UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Southern California Edison Company	)	Docket No. EL15-16-000

MOTION TO REPLY AND REPLY OF
THE CALIFORNIA WIND ENERGY ASSOCIATION

The Commission should reject Southern California Edison Company's ("SCE") answer to protests ("Answer") because the Answer provides no information, analysis or argument that SCE could not have anticipated and addressed in its Petition.[1] For example, the proviso in article 18.2 of the *pro forma* Large Generator Interconnection Agreement ("LGIA") expressly excludes consequential damages under collateral agreements, which makes SCE's irrelevancy excuse for not addressing it in the Petition implausible.[2] SCE's Answer also fails to provide new information to aid the Commission's decision, such as any examples to support the need for Commission action based on the assertion that "the courts of the 48 continental states applying their respective state laws" to claims for "profits on collateral power sales contracts" risks regulatory uncertainty and other undesirable consequences.[3] But like its Petition, SCE's Answer does not offer even one example to support its worries that state courts are misinterpreting article 18.2, or any instance of harm resulting from divergent state law approaches. That said, if the Commission nevertheless finds good cause to accept arguments in

[1] *Delmarva Power & Light Co.*, 69 FERC ¶ 61,144 (1994) (rejecting an answer containing arguments that "appear[ed] to be nothing more than a reiteration or expansion of the arguments [petitioner] made, or could have made, in its petition"); *see also California Independent System Operator Corporation*, 143 FERC ¶ 61,100, at P 54 (2013) (denying rehearing of the Commission's decision to reject an answer containing information that "could have and should have" been included in the CAISO's initial filing, on the grounds that "CAISO could have foreseen the type of challenges its proposal would face and anticipated the evidence needed to support its filing.").
[2] SCE Answer at 14.
[3] *Id*. at 2-3.

SCE's Answer that should have been presented in the Petition, then the California Wind Energy Association ("CalWEA") respectfully requests leave to provide this brief reply.[4]

To begin with, SCE has no real answer to the basic problem that its Petition raises: article 18.2 of the *pro forma* Large Generator Interconnection Agreement ("LGIA") specifically carves-out consequential damages claims under collateral agreements. Article 18.2's proviso states "*that damages for which a Party may be liable to the other Party under another agreement will not be considered to be special, indirect, incidental, or consequential damages hereunder*."[5] The carve-out shows why it is unreasonable to infer that Order 2003 "intended" a "national liability standard" on recovery of consequential damages under collateral agreements, as SCE insists.

SCE attempts to excuse its failure to mention article 18.2's proviso in its Petition by asserting that it applies only to "damages resulting from the breach of another agreement."[6] But, SCE's Petition was premised on the claim that "[s]ome states define lost profits from collateral contracts as being consequential damages while other states have broader definitions of direct damages that may permit parties to argue that profits lost under separate agreements are recoverable as direct damages."[7] On the face of SCE's pleadings, at least some courts disagree with its interpretation—otherwise, the Petition is pointless. Under article 18.2, the question

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[4] The Commission accepts such replies when they provide additional information that will assist the Commission, or will otherwise be helpful in the development of a more complete and accurate record in a proceeding. *See*, *e.g*., *N.Y. Indep. Sys. Operator, Inc.*, 99 FERC ¶ 61,246, at 62,040 (2002) (accepting answers to protests that helped to clarify issues and did not disrupt the proceeding); *Morgan Stanley Capital Group, Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 93 FERC ¶ 61,017, at 61,036 (2000) (accepting an answer that was "helpful in the development of the record"); *N.Y. Indep. Sys. Operator, Inc.*, 91 FERC ¶ 61,218, at 61,797 (2000) (allowing an answer deemed "useful in addressing the issues arising in these proceedings"); *Cent. Hudson Gas & Elec. Corp.*, 88 FERC ¶ 61,138, at 61,381 (1999) (accepting otherwise prohibited pleadings because they helped to clarify complex issues).

