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

Order Instituting Rulemaking to Integrate and Refine Procurement Policies and Consider Long-Term Procurement Plans.	Filed Public Utilities Commission May 6, 2010 San Francisco, California Rulemaking 10-05-006

OPENING BRIEF
OF THE WESTERN POWER TRADING FORUM

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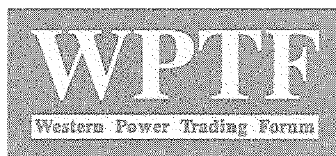

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 1

A. Description of WPTF 1

B. Procedural Background 2

II. ONCE-THROUGH COOLING ISSUES 3

A. The flaws in Staff's OTC Proposal argue against its adoption 3

B. The Commission should consider the California Independent System Operator's ("CAISO") evaluation studies before drawing conclusions as to the timing of the retirement or repowering of OTC power plants 5

III. IT IS IMPERATIVE THAT THE COMMISSION ADOPT REFINEMENTS TO THE BID EVALUATION PROCESS 6

A. The fundamental differences between UOG and PPA offers make bid comparisons in an RFO impractical 6

B. UOG proposals should not be allowed in utility RFOs. Instead, UOG should be proposed only through traditional CPCN applications in exceptional circumstances when a competitive solicitation has failed 9

C. IOU project development costs should be at risk and not ratepayer guaranteed 11

IV. PROCUREMENT OVERSIGHT PROCESSES NEED SOME REVISION 13

A. The Commission needs to clarify in the forthcoming Rules Track III proceeding how the CAM is to be implemented; how to distinguish between system and bundled resource needs; and whether there should be a test of "who benefits" under SB 695. 13

B. Independent Evaluators should be selected and paid by the Commission in order to assure real independence 15

C. In order to ensure competitive and fair RFOs, effective information controls are essential to prevent the sharing of critical information 16

V. CONCLUSION 17

TABLE OF AUTHORITIES

OTHER AUTHORITIES

Clean Water Act, Section 316(b)....4

CPUC DECISIONS, DOCKETS AND RULINGS

Application 07-11-001....12

Decision 04-12-048....15

Decision 06-05-016....12

Decision 06-07-029....9, 10

Decision 07-12-052....11, 16

Decision 11-05-005....13, 14

LEGISLATION

Senate Bill 695....1, 13, 14, 17

TESTIMONY AND BRIEFS

Pacific Gas and Electric Company Testimony on Procurement Rules....5, 7, 8, 17

Testimony of Southern California Edison Company On Track III Issues – Rules Track III Procurement Policy....5, 8, 9

SUMMARY OF WPTF's RECOMMENDATIONS

1. The once-through cooling ("OTC") proposal presented by the Energy Division Staff ("Staff") of the California Public Utilities Commission ("Commission") is flawed and should not be adopted.

2. The fundamental differences between Utility Owned Generation ("UOG") and Power Purchase Agreements ("PPA") projects make bid comparisons in a Request for Offers ("RFO") impossible and create a real perception of bias when the Investor Owned Utilities ("IOUs") evaluate their own UOG projects in competition with PPA proposals.

3. IOU development costs should be at risk and not ratepayer guaranteed

4. UOG offers should not be considered in RFOs. Rather, utility-owned projects should be proposed to the Commission via traditional applications for a certificate of public convenience and necessity ("CPCN") only after a competitive solicitation has failed, as confirmed by an Independent Evaluator ("IE").

5. The Commission needs to clarify in the forthcoming Rules Track III proceeding how the Cost Allocation Mechanism ("CAM") is to be implemented; how to distinguish between system and bundled resource needs; and how the test of "who benefits" under Senate Bill ("SB") 695 will be implemented .

6. IEs should be selected and paid by the Commission and not by the IOUs.

7. Information controls are essential to prevent the sharing of critical information among IOU personnel. Appropriate Codes of Conduct should be developed with IE, Procurement Review Group ("PRG") and Energy Division input, and submitted for approval by the Commission.

