

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)

**CALIFORNIA ENVIRONMENTAL JUSTICE ALLIANCE'S
COMMENTS RELATED TO CERTAIN TRACK III ISSUES**

SHANA LAZEROW
Staff Attorney
Communities for a Better Environment
Franklin Street, Suite 600
Oakland, CA 94612
Telephone: (510) 302-0430
Facsimile: (510) 302-0437
slazerow@cbeocal.org

Dated: April 26, 2013

DEBORAH BEHLES
MICHAEL DIGRANDE*
TOVAH TRIMMING*
Environmental Law and Justice Clinic
Golden Gate University School of Law 1904
536 Mission Street
San Francisco, CA 94105-2968
Telephone: (415) 369-5336
Facsimile: (415) 896-2450
dbehles@ggu.edu

Attorneys for California Environmental
Justice Alliance

*Certified Law Student under the California Bar Rules for Practical Training of Law Students practicing
under the supervision of Deborah Behles

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)

**CALIFORNIA ENVIRONMENTAL JUSTICE ALLIANCE'S
COMMENTS RELATED TO CERTAIN TRACK III ISSUES**

The California Environmental Justice Alliance (CEJA) respectfully submits these comments on certain Track III issues that were identified in the March 21, 2013 Administrative Law Judge's Ruling Seeking Comment on Track III Rules Issues (ALJ Ruling). CEJA is an alliance of six grassroots environmental justice organizations situated throughout California brought together to impact and change policy throughout the State.¹ These comments are timely and served pursuant to the March 28, 2013 email from the Administrative Law Judge. CEJA comments on the issues discussed in the ALJ Ruling in the order they were identified.

Issue 1: Maximum and Minimum Limits on IOU Forward Purchasing of Energy, Capacity, Fuel, and Hedges

(a) Limits on Energy and Capacity

The Commission should include limits on forward purchasing of energy and capacity. Limits would help ensure that the goals of AB 57 are met. AB 57² requires that a procurement plan will: procure sufficient renewable energy to meet California's Renewable Portfolio Standards; "first meet its unmet resource needs through all available energy efficiency and demand reduction resources that are cost effective, reliable, and feasible," and "[e]nable the electrical corporation to fulfill its obligation to serve its customers at just and reasonable rates."³

Historically, utilities have not followed the requirements to fill unmet needs with preferred resources before conventional resources. In the 2006 LTPP decision, the Commission

¹ The organizational members of CEJA are: Asian Pacific Environmental Network, The Center for Community Action and Environmental Justice, Center on Race, Poverty & the Environment, Communities for a Better Environment, Environmental Health Coalition, and People Organizing to Demand Environmental and Economic Justice.

² Cal. Pub. Util. Code, §§ 454.5 *et seq.*

³ *Id.*

criticized the utilities for filling their net short positions with conventional resources while ignoring the loading order.⁴ It held that strict compliance with the preferred resource loading order would be necessary for all future LTPPs and required the utilities to “not only conform to the energy and environmental policies in place, but aim for even higher levels of performance.”⁵ This order stemmed from the Commission’s concern that filling the utilities’ net short positions with conventional resources would lead to “the effect of there being no room in an IOUs’ portfolio for other resources.”⁶ Although the Commission has since clarified that the loading order applies to all procurement,⁷ it is not clear that this mandate is being followed.

Maximum limits on forward purchasing of energy and capacity could help assure that all resources are considered and evaluated for meeting unmet needs. Without actual limits, utilities could fill unmet needs with conventional generation even though preferred resources can be used to meet those needs. This would effectively crowd out preferred resources. A maximum limit is especially necessary because of California’s large reserve margin. Allowing continued contracting with all facilities without determining if those contracts are actually needed could unreasonably increase rates, and as mentioned above, leave little to no room for preferred resources.

