would not receive its share of power from Four Corners, yet still remain liable for these costs.¹⁹ SCE states that its share of power from Four Corners is approximately 720 megawatts (MW) and estimates that the potential loss of energy and capacity from Four Corners could cost SCE customers approximately \$220 million per year.²⁰ Consequently, considering the requested capital expenditures as “new ownership investments” would impose additional costs on SCE ratepayers even though the amount of GHG emissions from Four Corners would likely remain unchanged.

As explained above, we had intended that our definition of “new ownership investments” serve as a workable approach to identifying changes made by an LSE to an existing powerplant that would increase the expected level of GHG emissions over the long-term, not every capital expenditure. Further, the overall objective of establishing the EPS in D.07-01-039 is to focus on

new long-term financial commitments to electrical generating resources that will have major impacts on GHG emissions for many years to come. This enables us to prevent major LSE procurement ‘backsliding’ that will make future GHG reductions more difficult.²¹

Strictly applying our definition of “new ownership investments” in this instance would be inconsistent with the objectives of D.07-01-039, since the requested capital expenditures in Four Corners are necessary for continued reliability for the duration of SCE’s Agreements and SCE’s financial commitment is

¹⁹ SCE Petition, Exhibit B, ¶ 20.5.

²⁰ SCE Petition, pp. 6 & 9.

²¹ D.07-01-039, at p. 35.

contractually required under the terms of its Agreements. Accordingly, we find that the capital expenditures requested in A.07-11-011 to refurbish and replace equipment in Units 4 and 5 of Four Corners are not new ownership investments subject to the EPS. SCE may seek rate recovery of these costs in A.07-11-011.

While we find that these capital expenditures are not new ownership investments, we note that SCE has indicated that additional expenses will likely be required after 2011 to maintain the safety and reliability of Four Corners.²² However, regulations adopted by the California Air Resources Board (CARB) pertaining to GHG emission limits and emission reduction measures will be operative on January 1, 2012.²³ Therefore, SCE's continued ownership interest in Four Corners after that date could subject SCE's ratepayers to potential financial risk for GHG-compliance costs. Consequently, we believe it would be appropriate for SCE to conduct a study on the feasibility of continuing to maintain its interest in Four Corners after 2011. This study would include consideration of the following:

1. Estimated costs of future investments in Four Corners if SCE maintains its interest in Four Corners. This would include estimated costs to bring Four Corners into compliance with the EPS.
2. Costs of GHG allowances or other GHG compliance costs beginning January 1, 2012, and thereafter, if SCE maintains its interest in Four Corners.

²² SCE Petition, p. 4.

²³ Health & Safety Code § 38526.

3. Cost impacts of selling SCE's interest in Four Corners either by December 31, 2011, or in 2016 (the end of its current operating agreement).

SCE shall submit a report on its findings and a proposed course of action with respect to Four Corners to the Commission within six months after this decision is issued. The Commission would then have sufficient time to consider the best course of action to take before any additional capital expenditures would need to be made in Four Corners. Finally, since we will be considering whether it would be in the ratepayers' best interest for SCE to maintain its interest in Four Corners, SCE shall not extend any of its existing Agreements or enter into any new Agreements without first obtaining Commission approval.

3.2. Timeliness of SCE's Petition

Rule 16.4(d) requires that a petition for modification be

filed and served within one year of the effective date of the decision proposed to be modified. If more than one year has elapsed, the petition must also explain why the petition could not have been presented within one year of the effective date of the decision. If the Commission determines that the late submission has not been justified, it may on that ground issue a summary denial of the petition.²⁴

SCE's Petition was filed on January 29, 2008, more than a year after the effective date of D.07-01-039. On February 13, 2008, SCE filed an Amended Petition. In the Amended Petition, SCE notes that it had erroneously identified the effective date of D.07-01-039 as January 29, 2007, rather than January 25, 2007.

²⁴ Cal. Code Regs., Tit. 20, § 16.4, subd. (d).

