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)

COMMENTS OF SIERRA CLUB CALIFORNIA ON PROPOSED DECISION ON SYSTEM TRACK I AND RULES TRACK III OF THE LONG-TERM PROCUMENT PLAN PROCEEDING AND APPROVING SETTLEMENT.

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INTRODUCTION

Pursuant to Article 14 of the Commission"s Rules of Practice and Procedure, Sierra Club California ("Sierra Club") respectfully submits the following comments on the Proposed Decision on System Track I and Rules Track III of the Long-Term Procurement Plan Proceeding and Approving Settlement ("decision" or "PD"). (Cal. Code Regs tit. 20 § 14 (2012).)

Rule 14.3(c) provides that comments "shall focus on factual, legal or technical errors" in the Administrative Law Judge"s decision. (*Id.* at § 14.3(c).) These comments focus on the Commission"s failure to comply with California Environmental Quality Act, Public Resources Code Sections 21000 *et seq*. ("CEQA").

I. The Decision Errs by Finding That the Commission Need Not Do CEQA Review for the Greenhouse Gas Procurement Plans.

The decision errs when it rejects Sierra Club"s argument that the Commission should have performed CEQA review on its approval of the Investor Owned Utilities" ("IOUs"") proposed greenhouse gas procurement plans. The decision suggests that the Commission can instead rely upon the CEQA analysis contained in the Air Resources Board"s ("ARB") functionally equivalent document prepared for the Cap and Trade regulation. (*See* ARB, Functional Equivalent Document Prepared for the California Cap and Trade Regulation,

Appendix O, (Oct. 28, 2010) available at:

http://www.arb.ca.gov/regact/2010/capandtrade10/capv5appo.pdf (last visited March 7, 2012)

(hereinafter "FED").) The decision states that:

> [S]ince the Commission is only authorizing participation in a previously reviewed and approved CARB program, such an „environmental analysis" would be duplicative of that already performed by CARB. There is no good reason why the Commission should redo CARB"s environmental analysis, particularly for allowing participation in a CARB program.

(PD, p. 46.) The decision suggests that even if the Commission acted as a responsible agency under CEQA, an analysis beyond that performed by ARB would not be possible. (PD, p. 47 [citing CEQA Guidelines[1] §§ 15096 and 15253].)

A. The Commission Cannot Rely on the FED as the Environmental Document Required Under CEQA for the Commission's Action.

CEQA does not allow the Commission to rely on ARB"s FED as a substitute for compliance. (*See, e.g.* CEQA Guidelines § 15253; *Emmington v. Solano County Redevelopment Agency* (1987) 195 Cal.App.3d 491, 503 (agency must present its environmental analysis of a project in a single document even if it is based on another environmental impact report ("EIR").) Here, because the FED was produced pursuant to CARB"s certified regulatory program, Sierra Club agrees that CEQA Guidelines section 15253 is the applicable provision. CEQA Guidelines section 15253(c) states:

> Where a certified agency does not meet the criteria in subdivision (b): (1) The substitute document prepared by the agency shall not be used by other permitting agencies in the place of an EIR or negative declaration, and (2) Any other agencies granting approvals for the project shall comply with CEQA in the normal manner. A permitting agency shall act as a lead agency and prepare an EIR or a negative declaration.

CEQA Guidelines section 15253(b)(3) requires the certified agency to identify:

[1] Cal. Code Regs. tit. 14 §§ 15000 *et. seq.* (referred to as "CEQA Guidelines").

> (A) The significant environmental effects within the jurisdiction or special expertise of the responsible agency.
> (B) Alternatives or mitigation measures that could avoid or reduce the severity of the significant environmental effects.

But in the FED, ARB explained that:

> [w]hile ARB is responsible for adopting cap and-trade as a regulation, it does not have authority over the proposal, approval, or implementation of specific compliance actions for GHG reduction to comply with the cap-and-trade regulation. Other agencies are responsible for the review and approval of specific projects, and if applicable, environmental analysis of proposed compliance actions, definition and adoption of project-specific feasible mitigation, and monitoring of mitigation implementation.

