BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.	Rulemaking 11-05-005 (Filed May 5, 2011)

COMMENTS OF THE WESTERN POWER TRADING FORUM TO THE OCTOBER 5, 2012 SECOND ASSIGNED COMMISSIONER'S RULING ISSUING PROCUREMENT REFORM PROPOSALS

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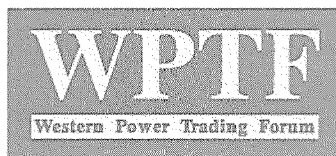

TABLE OF CONTENTS

I. Response to Ruling 2

A. Section 4.1 Proposal – Standards of Review for IOUs' Shortlists 2

B. Section 4.3 - Expedited Review of RPS Purchase and Sales Contracts 3

C. Section 4.4 B - Proposed Standards of Review for Bilateral Power Purchase Agreements 4

D. Section 4.4 C - Proposed Standards of Review for Amended Contracts 6

E. Section 4.4 D - Proposed Standards of Review for Power Purchase Agreements that are Beyond the Scope of the Commission's Advice Letter Process. 9

II. Conclusion 10

SB_GT&S_0199829

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On October 5, 2012, Assigned Commissioner Mark J. Ferron issued his Second Assigned Commissioner's Ruling Issuing Procurement Reform Proposals and Establishing a Schedule for Comments on Proposals ("ACR"). The ACR provided for comments to be filed not later than November 15, 2012. Subsequently, in her November 5, 2012, email, Administrative Law Judge ("ALJ") Anne E. Simon extended the date for comments to November 20, 2012. Therefore, these comments are timely filed.

The Western Power Trading Forum ("WPTF")[1] hereby submits the following response to certain of the issues discussed in the ACR. WPTF does not comment on all issues raised by the ACR but reserves the right to broaden its discussion to encompass other topics in the reply comments due on December 12, 2012. Responses are provided to certain, but not all, questions which explains the gaps in numbering.

[1] WPTF is a California non-profit, mutual benefit corporation. It is a broadly based membership organization 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.

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I. Response to Ruling

The following comments are ordered in accordance with the issues raised in the ACR, which explains the non-consecutive numbering that is used herein.

A. Section 4.1 Proposal – Standards of Review for IOUs' Shortlists

The ACR describes the current shortlist process, including the requirement that the investor-owned utility ("IOU") shortlists are reviewed to ensure that the bids were evaluated and shortlisted consistent with approved least cost, best fit ("LCBF") methodologies and the IOU's RPS net short, as approved in its annual RPS procurement plan.[2] The ACR finds a need to "streamline the advice letter review process,"[3] and therefore determines it is reasonable to put more emphasis on the review of the shortlist to ascertain whether it is consistent with an IOU's RPS net short and that the LCBF bid methodology was appropriately applied to select the projects on the shortlist. If this is found to be the case, the ACR states that the "contract review may be streamlined when a project is submitted by advice letter as long as the project characteristics and value do not meaningfully differ from the project as bid."[4] Therefore, the ACR proposes that instead of a Tier 2 Advice Letter, the shortlists be submitted via a Tier 3 Advice Letter. The standards of review for the shortlist will include consistency with an IOU's procurement plan (e.g. the approved net short and LCBF methodology), determination by the IE that the shortlist was fairly selected, assessment of the viability of shortlisted projects relative to all bids, and consistency with the IOU's procurement expenditure limitation, once adopted by the Commission. Furthermore, proposed contracts on the shortlist cannot be executed until the Commission adopts the shortlist in a resolution.

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[2] ACR, at p. 9.

[3] Id.

[4] Id.

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1. Provide comments on the strengths and weaknesses of increasing the level of review of IOUs' shortlists. If an alternative review process or review standards are proposed, include justification for the proposal.