(b) Limits on Forward Purchasing of GHG Allowances

The Commission should only authorize a low or zero maximum limit because forward purchasing of greenhouse gas (GHG) compliance instruments is not a reliable way to meet the goals of AB 32 and does not safeguard ratepayers. The Commission has recognized the inherent risk associated with offsets and the additional risk of purchasing derivative products.⁸ These risks do not align with either AB 32, which requires *actual* GHG emission reductions⁹ or the utilities’

⁴ See D.07-12-052, at p. 271 (“We find that in general all three LTPPs do not fully reflect our goals in regards to addressing preferred resources and the EAP loading order and GHG reductions.”).

⁵ *Id.* at p. 4.

⁶ *Id.* at p. 6.

⁷ D.12-01-033, at p. 20.

⁸ D. 12-04-046, at p. 52.

⁹ Cal. Health & Safety Code § 38505(i); Health and Safety Code §38505(e) (“‘Direct emission reduction’ means a greenhouse gas emission reduction action made by greenhouse gas emission source at the source.”).

requirement to adopt strategies “to address carbon emissions.”¹⁰ A minimum level could stifle the utilities’ incentive to actively and aggressively pursue actual reductions and instead rely solely on compliance instruments. Conversely, no minimum limit in combination with a low or zero maximum limit, could encourage compliance through innovation and implementation of programs and renewable sources, which reduce GHG emissions.

The Commission has developed calculations for the maximum level of compliance instruments, which grant the utilities broad latitude to forward procure and additional leeway to hedge GHG cost risk.”¹¹ These findings were made when the Commission and the utilities were “on the steep part of the learning curve” in the area of GHG compliance instrument procurement.¹² As Commission gains experience and more data is available about the pitfalls of trading programs, CEJA urges the Commission to reconsider and lower the maximum levels of forward purchasing.

Forward purchasing causes delays in achieving emissions reductions and can lead to the demise of trading programs. An International Energy Agency paper found that banking credits can undermine emission reductions.¹³ In addition, a 2009 article found that every trading program it studied¹⁴ faced problems of over-allocation or were so flawed that reductions were delayed or never occurred.¹⁵ Forward purchasing perpetuated over-allocation and created credit prices that were too cheap to push investment in clean technologies.¹⁶ The study concluded that “[t]he common effects of over-allocation include low allowance prices, delayed emissions

¹⁰ Cal. Public Util. Code § 635.

¹¹ D. 12-04-046 pp. 57, 58 (Apr. 19, 2012).

¹² *Id.* at p. 59.

¹³ See Christina Hood, REVIEWING EXISTING AND PROPOSED EMISSIONS TRADING SYSTEMS, INT’L ENERGY AGENCY 38-40, 47, 50, available at http://www.iea.org/publications/freepublications/publication/ets_paper2010.pdf (finding that banking over-allocated allowances makes reaching long-term emissions reduction target slow and difficult, neither benefiting the public’s economic interest or preventing price increases to consumers).

¹⁴ The McAllister paper examined: EPA’s Acid Rain Program, Los Angeles’s Regional Clean Air Incentives Market, the Chicago Emission Reduction Market System, European Union carbon trading program, and the Regional Greenhouse Gas Initiative.

¹⁵ Lesley K. McAllister, *Overallocation Problem in Cap-and-Trade: Moving toward Stringency*, 34 COLUM. J. OF ENVTL. L. 395, 402-3, 405, 408, 409, 411-413 (2009), available at www.columbiaenvironmentallaw.org/assets/pdfs/34.2/7._McAllister_34.2.pdf.

¹⁶ *Id.* at 413-17, 443.

reductions, and the establishment of a large allowance bank that allows for greater future emissions.”¹⁷

Ratepayers’ also suffer when utilities depend on forward purchasing of GHG compliance instruments. Forward contracts rely on a speculative and volatile market, where ratepayers, not the utility, must compensate for any losses or the additional upfront cost of allowances.¹⁸ This gives the utility little incentive to move towards more reliable means to reduce its own GHG emissions.¹⁹ Moreover, even if rates increase as utilities invest in methods to actually reduce GHGs, the benefits of such reductions will be long-term and local. Because utilities can purchase allowances from pollution sources outside of California, the lack of actual emissions reductions will continue to harm the local communities in which the power plants are sited. Often these communities are environmental justice communities, already disproportionately affected by pollution.