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OPENING BRIEF OF THE WESTERN POWER TRADING FORUM

I. INTRODUCTION AND SUMMARY

This opening brief is submitted on behalf of the Western Power Trading Forum ("WPTF") in accordance with the directive provided by Administrative Law Judge ("ALJ") Peter Allen and Rule 13.11 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission").

A. Description of WPTF

WPTF is a California non-profit, mutual benefit corporation. It is a broadly based membership organization dedicated to enhancing competition in Western electric markets in order to reduce the cost of electricity to consumers throughout the region while maintaining the current high level of system reliability. WPTF actions are focused on supporting development of competitive electricity markets throughout the region and developing uniform operating rules to facilitate transactions among market participants.

WPTF provides a voice through which its members can influence the development of market structures throughout the West. The membership of WPTF includes generators, scheduling coordinators, investment banks, energy service providers, energy consultants and public utilities, all of which are active participants in the restructured California electricity

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market. WPTF has a vital interest in the development of a competitive electric market and in the reduction of barriers that may exist in the very structure of new markets.

B. Procedural Background

On June 13, 2011, the Administrative Law Judge's Ruling Addressing Motion for Reconsideration, Motion Regarding Track I Schedule and Rules Track III Issues ("June 13 Ruling") was issued. The June 13 Ruling cites an earlier March 10, 2011 Ruling as follows:

> Based on input from the parties and Energy Division staff, it is preliminarily determined that aspects of certain Rules Track III issues will be addressed concurrently with the System Track I schedule set forth above, including: 1) procurement rules relating to once-through cooling issues; 2) refinements to the bid evaluation process, particular weighing competing bids between utility-owned generation and power purchase agreements; 3) refinements to the existing timelines associated with the utilities' RFOs for resource adequacy products; and 4) utility procurement of greenhouse gas related products.[1]

The June 13 Ruling confirmed that parties could address those four issues, plus the additional issue of procurement oversight rules, "including the oversight responsibilities and authority of various entities (including Independent Evaluators and the Procurement Review Group) and standards of conduct applicable to the utilities and their employees."[2] WPTF's testimony in this proceeding and this opening brief focus on Track III issues (1) and (2) above, as well as issues related to procurement oversight rules. A summary of WPTF's recommendations is provided above.

[1] June 13 Ruling, at pp. 4-5.

[2] Id, at p. 6.

SB_GT&S_0233366

II. ONCE-THROUGH COOLING ISSUES

The Scoping Memo[3] in this proceeding provided that a number of procurement policies related to UOG or contracted OTC generation units would be considered, including policies encouraging the retirement of OTC units, and that these issues would be resolved as part of the second phase of Track III, as informed by the concurrent development of Track I.[4] In its January 26, 2011 motion, the Independent Energy Producers Association ("IEP")[5] pointed out that Track III was originally planned to include issues related to procurement necessitated by OTC regulations.[6] In its February 23, 2011 prehearing conference statement, WPTF concurred with IEP that retirements due to OTC regulations will eliminate significant amounts of flexible generating capacity in load centers and in constrained local areas that would otherwise be available to help in the integration of renewable resources. Therefore, WPTF urged that consideration of OTC issues should be brought forward to Track I, which was accomplished when the June 13 Ruling provided that issues related to procurement affected by OTC regulations would be considered in Track I and not relegated to later consideration in Track III.

A. The flaws in Staff's OTC Proposal argue against its adoption

Appendix A to the June 13 Ruling provided that parties' testimony should address Staff's proposal regarding procurement rules related to contracts with any facility subject to the State Water Resources Control Board's ("SWRCB") *Statewide Water Control Policy on the Use of Coastal and Estuarine Water Used for Power Plant Cooling* (the "Staff OTC Proposal"). The

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[3] See, December 3, 2010, Assigned Commissioner and Administrative Law Judge's Joint Scoping Memo and Ruling ("Scoping Memo").

[4] Scoping Memo, at pp. 42-43.

