

April 12, 2013

The Honorable Michael Peevey, President
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: QF Settlement Agreement Implementation

Dear President Peevey:

I write to express my concern regarding the consistency and stability of the Commission's decision-making process related to procurement. IEP was a signatory to the QF Settlement Agreement. Recently, responding to draft resolutions¹ approving two contracts arising from the initial (first of three) CHP RFOs created by the QF Settlement Agreement, individual Commissioners raised concerns regarding whether the projects proposed met the "spirit" of the Settlement Agreement as approved.

To be clear, the process leading to the Commission's approval of the QF Settlement Agreement entailed the following:

- The QF Settlement Agreement was negotiated over 18 months. The individual Terms and Conditions of each section of the Settlement Agreement were examined in excruciating detail. As in any settlement, the Settlement Agreement reflects the give and take of parties on a number of issues, but it was to be accepted as a whole as written.
- The Commission approved the submitted Settlement Agreement as reasonable, including all its Terms and Conditions, upon the recommendation of Commission staff after having initiated and actively participated in the settlement throughout the process.

One can only conclude from this process that the Settlement Agreement addressed and expressed parties understanding of *all* the outstanding issues. Terms and Conditions were explicitly defined in the Settlement Agreement. Specifically, an entire section of the Settlement Agreement was devoted to defining CHP eligibility in unambiguous terms. Inferring some new meaning or definition of eligibility, after the fact, is completely inappropriate.

Regarding implementation of the QF CHP RFOs, the facts are as follows:

¹ Draft Resolution E-4529 and Draft Resolution E-4569.

- The CHP RFOs Protocols were subject to review for consistency with the Settlement Agreement and Commission policy by the Independent Evaluator, the Procurement Review Group, and the Energy Division acting on the behalf of the Commission.
- A Commission-approved Least-Cost/Best-Fit (“LCBF”) bid evaluation methodology was employed by the utilities to value and rank the bids, based on such critical factors as (a) eligibility, (b) price, and (c) GHG emission reduction. Application of the LCBF bid evaluation tool was subject to review by the Independent Evaluator, the Procurement Review Group, and the Energy Division for consistency with the Settlement Agreement and Commission policy.
- The first projects submitted for Commission approval were found to be eligible.
- The first projects submitted for Commission approval were subject to the Commission-approved LCBF bid evaluation methodology.
- The first projects submitted to the Commission for approval were delayed on April 4, 2013, ostensibly for being inconsistent with the “spirit” of the QF Settlement Agreement.

In other words, the projects before the Commission legally and factually met the criteria and approval process as determined by the Commission. That said, apparently there is another, non-transparent subset of subjective criteria, described as the “spirit” of the Settlement that is ultimately dispositive of the approval of any transaction resulting from the Settlement. This is a big problem not only for these projects, but any other projects considering participating in the subsequent CHP RFOs: What criteria fulfill the “spirit” of the Settlement if not directly prescribed in the Settlement?

The Commission’s discussion on April 4, 2013 regarding whether to approve the projects associated with Draft Resolution E-4529 and Draft Resolution E-4569 resurfaces concerns that the Commission’s procurement practices will return to the “bring me another rock” policy that was a catalyst for AB 57. The over-arching objective of AB 57 was to create a measure of certainty that if procurement practices were conducted consistent with the Commission’s rules, procedures, and policies articulated up-front, then the need for after-the-fact second-guessing of utility procurement practices and outcomes would diminish.

We urge the Commission to consider how best to proceed in the implementation of the QF Settlement Agreement. We note that the two additional CHP RFOs stipulated in the QF Settlement Agreement are scheduled to competitively procure CHP resources. Developers are preparing proposals to meet the terms and criteria of the Settlement Agreement. To the extent that the Commission desires to set parameters above and beyond those found explicitly in the Settlement Agreement, developers need to know in advance what the selection criteria will be. For example, as the QF Settlement Agreement did not set size limits on CHP eligibility, will the Commission now set size limits at 50 MWs, 80 MWs, 250 MWs or something equally arbitrary? Given AB 57, it is imperative that the Commission describe clearly and succinctly in advance what types of products/projects it will consider as meeting the “spirit” of the QF Settlement.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jan Smutny-Jones', with a long horizontal stroke extending to the left.

Jan Smutny-Jones
Executive Director

Cc: CPUC Commissioner Mark Ferron
CPUC Commissioner Michel Florio
CPUC Commissioner Catherine Sandoval
CPUC Commissioner Carla Peterman
Service List for R.10-05-006