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 (DMG) (Filed March 22, 2012)

OPENING COMMENTS OF SIERRA CLUB CALIFORNIA ON TRACK III RULES ISSUES

PAUL R. CORT
WILLIAM B. ROSTOV
Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111
Tel: (415) 217-2000
Fax: (415) 217-2040
pcort@earthjustice.org
wrostov@earthjustice.org

Attorneys for
SIERRA CLUB CALIFORNIA

Dated: April 26, 2013

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 (DMG) (Filed March 22, 2012)

COMMENTS OF SIERRA CLUB CALIFORNIA ON TRACK III RULES ISSUES

In accordance with Administrative Law Judge's Ruling Seeking Comment on Track III Rules Issues, Sierra Club California ("Sierra Club") respectfully submits the following comments on Track 3 Rules. Sierra Club repeats the questions and provides relevant answers after the question. For ease of reading, Sierra Club omits questions to which it does not provide opening comments. If Sierra Club does not respond to a specific question, it reserves the right to address that issue on reply.

1. Maximum and minimum limits on IOU forward purchasing of energy, capacity, fuel, and hedges

a. Should the Commission modify the Assembly Bill (AB) 57 bundled procurement guidelines to indicate minimum and maximum limits for which the three IOUs must procure for future years? If so, should these minimum and maximum limits address energy, system resource adequacy (RA), local RA, and/or flexibility?

The Commission should establish maximum limits for the purchase of fossil fuel resources. The limits should be established to implement the loading order and minimize the use of fossil fuels. This recommendation finds support in the loading order and AB 57. For example, AB 57 requires, *inter alia*,

> A showing that the procurement plan will achieve the following: . . .
>
> (B) The electrical corporation shall create or maintain a diversified procurement portfolio consisting of both short-term and long-term electricity and electricity-related and demand reduction products.

> (C) The electrical corporation shall first meet its unmet resource needs through all available energy efficiency and demand reduction resources that are cost effective, reliable, and feasible.[1]

Relatedly, the bundled plans should include minimums for preferred resources as well energy storage. The Track II decision in the 2010 LTPP explains that the Commission "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."[2] The minimums for preferred resources and energy storage would ensure no backtracking on resources that the state wants to maximize in the future; the minimums should also be designed to encourage forward procurement of preferred resources and energy storage.[3]

In addition, compliance with the loading order in the bundled plans should be intimately connected to the utilities' greenhouse gas reductions on a portfolio-wide basis. The Commission should adopt rules to require bundled plans to analyze and explain how the plans will achieve greenhouse gas emission reductions on a portfolio basis. The plans should identify the sources of greenhouse gases and identify the possible methods for achieving emission reductions. The bundled plans should explain and graphically demonstrate how emissions reductions will occur. This analysis should also incorporate implementation plans for compliance with the loading order. The Commission should require a standardized format for the greenhouse gas plans *and*

---

[1] Public Utilities Code § 454.5(a)(9)(B) and (C).

[2] D.12-01-033, p. 20.

[3] *See Id.*, pp. 21-22 (the Commission directed "the utilities to procure all of their generation resources in the sequence set out in the loading order. While hitting a target for energy efficiency or demand response may satisfy other obligations of the utility, that does not constitute a ceiling on those resources for purposes of procurement. . . . If the utilities can reasonably procure additional energy efficiency and demand response resources, they should do so. This approach also continues for each step down the loading order, including renewable and distributed generation"); *see also* D.13-02-015, p. 82 (Local Capacity Requirements' decision in Track I requires that "[a]ll additional resources beyond the minimum requirement must also be from preferred resources, or from energy storage resources").

extensive qualitative and quantitative GHG data, scenarios and analysis to provide useful information about compliance. This would also provide important information to the Air Resource Board regarding the State's progress towards its AB 32 mandate.

Additionally, the consideration of greenhouse reductions on a portfolio basis should consider the environmental factors as well as cost-effectiveness. How utilities choose to make greenhouse gas reductions will have environmental implications. For example, emission reductions from the utility portfolios may reduce pollution more than compliance mechanisms, such as offsets, that are procured by utilities. The plans should explicitly evaluate the trade-offs between cost, risk, reliability and environmental impact. Linking implementation of the loading order to the IOUs' greenhouse gas reduction plans, and in particular relating these to the AB 32 Scoping Plan targets with explicit data and analysis in the plans, could also provide a foundation for environmental review.

The Commission's decision in the 2006 LTPP proceeding (D.07-12-052) supports this proposal. In that decision, the Commission held:

> Going forward the utilities will be required to reflect in the design of their requests for offers (RFO) compliance with the preferred loading order and with GHG reductions goals and demonstrate how each application for fossil generation comports with these goals . . . . [W]e will require that subsequent LTPP filings for our regulated utilities not only conform to the energy and environmental policies in place, but aim for even higher levels of performance. We expect the utilities to show a commitment to not only meet the targets set by the Legislature and this Commission but to try on their own to integrate research and technology to strive to improve the environment, without compromising reliability or our obligation to ratepayers.[4]

Energy storage should also be incorporated into the analysis, because energy storage can be deployed to integrate renewables and reduce the greenhouse gas emissions of the IOUs.