Issue 2: Impacts of Transparency on Forward Purchasing

CEJA urges the Commission to require further transparency within the procurement process to ensure the ability for meaningful public participation by communities affected by procurement. Senate Bill (SB) 1488 requires that Commission provide for the “meaningful public participation and open decision-making.”²⁰ Prior Commission decisions support transparency in the procurement process, particularly in the solicitation and evaluation of RFO contracts.²¹ Consistent with these requirements, CEJA recommends the Commission require

¹⁷ *Id.* at 443.

¹⁸ See D.12-04-046, p. 54 (stating over-procurement unnecessarily spends ratepayer money and under-procurement risk penalties or last minute allowance purchases).

¹⁹ See e.g., *Citizens Climate Lobby vs. California Air Resources Board*, No. CGC-12-519554 at 6, Superior Ct. of Cal., San Francisco County (filed June 12, 2012) (observing that large amounts of available offset on the carbon market could cause prices to plummet and result in “incentive for capped industries to buy credits rather than undergo the expense of converting their facilities to emit less GHG.”).

²⁰ 2004 Cal. Stats. CH. 690, § 1 (Sept. 22, 2004).

²¹ See, e.g., D.06-06-066, p. 1 (This decision implements Senate Bill (SB) No. 1488...(which) expresses a preference for open decision making, a policy directive we embrace.”; D. 07-12-052, p. 155 (“The evaluation criteria used in competitive solicitation must be clear, transparent, and available to potential bidders.”); D. 12-11-

disclosure of relevant information to the public to facilitate the open decision-making reflected in SB 1488.²² Specifically, CEJA highlights three areas where the Commission may increase transparency by disclosing information to the public: 1) non-confidential information presented to the Procurement Review Group (PRG) meetings, 2) environmental assessments for bids in the RFO process; and 3) information about the RFO bid criteria and the evaluation process.

a. The Commission Should Require Disclosure of Procurement Review Group's Evaluation of Potential RFOs.

CEJA requests that the Commission require the disclosure of all non-confidential information submitted to the PRG to inform the public about RFO solicitations and evaluations. Past Commission decisions promote further transparency in the PRG process by utilities to report to the PRG with meeting summaries detailing strategy and specific transactions in procurement activities.²³

The current PRG structure prevents organizations that represent community members, such as the groups that form CEJA, from informing their membership about issues that may impact them. Problematically, all information exchanged in the PRG meetings, even non-confidential information, is not available to the public. In addition, only non-market parties with significant personnel, time, and resources have the capability of participating in a PRG. CEJA has highlighted this lack of information as a serious obstacle for community advocacy groups because it hinders their ability to take part in an active dialogue about RFO contracts that will have a significant effect on their neighborhoods.²⁴ The disclosure of all non-confidential information would provide notice to the public about how a RFO solicitation could impact a community.²⁵

016, p. 45 (detailing how the Commission preferred PG&E's revised procurement methodology due to the clarity and transparency it provided to potential bidders.)

²² CEJA Track III Comments at p. 1

²³ See, e.g., D. 12-04-046, pp. 64-65

²⁴ See e.g., CEJA's Reply to Workshop Comments for R. 12-03-014, at pp. 1-2 (Oct. 2012) (summarizing some parties concerns about transparency in the procurement process).

²⁵ D. 10-07-045, pp. 19-20 (The Commission called for more transparency from PG&E in this proceeding, stating the utility "should provide greater details of when and how discretionary decisions were made, and how these decisions affected the scoring and selection process.").

