GOODIN,
MACBRIDE,
SQUERI, DAY &
LAMPREY, LLP

Brian T. Cragg, Attorney at Law

January 31, 2012

Honesto Gatchalian
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: Comments of the Independent Energy Producers Association on Draft Resolution E-4471

Dear Mr. Gatchalian:

Draft Resolution E-4471 proposes to require the three largest investor-owned electric utilities (IOUs) to negotiate with Calpine Corporation with a goal of entering into a contract to purchase the capacity of Calpine's Sutter Energy Center for the remainder of 2012. The Independent Energy Producers Association (IEP) offers the following comments on the draft resolution.

The draft resolution includes some unnecessary and legally questionable language that should be revised in the final resolution adopted by the Commission. The draft resolution states: "Calpine is ordered not to retire the Sutter plant" (Page 8). Ordering Paragraph 3 states: "Calpine is not to retire the Sutter plant" until certain conditions are met (Page 10). The problem with this phrasing is that the Commission's jurisdiction extends only to entities that are public utilities under California law (*City & County of San Francisco v. Western Air Lines* (1962) 204 Cal.App.2d 105, 131). Neither Calpine nor the Sutter Energy Center is a public utility under California law. Rather, they have the status of Exempt Wholesale Generators (EWGs) under the Federal Power Act (42 USC § 16451(6)). California Public Utility Code Section 216(g) states that ownership or operation of an EWG does not make an entity a public utility, and Section 218.5(c) specifically states that EWGs are not public utilities "...subject to the general jurisdiction of the commission."

In addition, public utility status under state law is conferred only on entities that, in addition to meeting the statutory definitions, also hold themselves out as public utilities and dedicate their facilities to serve the public. (See Pub. Util. Code § 207; *Richfield Oil Corp. v. Public Util. Comm'n* (1960) 45 Cal.2d 419, 428-430.) Neither Calpine nor the Sutter Energy Center has held itself out as a public utility or dedicated its property to serve the public. In fact, EWGs are restricted by federal law to making sales only for resale, and they cannot offer their power to the general public. Moreover, federal statutory and decisional law has solidly

T 415.392.7900 F 415.398.4321
www.goodinmacbride.com
505 Sansome Street, Suite 900 | San Francisco, CA 94111

Direct 415.765.8413
E bcragg@goodinmacbride.com

established exclusive and preemptive federal jurisdiction over sales for resale in interstate commerce. Thus, the Commission lacks the legal authority to "order" Calpine to act or not to act.[1]

Finding of Fact 16 of the draft resolution is worded in a way that more accurately expresses the jurisdictional relationship between the Commission and an EWG, and this wording is more consistent with the spirit of cooperation between generators and the Commission that has characterized the implementation of General Order 167. Finding of Fact 16 states: "If a plant is requested by the Commission to remain online under General Order 167, it must receive a funding mechanism to compensate it for the readiness services provided." There is no jurisdictional issue raised when the Commission requests a plant to stay online, and there is no waiver of jurisdictional contentions when a plant owner voluntarily complies with that request.

IEP respectfully urges the Commission to eliminate or modify the statement on page 8 of the draft resolution to read: "Calpine is requested not to retire the Sutter plant" and make comparable changes to the subsequent sentence. In addition, the Commission should modify Ordering Paragraph 3 on page 10 to read: "Pursuant to General Order 167, Operating Standard 24, Calpine is requested not to retire the Sutter plant until this matter is either resolved before the Federal Energy Regulatory Commission or negotiations are successfully concluded and the Tier 3 advice letter approved."

The circumstances that led to the draft resolution are manifestations of fundamental problems with California's energy markets. The draft resolution closely follows the issuance on December 6, 2011 of the report by the California Independent System Operator (CAISO) on the "Basis and Need for CPM [Capacity Procurement Mechanism] Designation for the Sutter Energy Facility." In that Report, the CAISO stated that it "...has determined that it must take immediate action to avoid . . . reliability and operational issues in the future."[2] IEP views the need for the corrective actions proposed by both the Energy Division and the CAISO as a reflection of fundamental structural problems in the California energy markets that have persisted too long.

In particular, the procurement of capacity is split between long-term commitments (10-30 years) with new resources (when there is a forecasted need for additional capacity) and one-year commitments with existing units that can provide Resource Adequacy (RA) capacity. The RA obligation is implemented through a showing that load-serving entities (LSEs) have procured their required amount of qualifying RA capacity for a calendar year. This structure creates a very short-term focus and an incentive for "just in time" procurement to meet the annual RA obligation. At the other end of the scale, commitments for new utility-owned

[1] IEP and many independent power producers (IPPs) made these jurisdictional arguments during the development of General Order 167. Without waiving these arguments, most IPPs decided as a practical matter to comply voluntarily with GO 167, rather than to litigate jurisdictional issues. These jurisdictional issues have not yet been resolved by a court, however, and IEP continues to maintain, as it does here, that the Commission lacks jurisdiction over EWGs, qualifying facilities under the Public Utility Regulatory Policies Act of 1978, and other entities that sell electricity in wholesale markets regulated by the Federal Energy Regulatory Commission.
[2] Report, pp. 2-3.

generation are usually for the life of the plant, typically 30 years, while long-term contracts with independent power producers are generally limited to ten years for conventional generation or up to 20 years for renewable generation. The extreme differences in the length of commitments resulting from the two capacity procurement mechanisms, combined with the lengthy commitments IOUs are willing to make with their own generation but not with independent generators, leave modern EWG facilities like the Sutter plant with 20 remaining years of useful life but few opportunities to earn sufficient revenues in existing markets to support their continued operation.

Regardless of what action the Commission takes on the draft resolution, it should not ignore the market flaws that the draft resolution attempts to remedy. The Commission may need to act quickly on this draft resolution, but it also should devote the necessary time in 2012 to address the market gaps that lead to the extraordinary actions that both the Commission and the CAISO are contemplating.

IEP appreciates the Commission's consideration of these comments.

Very truly yours,

GOODIN, MACBRIDE, SQUERI,
DAY & LAMPREY, LLP

By 

Brian T. Cragg

cc: President Michael Peevey
Commissioner Mark Ferron
Commissioner Michel Florio
Commissioner Catherine Sandoval
Commissioner Timothy Simon
Ed Randolph, Director, Energy Division
Karen Clopton, Chief Administrative Law Judge
Frank Lindh, General Counsel
Robert Strauss, Energy Division (via email)
Nathaniel Skinner, Energy Division (via email)
Service List

2970/003/X136328.v3