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 12-03-014 (Filed March 22, 2012)

REPLY OF THE VOTE SOLAR INITIATIVE AND THE CALIFORNIA COGENERATION COUNCIL TO THE MOTION OF SOUTHERN CALIFORNIA EDISON COMPANY TO STRIKE PORTIONS OF THEIR REPLY TESTIMONY

R. Thomas Beach
Crossborder Energy
2560 Ninth St., Suite 213A
Berkeley, CA 94710
Telephone: (510) 549-6922
Email: tomb@crossborderenergy.com

For the California Cogeneration Council

Kelly M. Foley
The Vote Solar Initiative
2089 Tracy Court
Folsom, CA 95630
Telephone: (916) 367-2017
Facsimile: (520) 463-7025
Email: kelly@votesolar.org

Attorney for The Vote Solar Initiative

August 3, 2012

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 12-03-014 (Filed March 22 2012)

REPLY OF THE VOTE SOLAR INITIATIVE AND THE CALIFORNIA COGENERATION COUNCIL TO THE MOTION OF SOUTHERN CALIFORNIA EDISON COMPANY TO STRIKE PORTIONS OF THEIR REPLY TESTIMONY

Pursuant to Rule 11.1(e) of the California Public Utility Commission's (Commission's) Rules of Practice and Procedure, the Vote Solar Initiative and the California Cogeneration Council (VSI/CCC) hereby reply to the July 31, 2012 *Motion of Southern California Edison Company (U 338-E) to Strike Portions of the Reply Testimony of California Cogeneration Council and Vote Solar Initiative* (Motion). In the Motion, Southern California Edison Company (SCE) admits that the VSI/CCC reply testimony explaining why an all-source RFO is not an appropriate mechanism for Local Capacity Requirements (LCR) procurement is responsive to opening testimony advocating for an all-source RFO.[1] But SCE then attempts to strike as unresponsive VSI/CCC testimony on the proposed Preferred Resources LCR Mechanism (PRLM). The PRLM is a solution to the problems presented by an all-source RFO that ensures LCR procurement is consistent with the loading order and avoids unnecessary investment. Among many other reasons, because VSI/CCC's inclusion of an alternative to an all-source RFO is a constructive and robust response to both opening testimony advocating for an all-source RFO and the July 13, 2012 Assigned Commissioner's Ruling

[1] Motion at p. 2.

(Commissioner Florio's ACR) soliciting "robust" discussion on the design of the RFOs to procure local resources, SCE's Motion is wholly without merit.

Moreover, were SCE's Motion granted, it would send a message to parties that responses to a proposal must be restricted solely to criticism. Such an outcome would stifle the advancement of creative and solution-oriented alternatives and ultimately thwart the achievement of public policy objectives. Accordingly, VSI/CCC respectfully request that the SCE's Motion be denied in its entirety. In the alternative, VSI/CCC are not opposed to granting sur-rebuttal to the VSI/CCC testimony, due on August 7, 2012, provided that the SCE witness or witnesses sponsoring the sur-rebuttal are made available for cross examination no sooner than August 13, 2012.

I. THE LAWS AND RULES GOVERNING THE ADMISSABILITY OF EVIDENCE

The applicable laws and rules of evidence do not support SCE's request to strike portions of the VSI/CCC testimony. The relevant *Commission Rules of Practice and Procedure* state:

> **13.6. (Rule 13.6) Evidence.**
> (a) Although technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved.
> (b) When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly.
> (c) The Commission may review evidentiary rulings in determining the matter on its merits. In extraordinary circumstances, where prompt decision by the Commission is necessary to promote substantial justice, the assigned Commissioner or Administrative Law Judge may refer evidentiary rulings to the Commission for determination.

> **13.10. (Rule 13.10) Additional Evidence.**
> The Administrative Law Judge or presiding officer, as applicable, may require the production of further evidence upon any issue. Upon agreement of the parties, the

presiding officer may authorize the receipt of specific documentary evidence as a part of the record within a fixed time after the hearing is adjourned, reserving exhibit numbers therefor.