The administrative burden in disclosing such information is negligible considering the public notice it would provide. Prior Commission decisions already require utilities to provide information to the PRG including detailed summaries of PRG meetings, yet such information is only available to the PRG.²⁶ Disclosing non-confidential information from those documents to an equally interested public audience would not entail a large administrative burden, and functions as a more transparent process to inform the public at large. Therefore, CEJA respectfully requests that the Commission require the publication of all non-confidential information from PRG meetings to further facilitate the open decision-making policy highlighted in SB 1488.

b. The Commission Should Require Public Environmental Assessment for RFOs.

CEJA urges the Commission to increase transparency by making the environmental evaluation of projects in the RFO process publicly available. The environmental evaluation of a project is an assessment of publicly available material, making its release unlikely to impact the competitive nature of a bid, and thus, commercially neutral.

Conducting an environmental assessment would provide a mechanism to promote procurement of preferred resources through RFO contracts, as well as an opportunity to inform the public on how RFO contracts will affect local communities. The Commission already requires IOUs to disclose the tangible environmental benefits stemming from RPS procurement, considering factors such as public health, amelioration of air quality problems, and reduced reliance on fossil fuels.²⁷ The Commission also requires environmental impacts to be analyzed as part of the bidding process.²⁸ Requiring a public environmental assessment not only adheres to prior Commission decisions, but it also helps assess local impacts from RFO planning on the

²⁶ D. 12-04-046, p. 65 (highlighting how the Commission required utilities to provide PRG with meeting summaries pertaining to their RFO solicitation and procurement process).

²⁷ D. 06-05-039, p. 51 (stating, “We [the Commission] have discussed these and other potential benefits from RPS generation, and bidders are encouraged to describe these benefits, if any, in their bids. We have directed IOUs to make it known in their Plans that such benefits are sought, and apply transparent criteria to evaluating such claims.”)

²⁸ D.07-12-052, p. 157 (“Some criteria for which we believe the IOUs need to provide greater weight include disproportionate resource sitings in low income and minority communities, and environmental impacts/benefits (including Greenfield vs. Brownfield development).”)

outset before significant costs and complex agency proceedings begin. Therefore, CEJA urges the Commission to require the public disclosure of an environmental assessment for potential RFOs to facilitate the open decision-making goals of SB 1488.

c. The Commission Should Require Disclosure of Bid Evaluation Criteria.

The Commission should mandate disclosure of all bid evaluation criteria. Bid evaluation criteria is not specifically included in the confidential matrix in D.06-06-066. Yet, utilities have attempted to withhold this information from public disclosure in the past.²⁹ Allowing bid evaluation criteria to be public “will help insure that bidders are on an equal footing and allow them to present bids that best reflect Commission objectives.”³⁰ It is also important to provide the public with clear information about the RFO design and evaluation process. Increased transparency would allow the public to identify potential issues with the RFO design before significant time and resources are expended in the process. Therefore, CEJA requests that the Commission require disclosure and publication of IOUs’ bid evaluation criteria.

Issue 3: Long-term Solicitation Rules – Existing Facilities Should Be Allowed to Bid Into New-Generation RFOs.

The Commission should adopt a rule that explicitly indicates that existing power plants may bid upgrades or repowers into new-generation RFOs. Upgrades or repowers of existing power plants can be less expensive for ratepayers and less damaging to the environment. Existing resources are a potential source of incremental flexibility that should be allowed to bid into a RFO process. For currently existing facilities, software upgrades, such as OpFlex, are used to allow for faster startup and increased ramping capability.³¹ Facilities have seen

²⁹ See, e.g., A.09-09-021, Sept. 8, 2010 Administrative Law Judge’s Ruling Resolving Outstanding Motions, p. 4 (describing PG&E’s attempt to mark bid evaluation criteria as confidential.)

³⁰ A.09-09-021, Sept. 8, 2010 Administrative Law Judge’s Ruling Resolving Outstanding Motions, p. 5 (rejecting PG&E’s claim that bid evaluation criteria should be confidential).