[5] January 26, 2011, Motion of the Independent Energy Producers Association for Reconsideration of the Schedule for this Proceeding ("IEP Motion").

[6] IEP Motion, at p. 2.

Staff OTC Proposal recommended, among other things, that IOUs should not be permitted to enter into a contract for longer than one year with any facility identified in the SWRCB's *Statewide Water Control Policy on the Use of Coastal and Estuarine Waters Used for Power Plant Cooling (Once-Through Cooling or OTC facilities)*. Further, the Staff OTC Proposal would prohibit IOUs from entering into a contract with any OTC facility that requires operation of that facility beyond the compliance date identified in the SWRCB policy unless certain conditions applied.[7]

The Staff OTC Proposal is flawed, problematical and should not be adopted. The presumption that elimination of OTC is the same as an actual shut down of a plant that utilizes OTC is simply incorrect. In fact, a fuller assessment of the reliability impacts of the closure of OTC plants may well lead to a realization that shut down of those facilities is undesirable and unnecessary. Moreover, the owners of the plants are undoubtedly committed to analyses of potential alternatives to shut down that would keep the plants operating in an efficient and reliable manner. The Staff OTC Proposal presumes that aging power plants will completely cease operations by arbitrary deadlines, which is inaccurate and should be rejected.

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[7] a) A facility is found by the Water Resources Control Board to be fully in compliance with Section 316(b) of the Clean Water Act; or

b) If the Commission authorizes the procurement of new capacity in the LTPP proceeding, contracts longer than one year and/or that extend beyond the Water Resources Control Board OTC compliance date as detailed in the October 1, 2010 Statewide Water Control Policy on the Use of Coastal and Estuarine Waters Used for Power Plant Cooling or successor documents for the express purpose of enabling the repowering of those OTC facilities are permitted if those contracts do not result in operation of the once-through-cooling system beyond the compliance date; or

c) If an OTC facility elects to comply with the State Water Resources Control Board OTC policy by means of SWRCB Track 2 (under which water intake is reduced by 93% or screens or similar technologies that are expected to be approved by the State Water Resources Control Board are utilized), contracting with such a facility beyond the State Water Resources Control Board's compliance date is permitted. If the Track 2 compliance mechanism is not accepted for that OTC facility by the State Water Resources Control Board, any such contract must require that the contract terminate within one year from the date of the State Water Resources Control Board decision on the proposed Track 2 technology or before the State Water Resource Control Board's compliance date, whichever is sooner.

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WPTF is not alone in recommending rejection of the Staff OTC Proposal. Southern California Edison Company ("SCE") remarks that the OTC Staff Proposal would create undue risk, likely lead to higher bundled customer costs, create grid reliability concerns and hinder the integration of new and higher levels of renewable generation.[8] Pacific Gas and Electric Company ("PG&E") points out, "While the majority of the OTC units are aging and are coming close to the end of their useful lives, many of them provide needed local transmission reliability support which will continue to be required until suitable replacement capacity is built."[9] And San Diego Gas & Electric Company ("SDG&E") notes that limiting contracts with OTC facilities to one year serves no discernible purpose and should not be approved. Rather than limiting contracts with OTC units to one year, the Commission should focus its OTC policy consideration on examining the need for replacement capacity, as discussed below. Indeed, it may be the award of a multi-year contract that provides the financial underpinnings that will enable an OTC unit to invest in an upgrade of its cooling facilities to become compliant with the OTC regulations, or perhaps undertake an even more extensive repowering.

B. The Commission should consider the California Independent System Operator's ("CAISO") evaluation studies before drawing conclusions as to the timing of the retirement or repowering of OTC power plants.

The CAISO is engaged in studies to assess the impact of OTC retirements consistent with the SWRCB's policy. WPTF recommends that the Commission should await the final results from the studies before making any determinations as to the need for replacement capacity associated with OTC retirements. Waiting until the CAISO studies are complete prior to making any determination as to the need for replacement capacity may entail a modest delay. However,

[8] Testimony of Southern California Edison Company On Track III Issues – Rules Track III Procurement Policy ("SCE Testimony"), at p. 9.