WPTF supports increasing the level of review of the IOUs shortlists, but believes that there are a number of questions about the process and timing associated with this approach. Specifically, there needs to be more clarification of the process and timeline to be adopted. WPTF therefore requests that the Commission adopt a process whereby the IOUs will submit and the Commission will approve the shortlist within a specific amount of time. IOUs should be required to submit the shortlist within a month of bid closure and the Commission must approve it within 90 days. As the goal of this change is to streamline the current review process, then incorporating this specific time frame would ensure that the improved review process is substantive rather than just theoretical.

B. Section 4.3 - Expedited Review of RPS Purchase and Sales Contracts

This proposal would streamline the review of RPS contracts of lengths of less than five years (<5 years). IOUs would be allowed to request Commission approval of eligible contracts by Tier 1 Advice Letters, as compared to the currently required Tier 3 Advice Letter, if the prerequisites in Table 1 of the ACR are met. One of the prerequisites in Table 1 is that the delivery start date must be "Within 1 year of contract execution."[5]

3. The above proposal defines expedited review prerequisites differently for contracts <5 years and those ≥5 years in term length. Comment on the appropriateness of the 5 year term length distinction. If an alternative is proposed, include a justification for the proposal.

WPTF supports the expedited review proposal for contracts of less than five years and agrees with the proposed use of Tier 1 Advice Letters, as compared to the currently required Tier

[5] See, Table 1 of ACR, at p. 13.

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3 Advice Letter, if the prerequisites in Table 1 are met. Given the large number of contracts expiring in the coming years, an expedited review process is sensible. This is particularly so since existing projects have little risk and few if any, of development, transmission, and milestone issues associated with new generation. Therefore such projects should simply be tested for price competitiveness and whether they meet the utility need determination. In this regard, it should be noted that WPTF also proposes in its response to Question 12 below that more rigorous criteria must be developed for the approval of bilaterally negotiated contracts, as opposed to those pertaining to contracts arising from RFOs. Our endorsement of expedited review for contracts <5 years applies to contracts arising from RFOs.

Further, WPTF believes that the prerequisite that the delivery start date must be "Within 1 year of contract execution" is problematic and should be deleted. It creates an unnecessary restriction for projects that have a future contract expiration to bid in advance of contract expiration. Both the utility for planning purposes and the renewable developer with future contract expiration should not have to face the arbitrarily instituted uncertainty associated with having to wait until one year before a contract expires before knowing the future of the resource.

C. Section 4.4 B - Proposed Standards of Review for Bilateral Power Purchase Agreements

The ACR offers standards of review for RPS power purchase agreements that result both from IOU solicitations and bilateral negotiations. With regard to the latter, the ACR notes that "the focus of the RPS program and preference of the Commission is procurement through competitive solicitations."[6] This is entirely appropriate and WPTF appreciates the fact that this preference is strongly reiterated in the ACR. However, we also recognize the possibility that

[6] ACR, at p. 21.

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bilaterally negotiated contracts may be permissible and appropriate under certain limited circumstances, as discussed in the following response.

12. Are the proposed criteria and standards within the minimum viability requirements appropriate for bilaterally offered projects? If not, provide alternative criteria and standards and justification for the proposal.

WPTF strongly believes that the bilateral amendment and/or renewal of contracts without going through competitive solicitations should be discouraged. However, we will not argue for an absolute prohibition, instead keeping an open mind with regard to the idea that, perhaps, it will make sense for certain kinds of contracts to be created or extended via bilateral negotiation. That said, we believe such negotiations can only be acceptable when clear standards for the use of this methodology are defined in advance, not decided on an ad hoc basis after application - - that is, no "we'll know it when we see it."

To that end, we recommend the Commission develop, in advance, a clear, rigorous list of criteria under which such bilateral negotiations will be acceptable. We hope it goes without saying that such criteria should be supported by a clearly developed rationale as to why such situations cannot be feasibly exposed to the scrutiny of a competitive process. Furthermore, after such criteria are developed, the default assumption should be that the burden of proof is on the requestor to demonstrate why any given situation cannot be pursued competitively and is therefore eligible for the bilateral process. WPTF reserves the right to comment further on any proposed set of criteria that are developed towards this end.