³¹ See GE Ecomagination: OpFlex Turndown Technology, <http://ge.ecomagination.com/products/opflex-turndown.html>; see also Siemens, *Integrated Technologies that Enhance Power Plant Operating Flexibility* (POWER-GEN International 2007), available at http://www.energy.siemens.com/co/pool/hq/energy-topics/pdfs/en/combined-cycle-power-plants/PowerGen2007PaperFinal_.pdf.

substantial benefits by employing OpFlex³² and Fast Cycle technology.³³ This technology only requires relatively minor modifications, making upgrades more cost-effective than constructing a new facility.³⁴ The RFO process should be designed to allow increases in flexibility from existing resources to be fairly considered and evaluated as an alternative to new generation.

Importantly, as California moves towards an increasing decarbonized future, the State will need to limit investments and long-term commitments in new fossil-fuel facilities to meet its greenhouse gas (GHG) goals. The long-term nature of conventional power plants means that any plans approved now will likely affect GHG emissions for 40 years. Consequently, continuing to construct new GHG emitting fossil-fuel facilities will impede California's GHG goal to reduce GHG emissions to 80 percent below 1990 levels by 2050.³⁵ Thus, alternatives to building new generation, such as allowing existing generation to bid into RFOs, should be allowed.

In addition, RFOs should allow consideration of energy storage constructed at existing facilities because it can provide additional flexibility and ancillary services. The addition of energy storage to an existing facility can also limit the amount of facility startups and shutdowns, which helps to reduce potential air quality impacts. Problematically, pollutants from power plants are emitted at even higher rates during startup and shutdown of operation.³⁶ For example, the Marsh Landing Generation Station's turbine is permitted to emit up to 10 lbs/hr of CO during

³² See *Best Practices Awards*, COMBINED CYCLE JOURNAL, pp. 14, 16 (2008), available at <http://www.combinedcyclejournal.com/1Q2008/1Q2008-1/108Award-p.3-27.pdf>.

³³ See generally Siemens, *Integrated Technologies that Enhance Power Plant Operating Flexibility* (POPOWER-GEN International 2007), available at http://www.energy.siemens.com/co/pool/hq/energy-topics/pdfs/en/combined-cycle-power-plants/PowerGen2007PaperFinal_.pdf; Siemens AG, *Improvement of Operational Efficiency Based on Fast Startup Plant Concepts*, p. 4 (21st World Energy Congress, Sept. 12-16, 2010). <http://www.worldenergy.org/documents/congresspapers/455.pdf>.

³⁴ See Letter from Paul C. Richins, Jr., Envtl. Prot. Office Manager, California Energy Commission, to Jack P. Broadbent, Bay Area Air Quality Management District, p. 2 (May 29, 2007), http://www.energy.ca.gov/sitingcases/russellcity_amendment/documents/2007-05-31_LTR_BROADBENT.PDF.

³⁵ California Executive Order S-3-05.

³⁶ See e.g., CAL. COUNCIL ON SCIENCE AND TECHNOLOGY, CALIFORNIA'S ENERGY FUTURE – THE VIEW TO 2050, p. 4, (2011), available at <http://www.ccst.us/publications/2011/2011energy.pdf> (finding that if fossil fuel plants are the predominant resource used to backup renewables, this “would likely result in greenhouse gas emissions that would alone exceed the 2050 target for the entire economy.”).

steady-state operation but up to 541.3 lbs/hr of CO during a simple-cycle startup.³⁷ Energy storage can effectively reduce the frequency of startups and therefore drastically reduce power plants' pollution output.³⁸

Contracts for upgraded or repowered facilities should be allowed to bid for different length contracts. Otherwise, strict requirements to meet certain length of contracts could foreclose viable options for meeting need without building new plants. Upgraded or repowered facilities do not need to commit to the same length of time as new facilities in order for the upgrade investment to be just and reasonable. If existing facilities are allowed to bid in for shorter contract lengths, these facilities can fill in a potential gap until preferred resources are available to meet the need.