[9] Pacific Gas and Electric Company Testimony on Procurement Rules ("PG&E Testimony"), at p. 1-1.

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it should still allow sufficient time for the IOUs to engage in competitive procurement in this cycle, if necessary, or in the next cycle, while complying with the deadlines in the SWRCB's OTC policy.

III. IT IS IMPERATIVE THAT THE COMMISSION ADOPT REFINEMENTS TO THE BID EVALUATION PROCESS.

A fundamental issue for utility procurement is the weighing of competing bids between UOG and PPAs. This impacts other related issues as well, such as (a) whether IOU development costs should be "at-risk" or ratepayer-guaranteed; and (b) what measures should be taken to prevent sharing of sensitive information between IOU staff involved in developing UOG offers and IOU staff who create RFO evaluation criteria and select winning bids.

A. The fundamental differences between UOG and PPA offers make bid comparisons in an RFO impractical.

There are very real problems associated with evaluating UOG proposals in competition with PPA bids. The uneven life cycles of PPA contract periods (traditionally ten years) are shorter than the life of a UOG asset, which inevitably tilts any discounted cash flow analysis in favor of the longer lived UOG assets. PPAs and UOG also have very different risk profiles, with UOG having assurance of ratepayer cost recovery while PPA project sponsors must factor a return into their bids. And of course, UOG projects enhance utility profits through additions to rate base, whereas PPAs do not. An RFO that requires comparisons of UOG versus PPA projects is neither credible nor manageable. Finally, and of equal importance, having the IOUs in a position to evaluate their own UOG projects in comparison to PPA bids creates a very real perception of bias that in turn compromises the competitiveness of the RFO.

As noted in PG&E's testimony, there are various UOG options that can participate in an RFO, including (a) Purchase and Sale Agreements ("PSA") where, "the potential counterparty is

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responsible for developing, permitting, constructing, testing, and completing the facility, which is then handed over to the IOU;" (b) Engineering, Procurement, and Construction ("EPC") offers, where "the IOU develops and permits the facility, while the potential counterparty is responsible for constructing the facility;" and (c) utility development offer, where "the IOU develops, permits, and constructs the facility."[10] PG&E also points out that there may be UOG offers that are hybrids of these three types, yet regardless of the type of offer, "all UOG offers result in utility ownership of a facility."[11] Although PG&E discusses how UOG offers and PPA offers are evaluated on each of four evaluation criteria (Market Valuation, Portfolio Fit, Project Viability, and Credit) identified in Section A of its testimony,[12] it is apparent that there is no transparency associated with the utility's development of the UOG comparative cash flows, and no system of checks and balances that ensure that the UOG cost estimates have been accurately stated and that the cash flow conversions are unbiased. Nor does there appear to be any attempt to account for the different risk profile of the UOG compared to the PPA or any attempt to address the fundamental unfairness of comparing thirty-year (or longer) UOG service lives with ten-year PPAs. Neither PG&E nor SDG&E (who also believes UOG and PPA bids can be compared fairly) has presented any evidence that their comparison methodologies addresses the fundamental problems of comparing UOG cash flows to PPA cash flows, and the continuing lack transparency in that regard is precisely what gives rise to the perception of bias mentioned above.

What PG&E describes as Portfolio Fit, which PG&E states "accounts for how well an offer's features match PG&E's portfolio needs, including temporal, locational, and fuel diversity

[10] PG&E Testimony, at p. 2-5.

[11] Id.

[12] Id, at pp. 2-6 to 2-9.

SB_GT&S_0233371

aspects,"[13] is also illustrative of the fundamental comparison problems, and the unfairness of a process that allows the IOUs to compare UOG projects to PPAs. Obviously, PG&E is in a better position to develop a proposal that precisely fits the PG&E portfolio parameters than would be an Independent Power Producer ("IPP"), simply because it is PG&E who develops the Portfolio Fit criteria. The almost certain outcome here is that a utility is certainly more likely to ascribe higher portfolio fit values to its own proposals.

