BEFORE THE PUBLIC UTILITIES COMMISSION OF THE

STATE OF CALIFORNIA

Order Instituting Investigation into Implementation of Assembly Bill 970 Regarding the Identification of Electric Transmission and Distribution Constraints, Actions to Resolve Those Constraints, and Related Matters Affecting the Reliability of Electric Supply.	))))))))	**Investigation 00-11-001** **(Filed November 2, 2001)**

Request of California Wind Energy Association for Leave to Respond, and Response to Reply of Southern California Edison

With apologies for adding one more round, the California Wind Energy Association (CalWEA) respectfully requests leave to respond to Southern California Edison's (SCE) Reply dated September 8, 2003. CalWEA has two brief purposes. First, because SCE leaves unexplained, or unexamined, its theory of federal-state legal relations, CalWEA wishes to fill that gap. Second, because SCE seems to be retreating from its faith in a state-created backstop, CalWEA wishes to explain the legal basis for this unusual statutory protection.

1. FERC's authorization of a utility choice does not negate a state's authority to guide that choice, when seeking to satisfy a state policy not in conflict with FERC's.

SCE argues that (1) because FERC granted the utility an election, then (2) a state commission may not tell the utility how to exercise that election. But (2) does not necessarily follow from (1). By granting the utility an election, FERC is saying is that FERC will not dictate the result. As to whether states can direct the utility's choice, FERC is silent. To infer preemption from silence is inconsistent with Supreme Court doctrine. Camps Newfound/Owatonna, Inc. v.

Town of Harrison, Maine, 520 U.S. 564, 615 (1997) (noting that the "preemption-by-silence" rationale "has long ... been rejected by this Court").

It is in fact common in utility regulation for a utility to have a choice under federal law; and for the state commission then to direct the utility in, or hold the utility accountable for, making that choice. Four prominent examples:

a. Under Section 205 of the Federal Power Act, a utility is free to elect to buy from any wholesale seller, and pay any FERC-authorized price for the wholesale product. That election does not save a utility from state review and disallowance of FERC-approved costs. See Kentucky-West Virginia Gas Co. v. Pa. Public Utility Commission, 837 F.2d 600, 609 (3d Cir. 1988) (citing the "long standing notion that a state commission may legitimately inquire into whether the retailer prudently chose to pay the FERC-approved wholesale rate of one source, as opposed to the lower rate of another source."); Pike County Light & Power Co. v. Pennsylvania Public Utility Commission, 77 Pa. Commw. 268, 273-74, 465 A.2d 735, 737-38 (1983) (similar holding).

b. Under Section 203 of the Federal Power Act, a utility is free to dispose of its assets to anyone, provided that FERC finds the transaction consistent with the public interest. But approval of the transaction by FERC does not preclude its blockage by a state.[1]

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[1] See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act, 61 Fed. Reg. 68,595, 68,596 (Dec. 30, 1996) ("With respect to the merger's effect on state regulation, where the state commissions have [state-law] authority to act on the merger, we intend to rely on the state commissions to exercise their authority to protect state interests."). See also id., 61 Fed. Reg. at 68,610 (noting that when federal regulators condition approval of a merger of electric utilities on market power mitigation "[s]ome, and maybe all, of the possible remedies to market power require the approval of other Federal, state and local authorities"); Regional Transmission Organizations, 97 F.E.R.C. para. 63,036 (Sept. 10, 2001) (initial decision) (observing that regulators in states affected by the formation of regional transmission organizations often must approve the participation of their utilities); American Electric Power Co., 90 F.E.R.C. para. 61,242 (March 15, 2000) (noting that the state regulatory commissions of Louisiana, Arkansas, Indiana,

c. Well-known in California: Under the Federal Power Act, a utility when selling at wholesale may elect to use any fuel source -- coal, gas, nuclear, renewable, anything. But a state may prohibit the utility from using certain fuel sources. See Pacific Gas & Electric v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983) (holding that a state is not preempted by the Atomic Energy Act from barring, for economic reasons, construction of new nuclear plants).

d. The federal Public Utility Holding Company Act allows a utility and its holding company to choose certain corporate structures, but Maryland was not preempted from prohibiting one of those structures. See Baltimore Gas and Elec. Co. v. Heintz, 760 F.2d 1408 (4th Cir. 1985) (holding that a Maryland statute prohibiting a stock corporation from owning 10% of the total capital stock of a public service corporation was not preempted by the federal Public Utility Holding Company Act, even though the federal statute permitted what Maryland prohibited, particularly where the state goal – elimination of holding company abuse – was consistent with the federal goal).