(FED, p. 130). The FED also expressly noted that the analysis of environmental effects of specific projects in California "would be addressed through project-specific environmental reviews that would be conducted by local land use agencies (e.g., cities, counties, CPUC) or other regulatory bodies at such time the projects are proposed for implementation." (FED, p. 397.) Because ARB"s programmatic FED does not satisfy the criteria of section 15253(b)(3), the FED "shall not be used by other permitting agencies in the place of an EIR or negative declaration" and the Commission must do its own analysis as the lead agency.

ARB"s programmatic analysis did not address the project specific issues raised by the IOUs greenhouse gas procurement plans nor does it address issues specific to the electric sector and the Commission"s jurisdiction. As a result, the Commission must conduct its own analysis of the environmental effects specific to the IOUs" greenhouse gas procurement plans. The Commission can use the FED as a basis for its EIR or negative declaration, but simply pointing to its existence is inadequate. (*See* 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act § 21.23 (Cont.Ed.Bar 2d ed. Jan. 2011 update).)

B. CEQA Review Would Still Be Meaningful Because the FED's Programmatice Analysis Did Not Address the Environmental Effects Specific to the IOUs' Greenhouse Gas Procurement Plans.

A major thread of the decision appears to be less a legal argument than a policy concern that meaningful review beyond that provided in the FED is not possible. (*See, e.g.,* PD, p. 48.) At the same time, the decision accurately recognizes "Sierra Club"s main point . . . that the potential use of offsets to reduce greenhouse gases would affect the environment differently than the potential use of allowances to reduce greenhouse gases, and therefore the Commission"s authorization of the use of offsets would have a significant impact on the environment." (PD, p. 45.) As Sierra Club explained in its opening brief, there has been no analysis of the environmental effects of substituting the use of offsets in the electricity for other compliance mechanisms for reducing emissions within the electricity sector such as energy efficiency and demand response. (S.C. Opening Br., pp. 11-12.) This was not analyzed in the FED or in this proceeding. The decision argues that the Commission"s reiteration of its "commitment to the loading in order" in the Track II decision, D.12-01-033, will ensure that greenhouse gas reductions will occur irrespective of the offset decision. (PD, p. 41.) Although clarification of the loading order was an important and laudable result from Track II, that analysis and its result show that neither the IOUs nor the Commission analyzed the positive benefits of requiring strict adherence to the loading order. (D.12-01-033, pp. 17-21.) The IOUs even admitted on cross-examination that each IOU did not analyze the environmental effects of using offsets rather than allowances. (*See* S.C. Opening Br., p. 17 (citing IOU testimony).) Yet, there will be environmental consequences. (*See* S.C. Opening Br. pp. 17-18.)

Furthermore, the decision mistakenly conflates Sierra Club"s argument that the environmental impacts of the Commission"s decision should be analyzed with the proper choice of a baseline. The decision states

> [e]ven if Sierra Club is right that allowances are in some way „better" than offsets, that is not the analysis required by CEQA. The proper analysis for determining whether a project will have a significant impact is by looking to see whether approval of the project will have a significant impact when compared with currently existing conditions, not with some hypothetical other possibility.

(PD, p. 44, (citing CEQA Guidelines § 15125(a); *Communities for a Better Env't v. S. Coast Air Quality Mgmt. Dist.*, 48 Cal. 4th 310 (2010).) Sierra Club agrees that the baseline should not be hypothetical. Here, the baseline is the *status quo* – utilities are subject to declining caps on their greenhouse gas emissions but, unless and until authorized, are not allowed to procure offsets as a mechanism for complying with those declining caps. The baseline is the environment without the utilities" greenhouse gas procurement plans. To determine the environmental effects of the plans, the agency needs to look at both the effects of offset projects and the choice between using offsets in place of some allowances. This is what Sierra Club suggested. (S.C. Opening Br. p. 19.)

In this case, the Commission is approving greenhouse gas procurement plans for each IOU that includes authorization for the purchase of offsets and the tradeoffs that entails. The decision errs by stating that the Commission is simply making the same authorization as CARB"s. (PD, p. 46-47.) In fact, the decision"s discussion demonstrates that the Commission is exercising independent discretion, because the decision places restrictions on the purchase of offsets in sectors no covered by protocols approved in ARB"s rules. (PD, pp. 42, 47, 50-51.) For example, it only allows the procurement of offsets "if the seller assumes risk of invalidation." (PD, p. 42.) Sierra Club agrees with the Commission that this requirement will provide

additional protection for the billpayer, but imposition of this requirement shows that the Commission is not simply "rubber stamping" participation in ARB"s Cap and Trade program and that the Commission has the power to make decisions about *how* the IOUs participate in the Cap and Trade Program.

