

DOUGLASS & LIDDELL

AN ASSOCIATION OF
PROFESSIONAL CORPORATIONS

21700 OXNARD STREET, SUITE 1030

WOODLAND HILLS, CALIFORNIA 91367-8102

telephone 818.961.3001

facsimile 818.961.3004

Email douglass@energyattorney.com

Donald C. Liddell, P.C.

2928 2nd Avenue

San Diego, California 92103

Telephone 619.993.9096

Facsimile 619.296.4662

Gregory S.G. Klatt – Of Counsel

411 E. Huntington Drive, Suite 107-356

Arcadia, California 91007

Telephone 818.961.3002

Facsimile 626.628.3320

January 31, 2012

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

Re: Western Power Trading Forum Protest to Draft Resolution E-4471

Dear Mr. Gatchalian:

In accordance with the instructions contained in the Energy Division's January 17, 2012 letter, the Western Power Trading Forum¹ ("WPTF") offers its opening comments in opposition to Draft Resolution E-4471 ("DR"), issued by the Energy Division on its own motion. The DR recommends that the Commission direct the three investor-owned utilities ("IOUs") to enter into negotiations with Calpine Corporation ("Calpine") to offer a contract with the Sutter Energy Center ("Sutter") for a term that ends by December 31, 2012.

Although the cover letter states that parties should "list the recommended changes to the draft Resolution," WPTF recommends that the DR should be rejected in its entirety. There are a number of reasons that support this recommendation and each is discussed more fully below. However, a fundamental objection is that it is not appropriate for the Commission to be shaping the utilities' procurement activities by administrative fiat without a proper record such as that created in the resource adequacy ("RA") and long-term procurement plan ("LTPP") proceedings. Normally the utilities identify a need, propose procurement for that need, and then the Commission approves or disapproves of each utility's application. It is certainly unusual and not normal practice for the Commission to order the procurement of capacity. This is especially true where the capacity does not have specific locational value.

It is critical to note that this sort of activity acts to divert Commission attention from focusing on resolving the real issues of import, which should be to better define the RA requirements and the forward procurement rules. By doing so, RA-obligated entities would be enabled to make purchases that will meet the RA requirements without the need for the sort of "out-of-market

¹ WPTF is a California non-profit, mutual benefit corporation 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.

DOUGLASS & LIDDELL

AN ASSOCIATION OF
PROFESSIONAL CORPORATIONS

Mr. Honesto Gatchalian

January 31, 2012

Page 2

procurement” as is called for in the DR. Further, the Commission’s rationale for authorizing the Sutter procurement is flawed in many aspects, as discussed below.

A. The Commission does not have the authority to order a plant to stay online.

As a preliminary point, WPTF notes that the DR exceeds the Commission’s authority by stating that, “Calpine is ordered not to retire the Sutter plant.”² The Commission has jurisdiction over public utilities, while Calpine is not a public utility under California law. WPTF believes that Calpine is an Exempt Wholesale Generator (“EWG”) under the Federal Power Act.³ California Public Utilities Code Section 216(g) provides that an EWG is neither a public utility nor subject to the Commission’s jurisdiction.⁴ Furthermore, federal law restricts EWGs to making sales only for resale, meaning they cannot offer their services to the general public, as does a public utility. Since there is abundant federal statutory and decisional law that establishes exclusive federal jurisdiction over sales for resale in interstate commerce, the DR should not purport that the Commission has legal authority to “order” Calpine not to close its plant.⁵ That decision is exclusively within the purview of Calpine. Therefore, the DR should be reworded to reflect the jurisdictional reality that the Commission may of course request that a generator stay online, it has no authority to order it to do so.

B. The Commission and CAISO offer competing rationales for keeping Sutter open. The agencies should focus on coordination as opposed to competition.

Fundamentally, the overall capacity procurement market structure requires durable modifications that require cooperative efforts by both the Commission and the California Independent System Operator Corporation (“CAISO”) as opposed to unilateral efforts by either. In this regard, it is notable that the DR appears to reach the same end point that the CAISO tariff waiver process⁶ would accomplish yet offers a totally different rationale for doing so. For example, the DR neither endorses nor rejects the CAISO rationale regarding the need for forward procurement, better definition of RA requirements and market structures for procuring and managing RA requirements. The essence of the CAISO’s Waiver Petition is that the “tariff waiver is necessary to retain an air-cooled existing flexible resource that is not subject to OTC regulations in order to meet future system-wide reliability needs. If the Sutter plant is retired, the capacity gap

² DR, at p. 8 and Ordering Paragraph 3, at p. 10.

³ See, 42 USC § 16451(6).