It explained that its error arose as a result of the different rules concerning applications for rehearing and petitions for modification.²⁵

We find that SCE has sufficiently justified why its Petition was filed more than one year after D.07-01-039 was effective. It appears that SCE now realizes that petitions for modification should be filed within one year of the *effective* date, not the *mail* date, of a decision and we trust that SCE will not make this error again. Finally, we find that SCE's error was harmless, especially since it explained the error shortly afterwards through the filing of an Amended Petition.

4. Comments on Proposed Decision

The proposed decision of the Commissioner in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____ by _____.

5. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Amy C. Yip-Kikugawa is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. SCE owns a 48% co-tenancy interest in Four Corners and its rights and obligations with respect to Four Corners are stated in various agreements.

²⁵ Pursuant to Rule 16.1(a), an application for rehearing is due 30 days after the date the Commission mails an order or decision. D.07-01-039 was effective on January 25, 2007, but mailed on January 29, 2007.

2. SCE has requested authorization to recover \$178,593,000 to cover its share of capital expenditures at Four Corners as part of its General Rate Case Application for Test Year 2009 (A.07-11-011).

3. SCE states that it cannot comply with its co-tenancy agreements unless Four Corners is granted an exemption from complying with the EPS.

4. If SCE does not fulfill its financial obligations under the terms of the co-tenancy agreements, it would lose its rights to its share of power from Four Corners.

5. Four Corners makes up approximately 720 MW of SCE's resource portfolio.

6. The Commission's definition of "new ownership investments" was not meant to include every replacement of equipment.

7. The EPS Rules can only prevent backsliding if an LSE has discretion and control over the long-term financial commitments it makes.

8. CARB regulations pertaining to GHG emission limits and emission reductions measures will be operative on January 1, 2012.

Conclusions of Law

1. SCE's proposed modification is too broad and should be denied.

2. Pub. Util. Code § 8341(b)(3) authorizes the Commission to adopt rules to implement the provisions of SB 1368.

3. SCE's requested capital expenditures in Four Corners do not fall under the Commission's definition of "new ownership investments."

4. After January 1, 2012, SCE's ratepayers would be exposed to potential financial risks to bring Four Corners into compliance with the pollution control requirements established by CARB.

5. It would be unreasonable to allow SCE to make any further capital investments in Four Corners without first determining whether SCE should continue to maintain its interest in Four Corners after 2011.
6. Rule 16.4(d) specifies the timeframe for filing a petition for modification.
7. SCE Petition has met the requirements of Rule 16.4(d).

O R D E R

IT IS ORDERED that:

1. Southern California Edison Company's (SCE) petition to modify Decision 07-01-039 is denied.
2. SCE's requested capital expenditures are not subject to the emission performance standard. Therefore, SCE may seek rate recovery of these expenditures in Application 07-11-011.
3. SCE shall conduct a study on whether it should continue to maintain its interest in Four Corners Generation Station (Four Corners) after December 1, 2011. SCE shall file a report on its findings and a proposed course of action with respect to Four Corners with the Commission's Energy Division within six months after this decision is issued. This report shall also be served on the service list in this proceeding.
4. SCE shall not extend any of its existing Agreements or enter into any new Agreements concerning its ownership in Four Corners without first obtaining Commission approval.
5. Rulemaking 06-04-009 remains open.

This order is effective today.

Dated _____, at San Francisco, California.

R.06-04-009 COM/MP1/lil

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a Notice of Availability of the filed document to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the Notice of Availability of the filed document is current as of today's date.

Dated September 2, 2008, at San Francisco, California.

/s/ LILLIAN LI

Lillian Li

Appendix “B”

**Arizona Competitive Power Alliance
Initial Post-Hearing Brief
September 13, 2011
Docket No. E-01345A-10-0474**

MP1/AYK/mto 10/23/2008



FILED
10-23-08
04:59 PM

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies.

Rulemaking 06-04-009
(Filed April 13, 2006)

**ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW
JUDGE'S RULING ENTERING ADDITIONAL INFORMATION
INTO THE RECORD AND SEEKING COMMENTS**

This joint Assigned Commissioner and Administrative Law Judge's (ALJ) Ruling enters into the record additional information concerning Southern California Edison Company's (SCE) ownership interest in Units 4 and 5 of the Four Corners Generating Plant. This Ruling further sets forth the deadlines for parties to file comments on this additional information. Finally, this Ruling directs SCE to explain why it failed to include this information in its Petition to Modify Decision (D.) 07-01-039 and why the Commission should not pursue an investigation into whether SCE has violated Rule 1 of the Commission's Rules of Practice and Procedure.

