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	Rulemaking R-10-05-006

REPLY BRIEF OF THE GREEN POWER INSTITUTE ON THE 2010 LONG-TERM PROCUREMENT PLANS

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Introduction

Pursuant to the Dec. 3, 2010, *Scoping Memo* for this proceeding, and a series of follow-up *Rulings* culminating in the June 13, 2011, *Administrative Law Judge's Ruling Addressing Motion for Reconsideration, Motion Regarding Track I Schedule, and Rules Track III Issues*, the Green Power Institute (GPI) respectfully submits our *Reply Brief of the Green Power Institute on the 2010 Long-Term Procurement Plans*, in R.10-05-006, the **Order Instituting Rulemaking to Integrate and Refine Procurement Policies and Consider Long-Term Procurement Plans**.

We address the issue of confidentiality, and address specific items in the *Opening Briefs* of Calpine, CAISO, and SCE.

Confidentiality Issues

GPI continues to be concerned about confidentiality issues in this proceeding and, more generally, the degree to which the Commission seems to be increasingly relying on lax showings of the need for confidentiality by the utilities.

DRA states in its Opening Brief that it agrees that some of the IOUs' GHG procurement-plan data is "market sensitive" and should remain confidential (DRA Opening Brief, p. 25). GPI believes the Commission should follow its guidance in D.06-06-066 and modifying Decisions in R.05-06-044, which favors disclosure rather than confidentiality unless the burden of proof for establishing confidentiality is met. Per D.06-06-066, interpreting Public Utilities Code § 583, the rebuttable presumption with respect to confidentiality is that data submitted to the Commission by utilities are not confidential. The utilities must submit a

motion explaining why the data asserted as confidential should in fact be considered confidential.

D.06-06-066 states that the burden of proof is on the party asserting confidentiality, and there is no presumption of confidentiality (p. 26):

> As both courts and this Commission have stated in the past (and as reiterated in the OIR), § 583 does not require the Commission to afford confidential treatment to data that does not satisfy substantive requirements for such treatment created by other statutes and rules. This is important because several of the parties claim that there is a legal presumption of confidentiality for all data. If this were true, the Commission would be legally obligated to protect whole swaths of information without first considering whether the information meets relevant legal tests for trade secrets, privilege, or other established provisions protecting data from disclosure.

And on p. 27:

> Section 583 sets out the first procedural step for a party claiming confidentiality. That party has the right to submit relevant material under seal when it first submits it to the Commission. However, the material is not entitled to remain confidential forever based on the invocation of § 583. Rather, the affected party must accompany its records with a motion establishing the legal and factual basis for confidential treatment.

The same decision discusses recent court interpretations of § 583 (p. 27):

> As we stated in the OIR, § 583 does not limit our ability to disclose information. As the United States Court of Appeals for the Ninth District noted in Southern California Edison Company v. Westinghouse Electric Corporation (9th Cir. 1989) 892 F. 2d 778, 783: "Section 583 does not forbid the disclosure of any information furnished to the CPUC by utilities. Rather, the statute provides that such information will be open to the public if the commission so orders, and the commission's authority to issue such orders is unrestricted." Similarly, In Re Southern California Edison Company [Mohave Coal Plant Accident], D.91-12-019, 42 CPUC 2d 298, 300 (1991), states that § 583 "assures that staff will not disclose information received from regulated utilities unless that disclosure is in the context of a Commission proceeding or is otherwise ordered by the Commission" but does not limit our broad discretion to disclose information.

GPI agrees with DRA that market sensitive information that may allow other parties to game nascent GHG markets should remain confidential. However, we

also believe that a far higher showing must be made than has so far been made, per the Commission's guidance in R.05-04-026, in order for the Commission to make such a determination with respect to PG&E's greenhouse-gas procurement plan.

Independent Energy Producers (IEP) raises the valid point that allowing utility information to remain confidential generally favors utilities in procurement matters (IEP Opening Brief, pp. 17-18):

> Not surprisingly, the best, most up-to-date information about a utility's resource needs and the timing and type of those needs resides with the utility. Even though the Commission requires utilities to adopt a code of conduct "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," the utility staff developing UOG projects and bids may still have better access to relevant information than competing IPPs.[1]

While it is unlikely that greenhouse-gas procurement-plan issues will directly affect generation procurement bids, IEP's points go to the issue of confidentiality more generally – and the need to ensure that utility claims of confidentiality be scrutinized closely each time such assertions are made.