⁴ “Ownership or operation of a facility that is an exempt wholesale generator, as defined in the Public Utility Holding Company Act of 2005 (42 U.S.C. Sec. 16451(6)), does not make a corporation or person a public utility within the meaning of this section, solely due to the ownership or operation of that facility.”

⁵ WPTF is informed that Calpine submitted to the Commission a notice under General Order (“GO”) 167 notifying the Commission that the plant would shut down, in accordance with the provisions of GO 167.

⁶ See, January 25, 2012, Petition for Waiver of Tariff Provisions and Request for Confidential Treatment (“CAISO Waiver Petition”).

DOUGLASS & LIDDELL

AN ASSOCIATION OF
PROFESSIONAL CORPORATIONS

Mr. Honesto Gatchalian

January 31, 2012

Page 3

identified by the ISO will grow by an additional 525 MW, thereby aggravating an already challenging situation and posing further significant impediments to the reliable operation of the ISO grid starting in 2017.”⁷ CAISO also notes that it has just launched a Flexible Capacity Forward Procurement stakeholder process that will develop rules for the procurement of resources at risk for retirement in the current year but needed in future years, but cautions that the new tariff provisions resulting from this stakeholder process cannot be developed, finalized, and approved in time to procure the Sutter plant before it is targeted for retirement. The DR, however, focuses primarily on Sutter’s pseudo-tie status and ignores the need for forward procurement and a better definition of ERA requirements. This lack of a consistent rationale as between the Commission and CAISO is troubling and undercuts the purported legitimacy of both the DR and CAISO’s proposed tariff waiver.

In order for the California electricity market to flourish and its participants to be able to function efficiently, it is critical that there should be coordination between the Commission and the CAISO. In this case, each entity has sought to address the same perceived problem, but with distinctly different rationales and procedural approaches. WPTF is concerned that each energy agency is “stretching” for reasons to support their positions, when there is little solid rationale for doing so. Expending ratepayer money for the ephemeral pseudo-tie purposes contained in the DR is an unwarranted exercise of its jurisdiction.

WPTF does recognize the changing nature of our grid and notes that just this week the Commission, in conjunction with the CAISO, held a two day RA workshop to discuss (and create a formal record for) necessary changes to procurement guidelines so that the right capability and capacity can be procured to meet reliability and renewable integration needs. It is within this proceeding, not by this DR, that a record must be created before any costs are thrust upon ratepayers without justification.

C. The DR’s focus on Sutter’s pseudo-tie status is not persuasive.

The DR states that Sutter “is one of a small number of resources using a pseudo-tie to connect to the CAISO grid”⁸ and that therefore its continued operation could provide valuable information to the CAISO and stakeholders about the impact of the CAISO’s revised draft tariff language regarding dynamic transfers. In fact, there are multiple units in the state now that operate under pseudo-tie and dynamic transfer agreements. Since Sutter is not unique in that regard, the DR raises the obvious question of whether the Commission intends to give all such facilities similar arrangements, much as the CAISO’s tariff waiver may be requested by multiple other facilities. Furthermore, there is no evidence in the DR that the Commission has investigated whether Calpine in fact intends to continue to use a pseudo-tie arrangement, based on plans filed at the Western Electricity Coordinating Council (“WECC”) to relocate its interconnection such that it is directly interconnected to the CAISO grid. According to WECC, “Calpine submitted a request to

⁷ Id, at p. 3.

⁸ DR, at p. 3.

DOUGLASS & LIDDELL

AN ASSOCIATION OF
PROFESSIONAL CORPORATIONS

Mr. Honesto Gatchalian

January 31, 2012

Page 4

the CAISO in January 2010 to establish a new 600 MW interconnection for the plant to the CAISO-controlled grid on PG&E's Table Mountain-Tesla 500 kV line. The existing 230 kV connection to WAPA will be disconnected and the Sutter plant will connect directly to the CAISO-controlled grid."⁹ This relocation request, when granted and implemented, would end Sutter's pseudo-tie status. It may be the case that if the plant does not receive adequate compensation in the coming year, the request will be moot as the plant will shut down. Nevertheless, the DR fails to discuss this fact.

D. The Commission errs by bypassing its own administrative and regulatory processes.

The DR represents yet another example of how the Commission continually undermines its established RA and LTPP processes by making out of market procurement decisions such as Sutter, Oakley and Colusa. It should be noted that there is nothing in either the RA or LTPP records supporting this procurement. WPTF believes that making procurement directives outside the RA and LTPP proceedings causes precisely the sort of over-capacity that exists today. The CAISO Waiver Petition in fact states that Sutter is not required until at least 2017. Furthermore, although there is other uncontracted capacity in Northern California there is no evidence in the DR that the Commission has done anything to ascertain the level of uncontracted capacity that exists, explore other options or determine whether Sutter represents the least cost resource for ratepayers.