Similarly, a utility is far more likely to rank its own UOG projects higher than PPA projects with regard to Project Viability, which generally centers on credit related factors and experience of the developer. Since there is an utter lack of transparency with respect to how a utility ascribes creditworthiness and developer experience scores to its own projects versus PPAs, it is entirely understandable that IPPs have the perception that the outcomes of the RFOs that include UOG projects constitute a "stacked deck." What PG&E describes as the "asymmetry between UOG offers and PPA offers" that "should cause UOG offers to have slightly higher Market Valuation than PPA offers, all else equal,"[14] simply betrays the utility's bias in the bid evaluation process, which confirms that a head to head comparison of UOG to PPA is flawed and unfair.

WPTF agrees with SCE's witness who concludes that, "Any attempt to request 'utility bids' that can be evaluated in competitive solicitations, or numerically compared to market bids, is, at its foundation, conceptually unworkable."[15] SCE discusses this topic with a clear, declarative section header: "Utility-Owned Generation and Power Purchase Agreements Are Not

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[13] PG&E Testimony, at p. 2-7.

[14] Id at p. 2-11.

[15] SCE Testimony, Ex. SCE-3, at p. 13.

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Comparable During a Bid Evaluation Process."[16] SCE further explains that, "UOG and contracted-for generation are fundamentally different products."[17] WPTF concurs. Given these facts, what steps should the Commission take to acknowledge and cope with this issue? WPTF recommends that the Commission should decree that UOG offers shall not be considered in RFOs, as discussed in the following section.

B. UOG proposals should not be allowed in utility RFOs. Instead, UOG should be proposed only through traditional CPCN applications in exceptional circumstances when a competitive solicitation has failed.

The Commission has had a long-term commitment, as expressed in D.06-07-029, to market structures that will ultimately foster robust and cost-effective investment:

> "With this decision today, the Commission seeks to signal that it is committed to the fundamental principles that have guided electricity market restructuring in California and elsewhere: competition and customer choice."[18]

To further the commitment to a well-functioning market, the Commission should ban UOG participation in RFOs. In its testimony, SCE makes the recommendation that:

> UOG projects should be proposed only when competitive processes cannot deliver the products that the utility needs to serve its customers in a cost-effective manner. In such instances, however, utility-owned projects should be proposed to the Commission via more traditional methods, such as an application for a certificate of public convenience and necessity (CPCN).[19]

WPTF concurs with this recommendation and urges its adoption by the Commission. Further, we urge the Commission to specify that the CPCN process should not be an election by the utility, but rather result solely when there has been a failed competitive solicitation, as confirmed

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[16] SCE Testimony, at p. 13.

[17] Ibid.

[18] D.06-07-029, at p. 2.

[19] Id at p. 16.

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by the RFO's independent evaluator.[20] We believe that the instances where competitive processes are inadequate will be rare, and that by imposing this independent confirmation requirement, there will be no question as to whether competitive processes have been undermined to create the opportunity for UOG. Therefore, WPTF recommends that the Commission should adopt the following policy:

> "UOG offers shall not be considered in RFOs. Rather, utility-owned projects shall be proposed to the Commission via traditional applications for a certificate of public convenience and necessity only when and if a competitive solicitation has failed."

The Commission's explicit support for competitive market structures in D.06-07-029 showed that it intends for consumers to be able to capture the benefits that competitive markets foster. WPTF strongly believes that consumers benefit the most and that the procurement process proceeds most efficiently, when electricity and related products are provided by competitive suppliers. In organized markets throughout the country there is an explicit recognition of the incompatibility of utility rate based generation investment and healthy competitive wholesale markets. For this reason, most organized markets have recognized the basic competitive conundrum that exists when UOG investment is allowed and have restricted such investments.