Overall, WPTF agrees with the stated preference for competitive solicitations and that bilateral negotiations should be minimal and subject to greater scrutiny. The viability criteria should be applied at a minimum and bilateral contracts should be consistent with market pricing. There should be few instances where a bilateral contract is preferable to a contract that results

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from a competitive solicitation. However, we recognize that there are a large number of expiring contracts in the coming years and that many of them are old Qualifying Facility ("QF") agreements that may require non-standard terms and special considerations due to the age of the facilities. While WPTF maintains that any new contract would have to be consistent with market outcomes, we recognize there may be circumstances where a bilateral contract makes sense, particularly for existing facilities with expiring contracts.

The Standards of Review ("SOR") with regard to need authorization, contract price, consistency with prior Commission decisions and minimum development milestones should serve to enhance the viability of such bilaterally negotiated contracts. However, as noted above, a more rigorous list of criteria is needed. Without it, the risk increases of having the contract queue for Compliance Period 2 filled with projects that may require contract amendments and will be hard to judge and value. It should also be noted that if a utility does not have sufficient offers of projects that can meet the criteria, they can wait to procure until closer to when the need for new resource exists, using bilateral negotiations for this purpose. WPTF therefore endorses adoption of the proposed criteria and standards within the minimum viability requirements for bilaterally negotiated contracts.

D. Section 4.4 C - Proposed Standards of Review for Amended Contracts

WPTF applauds the idea that there should be a standard of review that is applicable when IOUs seek amendments for already executed and approved contracts, believing it to represent progress of a sort. However, WPTF advocates the adoption of much stricter principles as well as the imposition of more rigorous burdens of proof on parties that propose significant contract modifications. The ACR offers the observations that RPS markets have become very liquid and

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that the total number of proposals offered greatly exceeds actual needs.[7] Given these facts, there is less justification than ever for letting the IOUs and their suppliers seek substantive amendments to approved contracts.

13. The proposed SOR are for contract amendments that substantially modify a contract. Are additional SOR needed for other types of contract amendments (i.e., contract amendments that do not substantially modify approved contracts) or does review of "contract administration" within the IOUs' Energy Resource and Recovery Account filings encompass all other contract amendment types? If additional SOR are needed, propose alternative or additional SOR and describe the type of contract amendment that they would apply to.

As a general comment, WPTF believes the proposed rule to be too liberal. Projects that require price, online date or product changes should be terminated with the opportunity to rebid in a competitive solicitation. This will ensure that the new pricing and/or products continue to be the most cost effective. Given the Commission's stated preference for competitive markets and use of solicitations for judging contract reasonableness, it should not undermine that process by allowing bid winners to alter their projects after a contract is awarded. At a minimum, holding bidders to their commitment will instill market discipline and reduce the instances where the Commission is placed in the unenviable position of judging contracts that have failed to meet their contractual obligation.

To the extent that the final determination rejects WPTF's primary recommendation that contracts that cannot perform, as is, be terminated and forced to rebid, rather than be amended, we make the following suggestions for an additional SOR that should be adopted. Specifically,

[7] At p. 3, the ACR notes that, "Specifically, over one thousand unique bids were received collectively by PG&E, SCE, and SDG&E in the 2011 RPS solicitation from over 260 developers. This represents an increase of approximately 250% in the number of bidders and 150% in the number of developers from the previous RPS solicitation in 2009. In addition, cumulative generation bid into the 2011 RPS solicitation for procurement by IOUs to meet 2020 compliance requirements was approximately 4.5 times the total need of the entire RPS program" [footnote omitted].

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the Commission should direct that for proposed contract amendments, the IOU and supplier should be required to demonstrate all of the elements below:

a. why the supplier should not be viewed as failing to perform and being held liable for liquidated damages, rather than being awarded an amended contract;

b. why the altered proposal cannot reasonably just be re-submitted in the next solicitation, rather than amended; and

c. that the amended contract would still have won the solicitation in which it was entered; that is, when compared against the best offer not awarded a contract, the amended offer(s) would still have been selected.