It is evident that the Commission embarks on a slippery slope should it approve the DR. Once it does so, the Commission can reasonably expect to receive multiple such requests in the future, thereby further undercutting the policy goals and effectiveness of the RA and LTPP processes. In WPTF's experience, all too often the Commission gives lip service to competitive markets and then engages in administrative command and control decisions such as this. The DR is yet another example of the Commission placing expediency and potentially jurisdictional turf protection above rational and justified decisionmaking.

E. The suggested cost allocation for the Sutter procurement is improper.

The DR provides in finding 19 that "The identified need of the Sutter plant is system wide, and any benefits and costs should be applied via a non-bypassable charge to all benefitting customers."¹⁰ In doing so, the DR contravenes the Commission's previous directive in D.11-05-005 with regard to the Cost Allocation Mechanism ("CAM") authorized by Senate Bill 695.¹¹ D.11-05-005 specifically defers to a later proceeding resolution of just how the net capacity costs to be imposed on all benefitting customers will be calculated and provides that:

⁹ See, Log of Projects Undergoing WECC's Three-Phase Rating Process – Phase I Projects, revised 1/11/12.

¹⁰ DR, at p. 11.

¹¹ SB 695 added P.U. Code § 365.1(c).

DOUGLASS & LIDDELL

AN ASSOCIATION OF
PROFESSIONAL CORPORATIONS

Mr. Honesto Gatchalian
January 31, 2012
Page 5

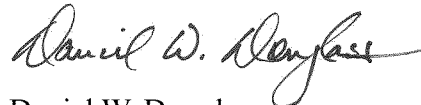
If the statutorily-specified conditions are met, then the CAM applies. Those conditions require that the Commission make a determination that the generation resources in question “are needed to meet system or local area reliability needs for the benefit of all customers in the electrical corporation's distribution service territory.” *The criteria that the Commission will use in making this determination will be developed later in this or a successor proceeding.*¹²

The DR's directive for CAM cost allocation treatment for any IOU contracts with Sutter is premature at best, and must be rejected for the time being. The Commission has recognized that further due process is required before the provisions of SB 695 with respect to CAM can be applied to specific projects. It should not prejudge its future deliberations on those issues by casually imposing CAM treatment in this manner. The Commission should neither circumvent that due process with the DR nor authorize CAM treatment until it has established specific criteria that ensure the application of CAM treatment is consistent with the underlying statute. In this regard, WPTF wants to make it unambiguously clear that it believes the DR to be bad policy for a number of fundamental reasons, as discussed above. Remedying the inappropriate cost allocation, while helpful, would not begin to address all of the DR's abundant problems.

F. Conclusion

In conclusion, the DR exceeds the Commission's authority in ordering Calpine to keep the units on-line. Further, the DR's reliance on a spurious pseudo-tie argument is not persuasive, is an unwarranted exercise of its jurisdiction and may be moot depending on the actions taken by Calpine. The DR undercuts the Commission's own administrative and regulatory procedures, as embodied in the RA and LTPP dockets. Finally, it prejudices the results of the Commission's commitment to examine the proper methods for implementing the SB 695 CAM. For all these reasons, WPTF recommends that the DR be rejected in its entirety and the Commission focus on working with the CAISO to achieve a palatable short term solution while longer term challenges are addressed through existing regulatory procedures. WPTF is willing and prepared to work collaboratively with the Commission and the CAISO to achieve such an alternative. WPTF thanks the Energy Division for its attention to these comments.

Respectfully submitted,



Daniel W. Douglass
DOUGLASS & LIDDELL

Counsel for the
WESTERN POWER TRADING FORUM

¹² See D.11-05-005, at pp. 6-7 (emphasis added).

DOUGLASS & LIDDELL
AN ASSOCIATION OF
PROFESSIONAL CORPORATIONS

Mr. Honesto Gatchalian

January 31, 2012

Page 6

cc: All Commissioners

Ed Randolph, Director, Energy Division

Karen Clopton, Chief Administrative Law Judge

Frank Lindh, General Counsel

All parties on the service lists in R.10-05-006 and

R.11-10-023

Dawn Weisz, MEA

David Orth, SJVPA

Mike Campbell, CCSF

Robert Strauss, Energy Division

Nathaniel Skinner, Energy Division

Leslie E. Starck, Senior Vice President, c/o Karyn Gansecki - SCE