Issue 4: Modified Rules for Review of Bundled Plans

CEJA urges the Commission to not reduce oversight of bundled procurement contracts. In order to lead California towards a renewable future by assuring all resources are fairly considered pursuant to the loading order, the Commission should not reduce oversight during bundled procurement contract execution. The loading order provides a framework to facilitate California's commitment to transitioning from convention energy resources to renewable resources. California has supported this commitment by instituting a policy that "fossil fuel reduction demand[s] *strict* compliance with the loading order."³⁹ The Commission has also repeatedly reiterated its commitment to the loading order, reducing environmental impacts, and encouraging energy efficiency, demand response, and renewable generation.⁴⁰

³⁷ BAAQMD, FINAL DETERMINATION OF COMPLIANCE: MARSH LANDING GENERATING STATION, Application No. 18404, pp. 16-17 (June, 2010) *available at* http://www.energy.ca.gov/sitingcases/marshlanding/documents/other/2010-06-29_BAAQMD_FDOC.pdf.

³⁸ See ECONOMIC AND TECHNOLOGY ADVANCEMENT ADVISORY COMMITTEE (ETAAC), Final Report of Recommendations to CARB: TECHNOLOGIES AND POLICIES TO CONSIDER FOR REDUCING GREENHOUSE GAS EMISSIONS IN CALIFORNIA, p. 5-3 (Feb. 11, 2008), *available at* <http://www.arb.ca.gov/cc/etaac/ETAACFinalReport2-11-08.pdf>; *see also* Electric Energy Storage, p. 1, Pew Center on Global Climate Change (May 2009) *available at* <http://www.c2es.org/docUploads/Energy-Storage-Fact-Sheet.pdf> ("Electric energy storage (EES) technology has the potential to facilitate the large-scale deployment of variable renewable electricity generation, such as wind and solar power, which is an important option for reducing GHG emissions from the electric power sector.").

³⁹ D. 13-02-015, p. 11 (emphasis added).

⁴⁰ *See e.g.*, D. 12-04-046, p. 43.

Because utilities do not have to procure fixed amounts of preferred resources,⁴¹ additional review safeguards compliance with the loading order.⁴² Importantly, the loading order specifically applies to bundled procurement.⁴³ However, as the Commission has recognized, utilities have historically failed to comply with the loading order.⁴⁴ In light of the utilities' track record of non-compliance with the loading order, reduced oversight would be inconsistent with California's high standard of "strict compliance." Therefore, a final review will afford the Commission meaningful opportunity to evaluate whether the utilities prioritized preferred resources to meet need according to the loading order.

In addition, the proposal to eliminate oversight for some bundled procurement contracts is inconsistent with Section 454.5 of the Public Utilities Code, which requires the Commission to have, at minimum, "an expedited approval process for the commission's review of proposed contracts and subsequent approval or rejection thereof."⁴⁵ For all of these reasons, CEJA urges the Commission to reject the proposal to reduce, and in some cases eliminate, the Commission's review of bundled procurement contracts.

Issue 5: CAM Issues

CEJA supports Community Choice Aggregation (CCA), and urges the Commission to separately evaluate whether to saddle CCAs with the significant infrastructure costs that IOUs advocate for under the Cost Allocation Mechanism. CCAs play an essential role by expanding customer choice and reducing greenhouse gas emissions by relying on more renewable energy. By blindly including CCAs in the CAM calculus, the Commission could be effectively shutting the door to CCAs.

As S.B. 790 provides, "[t]he exercise of market power by electrical corporations is a deterrent to the consideration, development, and implementation of community choice

⁴¹ D. 13-02-015, p. 11 (citing D. 12-01-033 p. 21).

⁴² D. 13-02-015, p. 11.

⁴³ Cal. Pub. Util. Code § 454.5(b)(9); D.12-01-033, p. 21.

⁴⁴ See D.07-12-052, pp. 3-4; D.12-01-022, p. 21.