The relevant *California Evidence Code* statutes state:

351. Except as otherwise provided by statute, all relevant evidence is admissible.

352. The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Taken together, these rules and statues uphold the long established legal balancing test that admits evidence that is *more probative than prejudicial.*[2] In other words, the question before the Commission is a two-part analysis: 1) whether the portions of the VSI/CCC testimony that SCE seeks to strike are probative and relevant, and 2) if the testimony is probative and relevant, does the probative value outweigh any prejudice or harm that SCE might incur?

II. THE TESTIMONY REGARDING THE PRLM IS PROBATIVE AND RELEVANT

Clearly, the PRLM-related testimony that SCE seeks to strike is probative and relevant. In fact, SCE claims only that the PRLM proposal is "new," that SCE did not have time to evaluate the PRLM,[3] and that the PRLM goes beyond the scope of Commissioner Florio's ACR.[4] Contrary to SCE's allegations, the PRLM proposal is

---

[2] McCormick on Evidence at §152, pp. 319–321 (2006).
[3] Motion at p.3.
[4] Id. at pp.3-5.

directly responsive to Commissioner Florio's ACR, which was issued after opening testimony was served and prior to the due date for reply testimony. In the ACR, Commissioner Florio specifically asked parties to develop a "robust record" on several topics listed in the ACR, both in reply testimony and during hearings.

Specifically, Topic 1 of Commissioner Florio's ACR asks "[t]o the extent that the Commission determines that [SCE and others] must procure capacity to meet long-term local capacity needs, how should the Commission direct these entities to meet that need on behalf of the system?"[5] The PRLM proposal is VSI/CCC's direct response to this straight forward question. Topic 3 of the ACR questions the effectiveness of all-source RFOs in meeting local area needs, particularly in allowing "participation of non-traditional resources like energy storage, demand response and distributed generation." [6] The VSI/CCC testimony was prepared in direct response to Commissioner Florio's concerns, and the PRLM was specifically proposed as an innovative way to use already established procurement policies to ensure that the loading order is followed in procuring resources to fill LCR.

In addition, nowhere does SCE state that the PRLM is beyond the scope of this proceeding, nor does it state that the PRLM related testimony is irrelevant. Very simply, the PRLM is within the scope of this proceeding and is an important and relevant proposal that deserves vetting. Pages 5 and 6 of May 17, 2012 *Scoping Memo and Ruling of the Assigned Commissioner*, lists, among others, issues within the scope of this Phase 1 as:

> 6. How resources aside from conventional generation, such as uncommitted energy efficiency, demand response, energy storage and distributed generation resources should be considered in determining future local reliability needs;
>
> 11. What rules should govern procurement of additional local

[5] Id. at p.1.
[6] Id.

Reliability needs not already covered by the Commission's RA rules.

The PRLM testimony squarely addresses items 6 and 11 by proposing an approach for ensuring that the procurement of renewable Distribute Generation, Combined Heat and Power, Energy Efficiency and Demand Response (Preferred Resources) is considered as a means to meet LCR needs, and by laying out rules governing that procurement process.

Finally, Decision 12-01-033, issued in the 2010 Long Term Procurement Plan (LTPP) proceeding, states at page 20 that "to clarify the Commission's position, [the Commission] expressly endorse[s] the general concept that the utility obligation to follow the loading order is ongoing. The loading order applies to all utility procurement, even if pre-set targets for certain preferred resources have been achieved." As stated in VSI/CCC testimony, the whole point of the PRLM is to provide the implementation details necessary to ensure incorporation of the loading order into any procurement authorized in Track 1 of this proceeding.[7]

SCE attempts to obfuscate the probative and relevant inquiry by claiming that "the PRLM proposal…goes beyond the scope of TURN's opening testimony by presenting a completely new proposal that no party has previously discussed in its opening testimony"[8] and " that "the PRLM is a completely new alternative proposal to the RFO." [9] VSI /CCC disagree that the PRLM is "a completely new alternative proposal." Without doubt, the issue of whether Preferred Resources can meet a portion of SCE's LCR is central to Track 1 of this proceeding – this was well established in the opening testimony of many parties served on June 25, 2012. Subsequent to that testimony, Topics 1 and 3 of Commissioner Florio's ACR asked parties to provide additional details on how SCE and other Load Serving Entities should meet any potentially determined LCR needs, and whether all-source RFOs present barriers to the procurement of non-traditional resources.