The intent is that any proposed amended contract must pass all three of the above criteria in order to be acceptable. So, an IOU should be required to demonstrate that such an amended contract cannot reasonably be delayed until the next solicitation, and that it would have won in its original solicitation. This further SOR would apply to contract amendments that, as noted in the ACR, change the project's technology, includes major modifications to existing technology that potentially change the economics of the project; substantially change the contract, or modify a term that is an explicit term of contract approval; a contract price change; an increase or decrease in contract capacity not previously approved by the Commission; a change to the project's commercial online date by more than three months; a change in project location; or a change in interconnection point.[8]

[8] See ACR, at pp. 25-26.

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E. Section 4.4 D - Proposed Standards of Review for Power Purchase Agreements that are Beyond the Scope of the Commission's Advice Letter Process.

The ACR notes that an IOU "may want to procure generation from projects that would not meet the SOR outlined above in Sections 4.4 A through 4.4 C."[9] It then cites as examples the situation where a project may have a worse net market value than the contracts it is being compared to, but have other attributes that merit Commission review; or where an IOU may want to contract with a technology that is not commercially proven. The ACR then offers a proposal that would require that these non-standard contracts must be submitted for Commission approval in an application. WPTF has a significant degree of discomfort with this proposal, believing it to create a gaping hole in the Commission's often expressed preference for competitive solicitation. The proposal is fundamentally contrary to the ACR's statement that, "While the Commission has allowed a utility and a generator to enter into bilateral contracts outside of the competitive solicitation process since D.03-06-071, the focus of the RPS program and preference of the Commission is procurement through competitive solicitations."[10] Saying that "we believe in competitive solicitations except when we don't" encourages neither regulatory certainty nor a robust competitive market.

WPTF believes it is improper for the IOUs to seek contracts outside a competitive solicitation in order to provide technological support to some untested technology, so long as they go through an application process. While an application provides greater procedural opportunities for examination of such a proposed contract, we believe as a general principle that

[9] Id at p. 29.

[10] Id, at p. 21.

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special contracts of this nature should be discouraged rather than encouraged. WPTF also offers comments herein with regard to Question 17 and the suggested "one percent" rule.

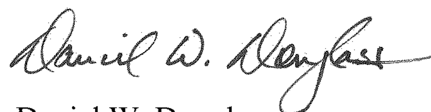
17. Comment on the appropriateness of the requirement that contracts that are expected to provide annually more than one percent of the IOU's total bundled sales in the first full year of deliveries should be filed by application. Provide justification for any alternative proposals.

WPTF does not support the requirement that a contract that would comprise more than 1% of the utilities' procurement should go through an application process. If a project can meet the viability, price and utility need prerequisites, there should be no reason to limit the procurement. In fact, the utility need is probably the limiting factor in any circumstance. The specified one percent seems to be purely arbitrary and the ACR offers no cogent arguments for its adoption. In WPTF's view, there is no need to require applications for competitive, viable project that fall within the need parameters specified in the RFO.

II. Conclusion

WPTF thanks the Commission for its consideration of these comments and urges it to act expeditiously to consider and implement the recommendations discussed herein.

Respectfully submitted,



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November 20, 2012

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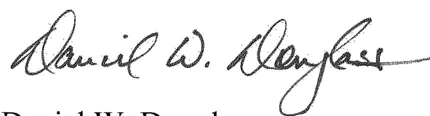
VERIFICATION

I, Daniel Douglass, am counsel for the Western Power Trading Forum and am authorized to make this Verification on its behalf. I declare under penalty of perjury that the statements in the foregoing copy of Comments of the Western Power Trading Forum to the October 5, 2012 Second Assigned Commissioner's Ruling Issuing Procurement Reform Proposals, filed in R.11-05-005, are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

Executed on November 20, 2012, at Woodland Hills, California.



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