However, if the Commission decides that IOUs should be allowed to offer UOG resources, these offers need to be evaluated by the Commission in the context of traditional CPCN applications. If a utility can convincingly demonstrate that competitive processes cannot deliver the products that the utility needs to serve its customers in a cost-effective manner, and that conclusion is confirmed by a Commission-designated and paid independent evaluator, then

[20] WPTF further recommends, as discussed in Section IV. B. below, that independent evaluators should be selected and paid by the Commission.

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UOG proposals should be permitted. Furthermore, UOG projects should be subject to the same risks as competitive suppliers, as discussed in the following section.

C. IOU project development costs should be at risk and not ratepayer guaranteed.

If the Commission rejects WPTF's proposal to allow UOG only when a competitive solicitation has failed, it would be fundamentally inequitable to permit utility UOG development costs and IPP project development costs to be treated differently when both types of projects are participating in an RFO. Depending on the type of UOG proposal, UOG development costs may be recovered from ratepayers even if a project is not developed, while IPP development costs are only recovered if the project is awarded a PPA. D.07-12-052 dealt with this issue in part when it directed that the Commission would not, "permit IOUs to recoup from ratepayers any bid development costs associated with losing PSA or EPC bids, in the event that any such costs are incurred."[21] The Commission notes in the same discussion that:

> We agree with parties and find it important to recognize that even the perception of bias in an RFO can be sufficient to dampen participation from other potential non-utility investors and developers are less likely to get support from capital markets if there is a perception that merchant bids will be undermined by utility built or affiliate projects.[22]

However, this directive does not currently apply to what PG&E characterizes as a "utility development offer" (see pages 6-7 above). WPTF therefore strongly recommends that if the Commission continues to allow UOG to compete in RFOs, the development costs attributable to "utility development offers" must also be at risk and not ratepayer guaranteed. This is consistent with the Commission's prior actions with regard to earlier proposals by SCE for ratepayer

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[21] D.07-12-052, at p. 207. As further clarification of these acronyms, footnote 233 at p. 197 of the decision provides, "For the purposes of this discussion, the term UOG includes, but is not limited to, utility-built, Engineer, Permit and Construct (EPC), and Purchase and Sale Agreement (PSA) acquired resources."

[22] Id, at p. 208.

SB_GT&S_0233375

funding of its Project Development Division ("PDD"). In its original decision on this topic, D.06-05-016, the Commission found that:

> While we recognize there is value in having more participants such as SCE in the process, we find it necessary to subject SCE to the same cost recovery risks as faced by independent producers. Independent producers' development costs associated with unsuccessful projects are not recoverable from ratepayers. It is a matter of fairness that SCE assume that same risk, if it chooses to participate.[23]

Subsequently, in a 2009 SCE GRC decision in A.07-11-001, the Commission once again ratified this finding:

> In D.06-05-016, the Commission expressed concerns regarding the potential to create an uneven playing field for competitors. The Commission stated, "…from a policy perspective, we feel it is important that the project development costs for proposed new projects should not be specifically included in rates." These same concerns continue to exist. To address these concerns, the Commission excluded SCE's entire PDD request from rates.[24]

If utilities were allowed to recover in rates the development costs attributable to what PG&E characterizes as a "utility development offer," this would clearly add to the "perception of bias" that the Commission cautioned against.

In summary, if the Commission should decide that utility development offers can participate in RFOs, then it should be explicit in requiring that (a) any development costs that are associated with that project must be included in the evaluation process; and (b) development costs should be at risk and not ratepayer guaranteed unless the UOG offer gains UOG development offers should be the responsibility of utility shareholders in order to minimize the perception of bias and to level the playing field among market participants.

[23] D.06-05-016, at p. 52.

[24] D.09-03-025, at pp. 41-42.

IV. PROCUREMENT OVERSIGHT PROCESSES NEED SOME REVISION.

WPTF offers comments herein on three topics: (a) resolution of issues associated with the CAM required under Senate Bill ("SB") 695; (b) how to assure the independence of the IE; and (c) the procurement Code of Conduct that should be applicable to the utilities and their staffs.