---

[7] Track 1 Prepared Reply Testimony of Eric Gimon on Behalf of The Vote Solar Initiative at p. 2. Lines 13-14.
[8] Motion at p.2.
[9] Id. at p. 4.

In response to the opening testimony and Commissioner Florio's ACR, VSI/CCC presented extensive reply testimony showing that all-source RFOs do present a significant barrier (testimony which SCE has not moved to strike). Logically, this type of response would be followed by a method for overcoming such barriers, and such a response was accordingly solicited by Commissioner Florio's ACR when he asked "how should the Commission direct these [load-serving] entities to meet that [local area] need on behalf of the system?"[10] VSI/CCC have proposed the PRLM as their preferred answer to the key question raised by Commissioner Florio.

Furthermore, the "newness" of a proposal does not, in itself, render it non-responsive. Under SCE's strained interpretation of "responsiveness," all reply testimony would be limited to pointing out the flaws in direct testimony, while proposing remedies and counter proposals to those flaws would be banned. This approach is not only inconsistent with existing laws and rules, but would also inappropriately limit the record created though the hearing process that forms the basis for Commission decisions. While the Commission certainly solicits critiques of various programs and proposals, the Commission also appreciates the appropriateness of, and the need for, counter proposals. Finding fault is far easier than finding solutions, but solutions are, generally speaking, far more valuable and critical to the work performed by the Commission.

Finally, the ACR clearly states that parties should conform their responses, "to the extent possible," as a response to Opening Testimony.[11] VSI /CCC believe that their testimony accomplished this, but regardless, the ACR states conformation to Opening Testimony as a ***goal***, to be achieved to ***the extent possible***, not a requirement for admissibility. Ultimately, because the PRLM is within the scope of this proceeding, responsive to Commissioner Florio's ACR, responsive to opening testimony, responsive to past Commission precedent, and, most importantly, elemental to building the robust and solution-oriented record critical to informed Commission decision making, the VSI/CCC testimony passes the first part of the admissibility inquiry – the evidence is probative and relevant.

---

[10] Id. at p.1.
[11] ACR at p.2.

III. SCE IS NOT HARMED BY ADMISSION OF THE PRLM TESTIMONY

Having established that the VSI/CCC testimony is probative and relevant, the second part of the analysis is to determine if admission of the testimony outweighs the potential harm to SCE. SCE's claim of harm essentially amounts to not having enough time to respond to the PRLM proposal, and not being able to respond through written sur-rebuttal testimony.[12] The VSI/CCC testimonies were timely served on July 23, 2012. Over a week transpired between then and the filing of the Motion. From July 23, 2012 to July 30, 2012, VSI/CCC did not receive any data requests, phone calls or other types of communication from SCE, ostensibly for the purpose of better understanding the PRLM proposal. During that time, VSI/CCC did, however, have communications regarding the PRLM proposal with a number of other parties.

Furthermore, both the VSI witness, Eric Gimon, and the CCC witness, Tom Beach, are scheduled for cross examination in the second week of hearings (Beach on August 15, Gimon on August 16).[13] Based on this witness schedule, SCE will have had 22 days to prepare to cross examine Gimon and Beach, and to prepare and receive responses to data requests. Comparing these 22 days which SCE will have had to prepare to cross examine VSI/CCC testimony to the 10 days all parties had to respond to Commissioner Florio's ACR, it appears that SCE really doesn't have much room for complaining about a "fair opportunity to respond."[14] The Commission sets many due dates well under 22 days for far more complicated issues. Simply put, there is no prejudice to SCE due to lack of time to respond to the VSI/CCC testimony.

The inability to submit pre-filed sur-rebuttal testimony also does not equate to harm to SCE, and it certainly does not outweigh the probative value of the PRLM testimony. SCE had (and still has) ample time to serve data requests, and will have ample time to cross examine Gimon and Beach. Unless SCE seeks to offer a counter proposal to the PRLM, there is nothing that SCE can accomplish in written sur-rebuttal testimony that it cannot accomplish through cross examination and subsequent briefing.

---

[12] Motion at pp.2-4.
[13] Judge Gamson's July 13, 2012 procedural memo.
[14] Motion at p.4.