[5] Order No. 2003, Appendix C, Standard Large Generator Interconnection Agreement Article 18.2 (emphasis added).

[6] SCE Answer at 15.

[7] Petition at 4.

whether an LGIA party is "liable . . . under another agreement" is precisely the issue that "will not be considered to be special, indirect, incidental, or consequential damages [under the LGIA]," even though SCE wishes it were otherwise. The plain words of article 18.2 thus answer SCE's question "whether the Commission . . . intended to bar recovery of loss [sic] profits on power sales under collateral agreements, or wished to leave that matter up to the courts to decide based on what constitutes consequential damages under each state's laws."[8] The proviso answers SCE's Petition in clear and unambiguous terms that require prompt dismissal.[9]

Further, neither SCE—nor the Edison Electric Institute ("EEI") in its supporting comments—have shown a compelling need for a creative reinterpretation of article 18.2. SCE's new fear about 48 different liability standards is not borne out by any examples. Apart from its pending state court litigation, which SCE does not otherwise wish to discuss, SCE has not identified any state court that has shown confusion about how to interpret or apply article 18.2 as written in the 12 years since the Commission adopted the *pro forma* contract through Order 2003, or demonstrated that leaving application of section 18.2 to state courts will "impinge significantly on the operations of public utilities across the nation."[10]

Similarly, EEI's assertion that fears about consequential damages under collateral agreements will chill transmission investments also lacks any basis in fact,[11] and runs counter to EEI's recent forecasts of robust transmission project development over the next decade.[12]

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[8] SCE Answer at 16.

[9] The LGIA itself, at article 14.2.1, provides that state law governs interpretation of its provisions.

[10] *PPL Electric Utilities Corp.*, 92 FERC ¶ 61,057, at p. 61,147 (2000) (rejecting the utility's argument that the risk of inconsistent contract interpretations by state courts required the Commission to clarify the contract terms at issue).

[11] EEI Answer at 4.

[12] In a recent publication, EEI touted that "Over 170 projects are highlighted in this report, totaling approximately $60.6 billion in transmission investments through 2024. This figure is up from the approximately $51.1 billion highlighted in the 2013 report, due to changing projections of system needs." EEI notes that this is "only a portion of the total transmission investment anticipated through 2024 by EEI's members." *Edison Electric Institute:*

Presumably, if the risk of consequential damages under collateral power contracts was a problem, transmission development would already have been stifled in states with unfavorable consequential damages rulings, and EEI would have called the issue to the Commission's attention long before now. The inability of SCE or EEI to show courts misapplying article 18.2 or producing unexpected results that "impinge significantly on the operations of public utilities across the nation" simply adds to the reasons why the Commission should promptly dismiss the Petition.

SCE's inconsistent arguments about the Commission's *Arkla* policy is a further ground for dismissal.[13] In the span of three pages SCE argues that the Commission's *Arkla* policy does not apply,[14] might apply,[15] and perhaps should apply to the Commission's decision whether to grant the Petition.[16] SCE should have quit while it was ahead. As the Commission knows, the *Arkla* policy covers decisions whether to rule on the merits of contract disputes, but SCE insists that it is not seeking a ruling on its pending state court case involving liability for damages under a power sales contract.[17]

SCE uses CalWEA's protest as a springboard for its lengthy *Arkla* discussion, but CalWEA called attention to it simply to highlight that case-by-case adjudication of damages claims under collateral power sales contracts was consistent with settled policy that was in place when Order 2003 issued, while SCE's quest for a blanket federal liability exemption for collateral agreements is inconsistent with that policy. Had the Commission intended Order

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Transmission Projects at a Glance (2014) (Executive Summary), available at: http://www.eei.org/issuesandpolicy/transmission/Documents/Trans_Project_executivesummary.pdf.

[13] *Arkansas Louisiana Gas Company v. Hall*, 7 FERC ¶ 61,175, *reh'g denied*, 8 FERC ¶ 61,031 (1979).