SCE's position distills to this: FERC, in granting SCE a choice, intended to deny states the authority to guide that choice. But FERC lacks authority to deny states anything. It is for Congress, and the reviewing courts, to define the boundaries between a utility's federal rights and its state law obligations. SCE cites no Congressional intent to preempt in this area, nor any court decisions so holding. SCE's argument lacks legal support.

Kentucky, Oklahoma, and Texas "have conditionally approved the merger, pending the outcome of this proceeding and final action by other relevant authorities"); Cincinnati Gas & Electric Co., 69 F.E.R.C. para. 61,005 (order denying rehearing) (Oct. 3, 1994) (referring to merger approval by Ohio, Kentucky and Indiana state commissions).

2. **Does SCE want a backstop or not?**

In its response dated August 28, 2003, CalWEA recommended that the Commission establish now the mechanics of the statutory backstop. The backstop would assure state-level recovery of any unrecovered transmission costs necessitated by a generator-caused upgrade. Clear backstop mechanics would remove any legitimate SCE cause for concern.

Rather than cooperate in the mechanics of the backstop, SCE derides its value: "this Commission's decisions cannot bind a later Commission."[2] This platitude is unsupported by legal analysis. The proper analysis -- the only proper analysis ---- is the one based on the Due Process Clause of the U.S. Constitution: when government policy has induced an investment, thereby creating a "legitimate, investment-backed expectation," the government cannot alter that policy so as to devalue the investment, without paying due compensation. Cf. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984) (governmental policy allowing a businesses to designate informational filings as "trade secrets" created a compensable "investment-backed expectation" that the information would not be disclosed to the public).

A clear state policy lawfully assuring transmission costs recovery, should that policy induce transmission investment, will create a property right in the utility to that recovery. A later commission may not derogate that right by denying recovery. As SCE's concern is not credible, SCE should support the backstop and make it work.

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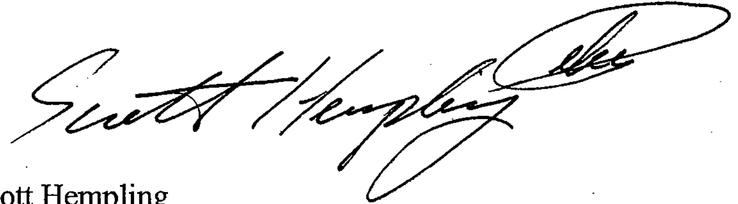
[2] Graphing the zigzags in SCE's position would require advanced mathematics. In its Application for Rehearing dated August 13, 2003, SCE complained that the Commission had failed to specify the statutorily promised backstop and thus left the utility vulnerable to nonrecovery. But now, having seen CalWEA support SCE's plea for backstop specificity, so as to placate SCE's worries about cost recovery, SCE says that a Commission backstop will be insufficient because "this Commission's decision cannot bind a later commission." Go figure.

Respectfully submitted,



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September 11, 2003

Certificate of Service

I hereby certify that I have this day served a copy of the

REQUEST OF CALIFORNIA WIND ENERGY ASSOCIATION FOR LEAVE TO RESPOND, AND RESPONSE TO REPLY OF SOUTHERN CALIFORNIA EDISON

on all known parties to I.00-11-001 by mailing a properly addressed copy by first-class mail with postage prepaid to each party named in the official service list.

Executed on September 11, 2003, at San Francisco, California.

Parashita Marschall