In sum, SCE's inability to submit written sur-rebuttal testimony does not result in any prejudice to SCE, and thus SCE does not need protection (i.e. the striking of the VSI/CCC testimony) from nonexistent undue harm. Nevertheless, because VSI/CCC support the development of as robust of a record as is practical and timely, VSI/CCC are not opposed to granting SCE the right to serve such sur-rebuttal testimony on August 7, 2012, provided that the SCE witness or witnesses sponsoring the testimony are available for cross examination no sooner than August 13, 2012.

IV. THE ISSUE OF A FURTHER LOCATION BONUS FOR CHP IS CLEARLY WITHIN THE SCOPE OF THIS CASE.

SCE also seeks to strike that portion of Mr. Beach's testimony which proposes, as part of the PRLM, to increase the location bonus that SCE would pay to new, highly-efficient, small CHP projects developed under the AB 1613 feed-in tariff that locate in the local areas where SCE's need for capacity is most acute. SCE claims that the issue of location bonuses for such CHP projects was determined in another proceeding, R. 08-06-024, which is now closed and past the due date for petitions for modification. SCE asserts that the CCC is "forum-shopping" to increase the location bonus for small CHP.[15]

First, issues and Commission decisions evolve over time and there is no support for the proposition that an issue decided in one proceeding can not be raised or revisited in a subsequent proceeding where it is relevant. Simply put, as is the case here, facts and circumstances change over time. As Commissioner Florio has recognized, the need to replace once-through cooling generation has raised issues and locational reliability concerns that need to be addressed by the Commission and that are directly relevant in this LTPP proceeding.

Second, SCE ignores the fact that central issues in this case are whether and how Preferred Resources, such as small, efficient CHP located in the right area, can displace dirtier, less efficient conventional fossil generation. The Commission has established

---

[15] The CCC notes that it does not have a direct interest in the development of small, under-20-MW CHP projects under AB 1613. CCC members operate existing large CHP projects developed in the 1980s, and almost all of the CCC member projects are larger than 20 MW. No CCC member operates or is developing an AB 1613 project. The CCC was only involved sporadically in A. 08-06-024, mostly in the early stages of that multi-year proceeding.

procurement processes for such preferred resources in a myriad of proceedings different than this LTPP case. It is not just small CHP procurement that has been developed in a different case – large CHP, the SB 32 and RAM feed-in tariffs, SCE's SPVP program, demand response resources, and energy efficiency all have their own procurement dockets. The Commission may need to modify a number of these procurement processes in order to attract additional development of preferred resources to the local areas where SCE's need is the greatest. Indeed, VSI /CCC proposed the PRLM to do precisely that. If the CCC cannot propose in this case to modify the established procurement process for small CHP in these local areas, then by extension none of the existing mechanisms for procuring other preferred resources could be changed, as well. Although SCE's goal may be to exploit the Commission's "proceeding silos" to argue that the Commission can only use all-source RFOs that strongly favor conventional fossil generation, Commissioner Florio's ACR expressed a desire to pursue a more innovative and flexible approach to this case. VSI/CCC present a proposal that will allow the Commission to explore how existing procurement processes for Preferred Resources can be modified to direct the procurement of these clean resources to locations where they are most needed. The Commission should confirm this intent by rejecting SCE's Motion to strike this portion of the CCC's testimony.

//

//

//

WHEREFORE, for the reasons stated above, VSI/CCC respectfully request the Commission deny the SCE Motion in its entirety. In the alternative, VSI/CCC are not opposed to granting SCE sur-rebuttal testimony due August 7, 2012, provided that the sponsoring SCE witness/witnesses are made available for cross examination no sooner than August 13, 2012.

Respectfully Submitted,

___/s/_____

Kelly M. Foley
The Vote Solar Initiative
2089 Tracy Court
Folsom, CA 95630
Telephone: (916) 367-2017
Facsimile: (520) 463-7025
Email: kelly@votesolar.org

Attorney for The Vote Solar Initiative

R. Thomas Beach
Crossborder Energy
2560 Ninth St., Suite 213A
Berkeley, CA 94710
Telephone: (510) 549-6922
Email: tomb@crossborderenergy.com

For the California Cogeneration Council

Dated: August 3, 2012