Similarly, the decision"s explanation of its offset decision further shows that the Commission is exercising its discretion by allowing the IOUs to use the same amount of offsets as the ARB regulations authorize. "Sierra Club"s argument that reducing the cost of greenhouse gas compliance would compromise other environmentally beneficial programs is unpersuasive, and we *decline* to second-guess the CARB on the appropriate level of offsets that can count toward compliance." (PD, p. 41 (emphasis added).) However, even if the Commission is not changing the ARB offset decision, the correct CEQA approach is to analyze the environmental effects of the Commission"s specific implementation decision in the electricity sector to inform both the decision makers and the public through an environmental analysis. As it stands, the current record is an inadequate basis for rejecting Sierra Club"s argument. The Commission can use the FED as predicate, but it must do its own review.[2] (*See* 2 Kostka & Zischke, § 21.23.)

C. Alternatively, Even If the Commission Could Rely on the FED as a Responsible Agency, the Commission Should Have Fulfilled Its Responsible Agency Duties.

Even if the Commission could use the FED as a substitute for its environmental analysis, the Commission would still have to independently review the document and adopt its own findings and statement of overriding considerations. (CEQA Guidelines §§ 15096(h), 15091, 15093; *see also* Remy, Thomas, Moose and Manley, Guide to the Cal. Environmental Quality Act, p. 410 (2007).) The FED found that the cap and trade program could have significant and

[2] The Commission"s attack on Sierra Club"s motives is incorrect. Sierra Club is not trying to "reverse a prior decision of this Commission." (PD, p. 48.) Sierra Club is requesting that environmental consequences of approving the greenhouse gas procurement plans be analyzed.

unavoidable effects. (*See, e.g.*, FED, pp. 397-402.) In addition, a responsible agency must evaluate if it can reduce or mitigate the significant environmental effects of a project. (CEQA Guidelines § 15096(g).) Here, the decision proposes to close the proceeding without any CEQA review by the Commission. The decision improperly relies on ARB"s decision with a passing reference to the FED"s existence. Indeed, if not for the arguments raised here, it is doubtful that the Commission would even had made the FED part of the record in this proceeding. Despite the decision"s protests about duplicative CEQA process (PD, p. 43-44), the Commission needs to do more than state the ARB completed an environmental review of the Cap and Trade Program.

II. The Commission Should Do CEQA Analysis on Future Decisions Related to the Greenhouse Gas Procurement Plans.

The decision correctly recognizes that CEQA will apply to its future decisions regarding offsets. It states:

> To the extent that the Commission approves specific offset projects, the Commission will consider tiering off the CARB document as appropriate. For example, if the utilities want Commission authorization to develop offset projects, they need to file an application with this Commission, at which time this Commission would perform the appropriate project-level CEQA review.

(PD, p. 46.) In addition, any additional changes to the implementation of the greenhouse gas procurement plans may require additional CEQA analysis.

CONCLUSION

Sierra Club respectfully requests that the Commission:

1. Delay approval of the IOUs" greenhouse gas procurement plans until the Commission has complied with CEQA.

2. Find that the Commission is the lead agency for the purpose of approving the greenhouse gas procurement plans.

3. Issue an Initial Study and determine the appropriate amount of CEQA review (*i.e.*, either a negative declaration or an environmental impact report).

4. Alternatively, if the Commission maintains that it is a responsible agency, the Commission must independently review ARB"s FED and adopt its statement of overriding considerations as well as analyze whether the Commission can lessen or mitigate the significant effects of the Cap and Trade program.

Respectfully submitted,

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APPENDIX

PROPOSED CONCLUSIONS OF LAW

Amend Conclusion of Law No. 8:

8. The utilities should **not** be allowed to procure certain greenhouse gas compliance instruments ~~at this time~~, specifically allowances, allowance forwards and futures, and offsets **until the Commission competes its CEQA review of the greenhouse gas procurement plans**.

Add the following conclusions:

8A. The Commission is the lead agency for reviewing the IOUs" greenhouse gas procurement plans.

8B. As lead agency, the Commission shall determine the appropriate CEQA document (negative declaration or environmental impact report) to issue.