Background

In D.07-01-039 (Decision), we adopted an interim greenhouse gas emissions performance standard (EPS) for new long-term financial commitments to baseload generation undertaken by all load-serving entities, consistent with the requirements of Senate Bill (SB) 1368 (Stats. 2006, ch. 598). As part of the Decision, we determined that a utility's new investment in retained baseload

generation "intended to extend the life of one or more units of an existing baseload powerplant for five years or more, or [that] results in a net increase in the existing rated capacity of that powerplant" is a "covered procurement" under SB 1368 and, thus, subject to the EPS.¹

On January 28, 2008, SCE filed a Petition to Modify (Petition) D.07-01-039. It states that as part of its General Rate Case (GRC) Application for Test Year 2009, Application (A.) 07-11-011, it has requested authorization to recover \$178,593,000 to cover its share of capital expenditures at Four Corners Generating Station (Four Corners).² SCE states that, as written, the Decision's language concerning new investment in retained baseload power could be applied in a manner that would prevent it from fulfilling its financial obligations under the Agreements. It further maintains that "application of [D.07-01-039] to preclude SCE's future investment in Four Corners will conflict with SCE's contractual obligation to financially support Four Corners, contravene [D.07-01-039's] stated intention, and harm SCE and its ratepayers." (Petition, p. 2.) Consequently, it requested that -- to deal with generating units owned jointly with third parties -- the Decision be modified to exclude from the "Covered Procurements" subject to the EPS "financial contributions required by existing contractual agreements ([i.e., those] effective prior to January 29, 2007)". (Petition, pp. 8-9.)

On September 2, 2008, the Assigned Commissioner issued a proposed decision (PD). The PD would deny SCE's Petition, but find that the definition of

¹ D.07-01-039 at p. 49 (*slip op.*).

² SCE owns a 48% co-tenancy interest in Units 4 and 5 of Four Corners. SCE's rights and obligations with respect to Four Corners are stated in various agreements (Agreements).

"new ownership investments" in D.07-01-039 was not intended to apply to the capital expenditures requested by SCE in A.07-11-011. Based on this determination, the PD would have allowed SCE to recover these expenditures in rates.

Discussion

SCE's arguments to adopt the proposed modification assert that the requested capital expenditures are "required financial investments" and that its "financial obligation with regard to Four Corners is not one over which it has much discretion or choice." (Petition, p. 8.) In support of these arguments, SCE included testimony from A.07-11-011 concerning the capital expenditures at Four Corners (GRC Testimony), as well as small portions of the Co-Tenancy Agreement and Operating Agreement between SCE and the other co-owners in its Petition.

After the PD mailed, Energy Division staff requested and received full copies of the Co-Tenancy Agreement and the Operating Agreement between SCE and its co-owners, a copy of the "Four Corners Units 4 & 5 Capital Improvements Design and Construction Agreement" (Capital Improvements Agreement), as well as additional information on the capital expenditures listed in A.07-11-011. Upon review of this additional information, we have discovered several discrepancies that cause us to question whether the Petition should have been more comprehensive in its explanation of SCE's rights and obligations under its Agreements and whether this additional information would have led us to reach a different outcome than recommended in the PD. Among other things, we find the following information troubling:

1. We are unsure why SCE states that its "financial obligation with regard to Four Corners is not one over which it has much discretion or choice" when there are provisions for unanimous consent for approval of capital expenditures as follows:
 - a. Pursuant to portions of the Operating Agreement not originally provided: (i) The Engineering and Operating (E&O Committee), which consists of one representative from each Participant (i.e., co-owner), is responsible for reviewing and approving the annual capital expenditures budget. (Operating Agreement, ¶ 8.2.1.1.) (ii) Approval by the E&O Committee requires "an affirmative vote of all Participants." (Operating Agreement, ¶ 8.1.)
 - b. Pursuant to portions of the Agreements not originally provided: (i) Capital Addition, Capital Betterment and Capital Replacement projects over \$5 million require approval of the Coordination Committee. (Operating Agreement, ¶ 7.2; Capital Improvements Agreement, ¶ 12.1.) (ii) Similar to the E&O Committee, the Coordination Committee consists of one representative from each Participant and any action or determination of this committee requires the affirmative vote of all Participants. (Co-Tenancy Agreement, ¶ 9.5; Operating Agreement, ¶ 7.3).
2. Under the Operating Agreement, the E&O Committee may only approve Capital Addition, Capital Betterment and Capital Replacement projects of \$5 million or less. (Operating Agreement, ¶¶ 5.12, 5.13 & 5.14.) All Capital Addition, Capital Betterment or Capital Replacement projects that are over \$5 million come under the Capital Improvements Agreement. (Operating Agreement, ¶ 7.2.4.) Although there are a number of individual expenditures of more than \$5 million, there is no reference to the Capital Improvements Agreement in the Petition or the GRC Testimony (Exh. C).

3. Despite the requirement that the Coordination Committee approve capital projects over \$5 million, there is no discussion of the Coordination Committee and its function in the Petition or the GRC Testimony (Exh. C). This is particularly troubling since SCE's subsequent emails to Energy Division staff show that the Coordination Committee has approved a large number of the capital expenditure projects.
4. In its response to questions asked by Energy Division staff, SCE provided a list of Four Corners Co-Owner approved projects through October 10, 2008. The email and list of approved projects show that the E&O Committee or the Coordination Committee has not yet approved all of the requested capital expenditures. As of the date the Petition to Modify was filed, approximately \$84.2 million of the requested expenditures had not yet been approved by these Committees and approximately \$56.7 million in expenditures remained unapproved, as of October 10, 2008. We do not understand why SCE believed it was contractually obligated for the entire \$178.6 million in capital expenditures when only approximately \$94.4 million had been approved by these Committees when it filed its Petition.
5. In its comments to the proposed decision that was ultimately voted out as D.07-01-039, SCE had argued that the definition of "covered procurements" might result in impairing its contract with its co-tenants concerning maintenance of Four Corners and proposed that the EPS not apply to "financial contributions required by contracts with third party co-owners." (SCE Comments to Proposed Decision of President Peevey and ALJ Gottstein, January 2, 2007, p. 13.) The Decision rejected SCE's proposal and stated: "If SCE anticipates that the EPS will prevent it from complying with its contractual obligations at Four Corners, it should file an application or petition for modification, together with adequate supporting information, documentation, and analysis, and request appropriate relief." (D.07-01-039, at p. 46.) Thereafter, SCE filed this Petition to modify D.07-01-039. However, Edison's e-mail and the list of approved projects show that SCE, through its participation in the E&O Committee and the Coordination Committee, has continued to approve capital

expenditures at Four Corners after D.07-01-039 was issued and even after it filed its Petition. Until a determination has been made concerning the Petition, SCE must comply with the requirements of D.07-01-039, including the requirement to obtain pre-approval of all procurements subject to the EPS. (D.07-01-039, at p. 278, OP 3.(b).) We are unaware of any filings by SCE for Commission approval to authorize capital expenditures at Four Corners after January 25, 2007. Furthermore, SCE has stated: "without modification of the EPS Decision or a reliability or 'extraordinary circumstances' exception, SCE cannot make future investment in Four Corners." (Petition p. 6.) Accordingly, we are unsure under what authority SCE believes it could authorize these expenditures without first obtaining approval from the Commission if these expenditures are considered covered procurements.

In order to fully understand this new information and its impact on SCE's Petition, we will withdraw the PD and shall enter into the record the following documents:

1. Four Corners Project Co-Tenancy Agreement, Including Amendment No. 6, Between Arizona Public Service Company, El Paso Electric Company, Public Service Company of New Mexico, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company, and Tuscon Gas & Electric Company. (Attachment A.)
2. Four Corners Project Operating Agreement, Including Amendment No. 12 and Letter Agreement Dated December 29, 1969, Between Arizona Public Service Company, El Paso Electric Company, Public Service Company of New Mexico, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company and Tuscon Gas & Electric Company. (Attachment B.)