A. The Commission needs to clarify in the forthcoming Rules Track III proceeding how the CAM is to be implemented; how to distinguish between system and bundled resource needs; and whether there should be a test of "who benefits" under SB 695.

Attachment 1 of Appendix B of the June 10 Ruling included a Staff proposal with respect to CAM that purportedly, "explains the rules related to participation, roles, and meeting protocols for the CAM group."[25] While the Staff proposal is unobjectionable so far as it goes, it ignores the fundamental changes in the CAM that have occurred due to the passage of SB 695. The same bill that provided for the transitional reopening of direct access retail choice also said that once the Commission had authorized that reopening, it must also ensure that if utility generation resources are determined to be needed to meet system or local area reliability requirements for the benefit of all customers, that the net capacity costs are to be allocated on a fully nonbypassable basis to (a) bundled service customers; (b) customers that purchase electricity through a direct transaction with other providers; and (c) customers of community choice aggregators.

In D.11-05-005, the Commission addressed some CAM issues, but left for future clarification the most fundamental issue of just which utility investments are eligible to be afforded CAM treatment. D.11-05-005 in fact notes that there are some issues that remain to be resolved, which include:

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[25] See June 13 Ruling, at p. 3.

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1. The development of policies and processes for distinguishing between system and bundled resource needs, and related cost allocation.
2. Whether there should be a test of "who benefits" under SB 695, and if so, the construction of such a test.[26]

The decision also notes that "we intend to further develop the record in later phases of this proceeding in order to resolve these issues."[27]

Put simply, the lack of clear Commission directives on these topics is problematical, because utilities have already made claims that specific projects meet the criteria of SB 695 and are eligible for CAM cost allocation. WPTF believes that it should not be left to utility discretion to determine whether the CAM cost recovery mechanism applies. Rather, stakeholders should be provided a meaningful opportunity to review and provide input regarding the criteria that should apply. The two outstanding issues identified above need to be directly addressed, and this LTPP cycle is the venue in which to do that.

CAM issues are important to competitive suppliers for several reasons. First, their procurement decisions are directly affected because when CAM is employed, there are concurrent allocations of underlying capacity to those suppliers. This basically constitutes a form of "on-behalf of procurement" that competitive retail suppliers abhor, because it takes procurement decisions out of their hands and often increases costs to their customers who have elected direct access or community choice aggregation specifically because they want an alternative to utility service. Second, the current uncertainty with regard to the precise terms of CAM eligibility; the processes for distinguishing between system and bundled resource needs and related cost allocation; and how to assess "who benefits" under SB 695 frustrates meaningful procurement planning for non-utility load-serving entities.

[26] D.11-05-005, at p. 16.

[27] Id, at p. 17.

This uncertainty needs to be resolved. WPTF is mindful of the fact that while it has addressed this issue in its opening testimony, there was a dearth of meaningful effort by other parties to discuss the topic. To provide clarity and certainty to this unresolved issue, it is strongly recommended that the Commission should direct that the outstanding CAM issues will be specifically addressed in the forthcoming Rules Track III Issues proceeding.

B. Independent Evaluators should be selected and paid by the Commission in order to assure real independence.

The Staff Proposal defines the role of the IE to "provide an independent evaluation of the IOU's bid evaluation and selection process and help inform the Commission and the Procurement Review Group (PRG) about the process,"[28] but does not address the critical issue of assuring the IE's actual independence. WPTF believes that the practice of having an IE be retained by the utility whose procurement it is supposed to evaluate on an independent basis is inconsistent with good procurement practice. As a result, WPTF recommends that any IE be retained by and solely answerable to the Commission. The cost associated with the IE should be charged back to the IOU on whose behalf the independent evaluation is being performed.