⁴⁵ Cal. Pub. Util. Code § 454.5(b)(7).

programs.”⁴⁶ S.B. 790 also states that “California has a substantial governmental interest in ensuring that conduct by electrical corporations does not threaten the consideration, development, and implementation of community choice aggregation programs.”⁴⁷ Section 380(b)(4) of the Public Utilities Code provides that the Commission should “[m]aximize the ability of community choice aggregators to determine the generation resources used to serve their customers.” To accomplish this, the Commission needs to closely evaluate how CAM rules apply to CCAs. Otherwise, CAM rules will be making the generation choices for CCAs.

Issue 6: Energy Resource Recovery Account Compliance Filing Requirements

Part (a): CEJA urges the Commission to require consistency in the format for energy resource recovery account compliance reports among the three major IOUs to allow interested members of the public and regulators to easily review the information presented. This review is more difficult if the IOUs use inconsistent, undefined formats, especially considering the technical nature of the information presented in the quarterly compliance reports. These reports compile important information for the Commission and the public to evaluate. Using a template will assist the Commission and the public with this evaluation.

Part (b): In addition to the information already included in the quarterly compliance reports, the Commission should require that the quarterly compliance reports include information on the three major electric IOUs’ loading order compliance. The loading order requires utilities to invest first in energy efficiency and demand-side resources, followed by renewable resources, and only then in clean conventional electricity supply.⁴⁸ The Commission has further directed that “[t]his approach also continues for each step down the loading order, including renewable and distributed generation.”⁴⁹ As the Commission has clarified, the “loading order applies to all utility procurement, even if pre-set targets for certain preferred resources have been achieved.”⁵⁰

⁴⁶ Cal. Senate Bill 790 (Leno) (2011).

⁴⁷ *Id.*

⁴⁸ See D.12-01-033, p. 21-22; Cal. Pub. Util. Code § 454.5(b)(9)(A) & (C).

⁴⁹ D.12-01-033, p. 21-22.

⁵⁰ *Id.* at p. 20.

Despite its import, the Commission does not currently require IOUs to report on their compliance with the loading order in the Energy Resource Recovery Account filing requirements, including the quarterly compliance reports. Requiring reporting of compliance with the loading order in the quarterly compliance reports would be a step towards achieving compliance with the loading order. The Commission could require the IOUs to fill out another line for each transaction. The IOUs could either check that the resource is a preferred resource or for conventional resources, the IOUs could include a brief explanation of why the need is not being filled by a preferred resource.

Part (c): CEJA urges the Commission to continue requiring the quarterly compliance reports every quarter. The quarterly compliance reports include a detailed compilation of transactions that is otherwise not available. It is important to have access to this information in a timely matter if issues related to the transaction arise, and to keep the public informed.

In addition, as required by the 2010 LTPP decision, the quarterly compliance reports must include detailed information about the IOUs GHG compliance plan, including “[f]orecast updates and corresponding revisions to the purchase limits, along with all compliance instrument transactions.”⁵¹ This information will be critical as the IOUs, the Commission and the interested public gain experience in the new market. As the Commission stated: “greenhouse gas compliance instrument procurement is an area in which both the utilities and the Commission are on the steep part of the learning curve, and will need to adapt as the functioning of the greenhouse gas compliance market develops.”⁵²

Issue 7: Proposed Refinements to the Independent Evaluator Program

The ALJ Ruling contains a four-part proposal detailing potential changes to the Independent Evaluator (IE) program. As related to part (i), CEJA requests that the rules for qualifying for the IE pool be modified to include qualifications to review other types of resources and environmental considerations including environmental justice. CEJA supports parts (ii) and

⁵¹ D.12-04-046, p. 57.

⁵² D.12-04-046, p. 59.

(iii) because these proposals are steps towards reducing potential conflicts and allowing for an independent evaluation. CEJA does not support part (iv) because of the potential for conflicts that arise after participating in the process for a number of years.