3. Four Corners Units 4 & 5 Capital Improvements, Design and Construction Agreement Among Arizona Public Service Company, El Paso Electric Company, Public Service Company of New Mexico, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company and Tuscon Electric Power Company. (Attachment C.)
4. Email correspondence between Scott Murtishaw, CPUC Energy Division Staff, and Nancy Chung Allred, SCE Attorney, concerning follow-up questions on the capital expenditures and the Agreements. (Attachment D.)
5. Four Corners Co-Owner-Approved Projects to Date - October 10, 2008. (Attachment E.)

In order to develop a full record, we seek comments from parties on these documents and their relevance to resolving the Petition. In particular, parties are asked to comment on the following:

1. How, if at all, should the PD's original conclusion that the capital expenditures at Four Corners do not fall under the definition of "new ownership investment" change as a result of this new information? Why or why not?
2. Should SCE be allowed to recover any of the requested capital expenditures for Four Corners? Which expenses and why?
3. Are evidentiary hearings necessary and what issues need to be addressed through hearings?

Comments shall be filed by November 24, 2008 and reply comments shall be filed by December 15, 2008.

Finally, we are concerned that by failing to include the full Agreements and the history of project approvals in its initial Petition, SCE sought to mislead the assigned ALJ and this Commission in direct contravention of the Commission's Rules of Practice and Procedure. Therefore, SCE is directed to

explain the discrepancies noted above, including why in light of the additional information entered into the record by this Ruling, its statements in the Petition should not be considered misleading. Further, SCE shall explain why it believed the additional information was not relevant or necessary for the Commission to address the Petition. Finally, SCE shall explain why the Commission should not initiate an investigation into whether it violated Rule 1 of the Commission's Rules of Practice and Procedure. SCE shall submit this filing by November 6, 2008.

IT IS RULED that:

1. The following information is entered into the record:
 - a. Four Corners Project Co-Tenancy Agreement, Including Amendment No. 6, Between Arizona Public Service Company, El Paso Electric Company, Public Service Company of New Mexico, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company, and Tuscon Gas & Electric Company. (Attachment A.)
 - b. Four Corners Project Operating Agreement, Including Amendment No. 12 and Letter Agreement Dated December 29, 1969, Between Arizona Public Service Company, El Paso Electric Company, Public Service Company of New Mexico, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company and Tuscon Gas & Electric Company. (Attachment B.)
 - c. Four Corners Units 4 & 5 Capital Improvements, Design and Construction Agreement Among Arizona Public Service Company, El Paso Electric Company, Public Service Company of New Mexico, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company and Tuscon Electric Power Company. (Attachment C.)

- d. Email correspondence between Scott Murtishaw, CPUC Energy Division Staff, and Nancy Chung Allred, SCE Attorney, concerning follow-up questions on the capital expenditures and the Agreements. (Attachment D.)
- e. Four Corners Co-Owner-Approved Projects to Date - October 10, 2008. (Attachment E.)

2. Parties may file comments on this additional information, consistent with this ruling, by November 24, 2008. Reply comments shall be filed by December 15, 2008.

3. Southern California Edison (SCE) shall submit a filing by November 6, 2008 explaining why it did not include this additional information in its Petition and why failure to include the information should not be considered misleading and grounds for the Commission to initiate an investigation into whether SCE violated Rule 1 of the Commission's Rules of Practice and Procedure.

Dated October 23, 2008 at San Francisco, California.

/s/ MICHAEL R. PEEVEY
Michael R. Peevey
Assigned Commissioner

/s/ AMY YIP-KIKUGAWA
Amy Yip-Kikugawa
Administrative Law Judge

R.06-04-009 MP1/AYK/mto

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

I will cause a Notice of Availability of the filed document to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the Notice of Availability of the filed document is current as of today's date.

Dated October 23, 2008, at San Francisco, California.

/s/ MICHAEL J. OLIVEROS
Michael J. Oliveros