The IE mechanism was developed due to the Commission's finding in decision D.04-12-048 that it was time to, "allow greater head-to-head competition" and "adopt certain guidelines and safeguards, including an independent third party evaluator (IE) requirement."[29] The IE mechanism serves as somewhat of a counterbalance to the risks of favoritism that arise due to allowing UOG bids or utility affiliates to bid in utility RFOs, but it simply does not do enough to ensure actual independence. The Commission should remedy this flaw in the IE mechanism and direct that all IEs are to be selected, retained and paid by the Commission itself. Only with this

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[28] Attachment 1, at p. 8.

[29] D.04-12-048, at p. 2.

SB_GT&S_0233379

step can a truly independent evaluator be selected and commissioned to act as the watchdog that the interests of ratepayers deserve.

C. In order to ensure competitive and fair RFOs, effective information controls are essential to prevent the sharing of critical information.

No party would object to the principle that RFOs should be both competitive and fair. In order to ensure this fairness, there needs to be strict protocols to ensure that there is no sharing of sensitive competitive information between IOU staff that develop UOG proposals and IOU staff who evaluate RFO offers and select the winning bids. In D.07-12-052, the Commission addressed this issue:

> …we will relax for the moment the proposed restriction to exclude head-to-head competition between PPAs and PSAs (and in appropriate circumstances, EPCs). However, we reiterate that, as a precondition for conducting an RFO seeking utility ownership options, the IOU, in conjunction with its IE, PRG, and ED staff shall develop a strict code of conduct – to be signed by any and all IOU personnel involved in the RFO process – to prevent sharing of sensitive information between staff involved in developing utility bids and staff who create the bid evaluation criteria and select winning bids.[30]

The same decision specified that this code of conduct would need to be very similar to the codes of conduct and bans on preferential access to information that apply between a utility and its generation affiliates. It further provided that "the employees developing the utility-owned project would be barred from access to any evaluation protocols, input assumptions, or bid information not made generally available to outside bidders."[31] The Commission clearly intended by these directives to provide assurance that a utility could not use "inside information" to the advantage of its own project.

WPTF agrees with PG&E that an effective Code of Conduct should specify to whom and what information it applies, what activities are prohibited, and the consequences should a

[30] D.07-12-052, at pp. 206-207.

[31] Id, fn 236 at p. 207.

violation of the Code of Conduct occur.[32] WPTF also endorses the recommendation that the Codes of Conduct should be developed with IE, PRG and Energy Division input and that the Commission itself should approve each utility's Code of Conduct. WPTF therefore supports the Code of Conduct guidelines provided in Appendix B, with the proviso that such a code of conduct is essential even if the Commission decides, as WPTF recommends, that UOG projects not be allowed to compete directly against PPAs in utility RFOs.

V. CONCLUSION

WPTF urges the Commission to adopt the following positions in this proceeding:

1. Staff's OTC proposal is flawed and should not be adopted.
2. The fundamental differences between UOG and PPA projects make bid comparisons in a RFO impossible and create a real perception of bias when the utilities evaluate their own UOG projects in competition with PPA proposals.
3. If the Commission continues to allow UOG to compete in RFOs, IOU project development costs attributable to "utility development offers" should be at risk and not ratepayer guaranteed.
4. UOG offers should not be considered in RFOs. Rather, utility-owned projects should be proposed to the Commission via traditional applications for a CPCN only when and if a competitive solicitation has failed, as confirmed by an IE.
5. The Commission needs to clarify in the forthcoming Rules Track III proceeding how the CAM is to be implemented; how to distinguish between system and bundled resource needs; and whether there should be a test of "who benefits" under Senate Bill ("SB") 695.

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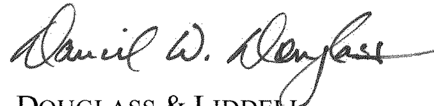
[32] PG&E Testimony, at p. 2-13.

6. IE should be selected by and solely answerable to the Commission.

7. As information controls are essential to prevent the sharing of critical information, appropriate Codes of Conduct should be developed with IE, PRG and Energy Division input and that the Commission itself should approve each utility's Code of Conduct.

WPTF thanks the Commission for its attention to these issues.

Daniel W. Douglass



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