Part (i) proposes that “[t]he rules for whom or which entity may qualify to be in the IE pool remain the same.”⁵³ These rules do not include qualifications to review different types of resources side by side. To comply with the loading order and increase California’s reliance on preferred resources, utilities will increasingly need to evaluate filling needs with preferred resources rather than fossil-fuel resources. Therefore, IEs need to understand how to evaluate other types of resources to effectively act as an independent check on these selection processes.

In addition, IEs should be qualified to review environmental considerations including environmental justice concerns. The Commission has stated that that utilities “need to provide greater weight” to criteria regarding “disproportionate resource siting in low-income and minority communities, and environmental impacts.”⁵⁴ In addition, Section 399.13 of the Public Utilities Code which relates to renewable energy procurement, *requires* that utilities “give preference to renewable energy projects that provide environmental and economic benefits” to communities that have high-unemployment rates, are low-income, or that “suffer...high emission levels of toxic air contaminants, criteria air pollutants, and greenhouse gases.”⁵⁵ An IE report on solicitations is intended to “serve as an independent check on the process and final selections.”⁵⁶ In order to fully provide a check on the process, IE’s must be able to evaluate environmental considerations that IOUs are required to make or else these important considerations could be ignored.

Parts (ii) and (iii) propose that the “IOUs may not limit the IE’s interactions with the Commission” and that “IEs are positioned on particular assignments through a random selection

⁵³ ALJ Ruling, p. 5.

⁵⁴ D.07-12-052, p. 157.

⁵⁵ Cal. Pub. Util. Code § 399.13(a)(7).

⁵⁶ D.06-05-039, p. 46.

process.”⁵⁷ Both of these changes are a step in the right direction towards providing IEs with the necessary independence that is required to effectively assess RFOs and bids.

The Commission includes IE oversight as part of the procurement process to ensure “a fair, competitive procurement process free of real or perceived conflicts of interest.”⁵⁸ The Commission has given IEs authority to oversee procurement during a phase in the process where the public and the Commission are not directly involved.⁵⁹ Thus, it is critical that IEs are actually independent and free of conflict to protect the ratepayers’ interests.

Problematically, IEs are still hired by IOUs, which creates actual and perceived conflicts of interest. Despite finding that “it would be preferable for IEs to be hired by and report to the Commission, rather than utilities,” the Commission did not institute this change in the 2010 LTTP, citing “practical and administrative hurdles to overcome” before such shift can be accomplished.⁶⁰

The proposals in parts (ii) and (iii) are steps towards true IE independence because both parts will increase the objectivity of the IEs. In addition to taking these steps, CEJA continues to urge the Commission to overcome the hurdles identified in the 2010 LTTP and have the Commission report and hire the IEs directly.

Part (iv) proposes that IEs remain in the selection pool for ten years instead of six with evaluation every three years.⁶¹ CEJA does not support this proposal because allowing IEs to remain in the pool for ten years, especially given the fact that the IEs are paid for and hired by the IOUs, increases the chances for potential conflicts of interest to occur. The problems inherent in this process will likely be exacerbated if IEs remain in the selection pool for longer than six years. If the Commission changes how IEs are paid for and hired, this proposal would be worth reexamining.

⁵⁷ ALJ Ruling, p. 5.

⁵⁸ D.07-12-052, p. 140.

⁵⁹ The Energy Division is involved, but not the Commissioners’ offices.

⁶⁰ D.12-04-046, p. 68.

⁶¹ ALJ Ruling, p. 5.

CONCLUSION

CEJA recommends the Commission make the procurement rule changes specified above.

Respectfully submitted,

April 26, 2013

/s/ Deborah Behles
DEBORAH BEHLES
Environmental Law and Justice Clinic
Golden Gate University School of Law
536 Mission Street
San Francisco, CA 94105-2968
(415) 442-6647 (Telephone)
dbehles@ggu.edu

SHANA LAZEROW
Communities for a Better Environment
1904 Franklin Street, Suite 600
Oakland, CA 94612
(510) 302-0430 (Telephone)
slazerow@cbeocal.org

Attorneys for
CALIFORNIA ENVIRONMENTAL JUSTICE
ALLIANCE