For example, PG&E states, in response to GPI's (and other parties) concerns about the excessive redaction of the greenhouse-gas procurement plan (pp. 29-30):

> If GPI had concerns about PG&E's redactions, it should have met and conferred with PG&E regarding the redactions and, if that process was unsuccessful, could have filed a motion opposing confidential treatment of this material. Notably, GPI failed to pursue these procedural remedies. Moreover, there is no substantive basis for GPI's concerns. The redacted information reveals PG&E's proposed procurement activities, including its bid, price, and volume strategies. The release of this commercially sensitive information could cause harm to PG&E's customers and put PG&E at an unfair business advantage by the disclosure of a GHG

[1] IEP also states (p. 20): "To promote fair competition between UOG projects and IPP projects, the Commission should adopt the simple principle that if an IPP has to recover its project development-related costs out of project revenues (or reduced earnings), so should the utility, and ratepayers should not be required to subsidize those activities." GPI agrees with this statement and, more generally, we agree that UOG and IPP competition should be as robust and fair as possible.

> procurement strategy to other market participants. In addition, this information regarding PG&E's confidential GHG procurement strategy is similar to the general type of procurement information that is confidential and provided in response to the Energy Division's Monthly Data Request. This information also reveals the net open position for GHG compliance.

GPI disagrees with these statements. First, the Commission provided a clear path to remedy PG&E's excessive redaction by requesting party comments on the procurement plans. GPI provided such comments. Second, PG&E's response does not address the issue GPI initially raised: why does PG&E need to redact this information when SCE and SDG&E did not? Until this question is answered, the Commission should determine that PG&E has not met its burden of proof for establishing confidentiality of this data.

PG&E requests the Commission to approve its GHG procurement plan as is. GPI disagrees with this request and again urges the Commission to require PG&E to satisfy its burden of proof with respect to confidentiality, and to release a version that is not redacted, or appropriately redacted with justification, before approving the plan.

Calpine's Proposal

GPI agrees with TURN's objections in their *Opening Brief* to Calpine's proposal (TURN *Opening Brief*, p. 3):

> Calpine's proposal [for short-term solicitations to ensure that plants aren't forced to shut down] is riddled with flaws and must be rejected. Calpine has not demonstrated that its facilities need such solicitations to remain profitable, would almost certainly possess extreme market power in any such solicitation, cannot credibly argue that their facilities will be permanently shut down in the absence of these solicitations, and fails to reconcile this proposal with the establishedplanning reserve margins adopted by the Commission."

Specifically, GPI agrees that Calpine has failed to make its case because it has failed to include key data to support its assertions (such as current ROI data and in what manner reduced revenue streams for its power plants will affect its ROI).

We also note that if the Commission does agree, in whole or in part, with Calpine's assertions that new revenue streams are required to allow current natural gas facilities avoid economic closure, any new capacity markets must be open equally to natural gas and renewable power facilities.

CAISO Assumptions

CAISO makes a number of assumptions in its Opening Brief that warrant further explanation. For example:

> Pp. 4-5: If 50% of the local needs come from combined cycle resource additions and 50% come from combustion turbine resources, the system need for operational purposes in 2020 would be 2700 MW. These results were based on the assumption that all 12,079 MW of OTC resources would be retired by 2020.

What is the basis for these assumptions? Why are only fossil resources assumed to be substituted, and why does CAISO assume all 12,079 MW of OTC facilities will be retired by 2020?

> P. 6: The ISO shares the concerns identified by AES that, given the lengthylead times required to permit and construct generation needed for operational flexibility, long-term procurement decisions must be made quickly, preferably well before year end 2012.

GPI agrees that long-term procurement decisions in this current cycle should be made before the end of 2012. We are very concerned, however, as we have mentioned previously, with the ongoing lack of adequate analysis of the ability of renewables like biomass and geothermal, as well as energy storage, electric vehicles, and smart-grid technologies to help integrate variable renewables into the grid. We feel that these items may constitute a very substantial additional resource for balancing variable renewables.

