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 10-05-006 (Filed May 6, 2010)

PACIFIC ENVIRONMENT'S COMMENTS ON THE PROPOSED TRACK II DECISION OF ALJ ALLEN

DEBORAH BEHLES
LUCAS WILLIAMS
Environmental Law and Justice Clinic
Golden Gate University School of Law
536 Mission Street
San Francisco, CA 94105-2968
Telephone: (415) 442-6647
Facsimile: (415) 896-2450
dbehles@ggu.edu, lwilliams@ggu.edu

Dated: November 30, 2011

Attorneys for Pacific Environment

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Pursuant to Article 14 of the Commission's Rules of Practice and Procedure, Pacific Environment submits these comments on the Proposed Decision of Administrative Law Judge (ALJ) Allen, distributed on November 11, 2011 in this application, which considered whether to approve the bundled procurement plans of the utilities.

Rule 14.3(c) provides that comments "shall focus on factual, legal or technical errors" in the ALJ's Proposed Decision. The Proposed Decision is well-reasoned, well-written and, except for a few instances, free of errors. Pacific Environment's comments thus are limited to only a few issues in the Proposed Decision that require clarification, are erroneous, or contain inaccuracies, and do not include a discussion of Pacific Environment's disagreement with particular findings.[1]

(1) To Ensure Contracts Reflect Just and Reasonable Rates, The Commission Cannot Approve Procurement Levels Based Solely on Market Prices.

The Proposed Decision correctly concludes that: "[t]he Commission has a legal duty to ensure that ratepayers pay just and reasonable rates, and accordingly the utilities' procurement

[1] Pacific Environment notes that the Proposed Decision inadvertently did not list its reply brief. Pacific Environment filed a Track II reply brief on June 30, 2011. *See* R.10-05-006 Docket, http://docs.cpuc.ca.gov/Published/proceedings/R1005006.htm.

activities must have some correlation to the procurement plan approved by the Commission."[2] To fulfill this legal duty, the Proposed Decision finds that the record is sparse about what constitutes "just and reasonable" rates, and thus relies on an instrument proposed in the hedging context.[3] In particular, the Proposed Decision finds that the utilities will be operating under a Commission-approved procurement plan as long as the procurement activities do not result in a system rate increase over 10% over a rolling 18 month period.[4] The Commission's proposed reliance on this financial hedging concept is not sufficient to ensure that rates are just and reasonable.

Several provisions in the Code require the Commission to ensure just and reasonable rates.[5] Pursuant to these requirements, the Commission has found that a determination of whether a rate is just and reasonable must consider need. As the Commission has summarized:

> Our approval of any project under the LTPP mandated by section 454.5(d) must consider need. As a matter of practice and in exercise of our regulatory expertise, the need has been based on a previously determined number. (See e.g. D.07-12-052, D.09-10-017, D.10-07-042, and D.10-07-045 involving the IOUs' LTPP.) We have consistently made an empirical finding of need, measured in MW, in considering the section 454.5(d) requirement that the procurement plans "fulfill [the utility's] obligation to serve its customers at just and reasonable rates.[6]

Consistent with this standard, the Commission has rejected a project when a utility failed to make an adequate showing of need.[7] The Commission's proposed sole reliance on an evaluation of relative cost should be changed in the proposed decision to include consideration of need.

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[2] ALJ Allen's Proposed Track II Decision at p. 7.
[3] *See* ALJ Allen's Proposed Track II Decision at pp. 13-14.
[4] ALJ Allen's Proposed Track II Decision at pp. 13-14.
[5] *See e.g.,* Pub. Util. Code Section 454.5; Pub. Util. Code Section 451 ("All charges demanded or received by any public utility . . . shall be just and reasonable.").
[6] D.11-05-049, at p. 38.
[7] D.11-03-036, at pp. 2-3 (rejecting project that would "subject the ratepayers to unacceptable risks," and that the utility failed to make "an adequate showing of need.").

In addition, other reasons demonstrate why the Commission should not determine whether procurement contracts are "just and reasonable" solely by reference to prior market conditions. While examining natural gas rates under an analogous statute, the United States Supreme Court concluded that: "the prevailing price in the marketplace cannot be the final measure of 'just and reasonable' rates."[8] The Court based this finding on the fact that the natural gas industry had historically been anti-competitive and influenced by "monopolistic forces."[9]

Similar concerns are present here. After the energy crisis in 2001, the State passed emergency legislation that required the State Department of Water Resources (DWR) to quickly enter into long-term energy contracts. As a result:

> DWR entered into 55 long-term contracts and two agreements in principle to meet a portion of its net short obligations. These contracts had terms ranging from a few months to as long as 20 years and could cost the ratepayers of the investor-owned utilities up to $42.6 billion over the 10-year period ending in December 31, 2010.[10]

Problematically, these contracts were quickly negotiated at a time that DWR did not believe that its agreements needed to be just and reasonable.[11] These contracts thus impacted the rates that ratepayers have paid and will pay for twenty years. Thus, this historical backdrop further warrants not relying solely on the current rates as a measure of whether procurement activity is just and reasonable because current rates are the product of agreements entered into during an anti-competitive time that even PG&E has argued does not reflect just and reasonable rates.[12]

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[8] *Fed. Power Comm'n v. Texaco*, 417 U.S. 380, 398 (1974).
[9] *Id.*
[10] *Pacific Gas & Electric Co. v. Dept. of Water Resources* (2003) 112 Cal. App. 4th 477, 486.
[11] *Id.* at 481 ("DWR contends AB 1X does not require DWR to conduct any just-and-reasonable review of its revenue requirement.").
[12] *See id.* at 488 (PG&E alleged that "several of the calculations contained in the revenue requirement are unreasonable on their face.").

A better measure would be to require the utilities to adopt standardized assumptions for a determination of the level of procurement that presumptively meets the requirements of Section 454.5. The Commission has the information to make this determination. The majority of the information needed to calculate bundled need based on the Commission's assumptions is contained in the standardized assumptions themselves and in the adjustments made to the assumptions in the Proposed Decision. The utilities' plans provide the additional information necessary to make the calculation because they discuss the resources that are currently under contract in their bundled territories.[13]

If a utility wants to procure additional resources beyond this determination, it can ask for upfront approval of its additional proposed contracts. This type of evaluation would be more consistent with the requirements of a "just and reasonable" evaluation than the SCE method discussed in the Proposed Decision.[14] Under SCE's proposed method, ratepayers could pay for meeting the same needs twice if the utility does not meet the targets of other programs paid for by ratepayers. Paying to meet the same need twice should be presumptively unreasonable.

CONCLUSION

For the foregoing reasons, Pacific Environment recommends that the Commission adopt its recommendations.

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[13] *See, e.g.,* PG&E Bundled Procurement Plan at p. 95 (capacity table).
[14] *See* Proposed Decision at p. 7 (describing SCE's position).

Respectfully submitted,

November 30, 2011

/s/ Lucas Williams
DEBORAH BEHLES
LUCAS WILLIAMS
Environmental Law and Justice Clinic
Golden Gate University School of Law
536 Mission Street
San Francisco, CA 94105-2968
(415) 442-6647 (Telephone)
dbehles@ggu.edu; lwilliams@ggu.edu

Attorneys for
PACIFIC ENVIRONMENT