[14] SCE Answer at 3-4.

[15] *Id*. at 5.

[16] *Id*. at 6-13.

[17] Petition at 3.

2003 to establish a national liability standard for consequential damages under collateral agreements, as SCE now urges, it would have needed to explain the shift to comport with elemental principles of administrative law because damages claims are normally decided by the courts under the *Arkla* policy.[18]

For example, the core of SCE's Petition and Answer turns on the argument that the Commission took pains to explain why it adopted a "national" liability standard for consequential damages arising from claims under the LGIA. SCE points to no similar explanation by the Commission that supports SCE's inference that the Commission intended this policy to extend to consequential damages claims under collateral agreements. The absence of such an explanation in the context of consequential damages under *collateral* power sales (or other) contracts leads to the contrary inference: the Commission did not intend one liability standard to govern consequential damages claims under collateral agreements.[19] SCE seeks to overcome this fatal defect in its position by attempting to persuade the Commission to teleport its explanation about consequential damages arising under the LGIA to give new meaning to consequential damages arising under collateral agreements. If the Commission had truly intended this result, the time to say so was 12 years ago, not now. The absence of

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[18] *E.g.*, *Louisiana Pub. Serv. Comm'n v. FERC*, No. 13-1155, 2014 WL 6845199, at *6 (D.C. Cir. Dec. 5, 2014) ("The Commission can depart from a prior policy or line of precedent, but it must acknowledge that it is doing so and provide a reasoned explanation"); *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) (holding that "[i]t is textbook administrative law that an agency must 'provide[] a reasoned explanation for departing from precedent or treating similar situations differently,'" and rejecting FERC's policy change on the applicability of amendments to interconnection tariffs because FERC failed to explain it) (citing *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995)).

[19] In this regard, EEI's assertion that the "choice of law provision in Article 14.2.1 of the LGIA went uncommented on throughout the NOPR process" (Comments at 3) provides further grounds for dismissal because the Commission cannot depart from precedent like the *Arkla* policy without commenting on the departure. *Louisiana Pub. Serv. Comm'n*, 2014 WL 6845199, at *6; *West Deptford*, 766 F.3d at 20.

commentary in Order 2003 by the Commission on this issue further compels dismissal,[20] especially considering the Commission's ruling in Order 2003 that "Parties remain liable for . . . *any* damages for which a Party may be liable to the other Party under another agreement."[21]

Finally, SCE relies on *Nicole Gas*[22] to argue that its Petition meets the criteria for a declaratory ruling because it will resolve uncertainty. That case, however, dealt with an interpretation of an ambiguous contract term at the center of then-pending state court litigation. SCE identifies no ambiguous words in article 18.2 that require clarification to help resolve its pending case, but instead urges the Commission to grant a "clarification" that contradicts the plain words of the proviso to further SCE's goal for a new generally applicable "national" standard. In short, *Nicole Gas* presented the Commission with a fundamentally different question from the one SCE has brought to the Commission's doorstep. Thus, *Nicole Gas* does not rescue SCE's Petition from prompt dismissal.

WHEREFORE, for the foregoing additional reasons, CalWEA renews its request that the Commission expeditiously deny the Petition.

Respectfully submitted,

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January 8, 2015

[20] SCE's reliance on commentary by intervenors in Order 2003 is misplaced because the Commission itself did not adopt the views of the intervenors. *ANR Pipeline*, 71 F.3d at 901 ("In determining whether an agency has provided a reasoned explanation for departing from precedent . . . the court looks only to the reasons given by the agency.") (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943)).
[21] Order 2003 at P 906 (emphasis added).
[22] *Nicole Gas Production Ltd.*, 103 FERC ¶ 61,328 (2003), *vacated on other grounds sub nom. Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459 (D.C. Cir. 2005).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2014).

Dated at Washington, D.C., this 8th day of January, 2015.

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