CAISO also seems to accept at face value Calpine's statements with respect to the possibility of economic closures of existing facilities (p. 7):

> According to Mr. Barmack's [Calpine] sensitivity studies, if 3200 MW of Calpine CCGT capacity is assumed to be retired and removed from the High Load Trajectory case, there is a need for 2600 MW of new replacement capacity. Removing 3200 MW of Calpine CCGT capacity from the CPUC Trajectory case results in the need for approximately 1400 MW of new replacement capacity. These study results raise concerns for the ISO.

And at p. 8:

> The ISO agrees that a "gap" currently exists between the ISO's renewable study assumptions that existing resources modeled in the 2011-2020 time period will actually still be part of the fleet when needed as the system approaches 33% renewables, and the reality that some, or many, of these units could face economic retirement if not procured under long-term contracts. Clearly this gap must be addressed and the Commission in this proceeding has the opportunity to design a flexible solicitation process and intermediate term procurement directive as suggested by Calpine. The ISO urges the Commission to take these steps in the decision to be issued by the end of 2011."

As mentioned above, GPI feels that Calpine has more to do in order to satisfy its burden of proof. TURN describes very well in its *Opening Brief* the many problems with Calpine's proposal, and we urge CAISO to consider TURN's comments with respect to CAISO's support for Calpine's proposal.

It is important to note that while we believe that it is questionable how much natural-gas fired generators operating under tolling agreements might be at-risk, given that the tolling agreements protect them from low SRAC payments, there are many existing renewable generators operating on SRAC who are not protected from low SRAC prices, and are at great risk of having to shut down if SRAC prices remain where they are today. In particular, the GPI is aware that a number of existing biomass generators in the state, who recently saw their last five-year fixed-price energy agreements expire, are seriously considering shutting down, given the current market conditions. Shutdowns of this kind would deliver a body blow to the RPS procurement performance of the IOUs who depend on their output, especially PG&E.

SCE

SCE disagrees with GPI's and other parties' suggestions regarding its GHG procurement plan (p. 2):

> Pacific Environment (PE), Division of Ratepayer Advocates (DRA), and Green Power Institute (GPI) were the only parties to propose any modifications to SCE's proposed GHG Procurement Plan, asserting that more oversight and safeguards were necessary than SCE included in the plan. SCE's Reply Testimony and this Opening Brief explain why SCE's proposed GHG Procurement Plan, similar to other commodities in SCE's AB 57 Bundled PP, provides bundled customers with sufficient oversight and safeguards while, at the same time, minimizing the risks associated with GHG-related procurement. The Commission should reject the proposed modifications and adopt SCE's proposed GHG Procurement Plan without modification.

SCE also objects to GPI's suggestion that the Commission ensure that the utilities do not engage in arbitrage for profit in the upcoming GHG market (SCE Opening Brief, p. 12):

> If GPI is actually concerned about SCE engaging in "speculation for profit," not only are SCE's shareholders unable to profit from SCE's GHG-related transactions, SCE's proposed GHG Procurement Plan is clear that SCE does not engage in speculative behavior. Exhibit 210, SCE's proposed GHG Procurement Plan, at page 5, footnote 12, specifically addresses SCE's position regarding speculative transactions, stating,
>
> Through its energy and energy-related procurement plans, SCE seeks to hedge or reduce its exposures, not to speculate in the relevant markets.
>
> SCE will not engage in speculative transactions consistent with SCE's proposed GHG Procurement Plan.

GPI stands by the comments in our *Opening Brief* with respect to SCE's greenhouse-gas product procurement plan. SCE explains that it may by law engage in greenhouse-gas arbitrage, but not in what it calls speculation. GPI continues to feel that utilities should not be allowed to engage in arbitrage for profit even if such profit accrues to ratepayers. We are generally wary of market-based solutions to greenhouse gases because of the potential to game such markets, even in fairly well-designed systems. While we recognize that hedging

and other similar strategies should be allowed in order to minimize AB 32 compliance costs for ratepayers, we urge the Commission to set clear rules for what greenhouse-gas trading and hedging activities utilities may engage in and what they may not.

We also remind the Commission that the cyclical natural gas commodity market is not a good model for the market for greenhouse-gas compliance-products that is being created in conjunction with the ARB's establishment of a cap-and-trade program to reduce greenhouse-gas emissions. Although it is certainly possible that during the first compliance period for the program (2013 – 2014) an oversupply of compliance products will be made available, in the longer term the supply of compliance products should become increasingly scarce, with inevitable upward pressure on prices over time.

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Respectfully Submitted,

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