[4] D.07-12-052, pp. 3-4.

Moreover, the Commission has already set an energy storage procurement target for SCE[5] and the Commission is actively pursuing policies and potentially additional procurement targets for energy storage in the energy storage proceeding. Any targets set in the energy storage proceeding should also be included in the bundled plans.

Setting limits for system resource adequacy (RA), local RA, and/or flexibility raises record and jurisdictional issues. System RA, local RA and flexibility issues are the subjects of the current RA proceeding. The flexibility issues are hotly contested. For example, Sierra Club maintains in the RA proceeding that a flexibility need has not been demonstrated.[6] Moreover, the current flexible capacity procurement proposals in the RA proceeding have significant greenhouse gas impacts by discriminating against demand response and energy storage.[7] If limits related to RA are to be established, a record supporting those limits needs to be developed in this proceeding. Even though one form of flexibility is being addressed in RA, related flexibility issues may also arise during Track 2. The solution may be to merge the two proceedings on these topics since each proceeding addresses procurement. At the very least, explicit coordination of the two proceedings on these topic would be necessary. If the Commission were to place limits for system RA, local RA and flexibility issues in the bundled plans, a record for each of them would need to be developed in this proceeding.

---

[5] D.13-02-015, p. 82.

[6] *See generally* "Sierra Club Opening Comments on Joint Party and Energy Division Flexible Capacity Procurement Proposals" (April 5, 2013) R.11-10-023; *see also* "Sierra Club Reply Comments on Joint Party and Energy Division Flexible Capacity Procurement Proposals" (April 5, 2013) R.11-10-023, pp. 1-2.

[7] "Sierra Club Reply Comments on Joint Party and Energy Division Flexible Capacity Procurement Proposals" (April 5, 2013) R.11-10-023, pp. 4-5.

b. How may the Commission best balance issues regarding departing load in any future requirements for procurement?

The bundled plans should plan and account for a certain amount of departing load. This is consistent with the Track II decision of the 2010 LTPP that held IOUs should adopt realistic assumptions related to community choice aggregation and direct access customers.[8] The assumptions in the bundled plans should ensure that CCAs are not over-burdened,[9] and—even more importantly— that CCAs wishing to utilize additional higher loading order resources are supported by CPUC policy and decisions, rather than discouraged by the requirement to pay twice for reliability capacity—once for the cleaner resource and once for natural gas— if they consider developing the cleaner alternatives.

2. Impacts of transparency on forward procurement

a. Should the Commission require the three major electric IOUs to provide more public transparency into the levels of future procurement for which each has entered into a contract? What confidentiality rules could be changed or removed? In particular how can IOUs provide visibility to the California Independent System Operator (CAISO) regarding their midterm procurement contracts?

Agencies with regulatory obligations with respect to IOUs, such as CAISO and the Energy Commission, as well as the public, should have access to significant information about mid-term and other procurement contracts. Even as an active participant in Commission proceedings, Sierra Club, like the general public, does not have direct access to the prices and other information in these contracts. Furthermore, even if Sierra Club did obtain this information, it would be under cover of confidentiality in accordance with current rules, which means the Club could not share this information with its members who are customers of these IOUs, and whom we are representing at the CPUC. These contracts contain information that is vitally

[8] D.12-01-033, pp. 30-31.
[9] Public Utilities Code § 366.2.

important to the implementation and evaluation of state policies, and more broadly to members of the general public who ultimately have to pay for these resources.

While IOUs may argue that such confidentiality is necessary in the "competitive" context of a regulated public utility, the world's major financial markets maintain much more transparency about price, volumes, bids, offers, terms, and conditions, than public utilities that are regulated by government agencies. In stark contrast, highly competitive markets such as the stock, options, currency, commodity, and bond markets have transparent, open public access to data, information, and analysis about contract prices and volumes for trillions of dollars in assets that is available in near real time in many cases. Open access to this information is a fundamental feature of the operation of these critical markets. Sadly, the Commission has allowed regulated utilities to create secret markets that transact billions of dollars per year on energy commodities, in a much less transparent manner than Wall Street, and this situation is absolutely contrary to the public interest in a modern, democratic society.

Additionally, current interpretations of confidentiality rules for power contracts impede transparency and meaningful participation by stakeholders. The Matrix of Allowed Confidential Treatment (the "Confidentiality Matrix") is vastly over-inclusive with regards to material considered confidential, allowing the entirety of the contract, much of which has no market impact, to remain hidden from the public and stakeholders. [10] The Confidentiality Matrix allows project generators to hide under the cloak of their confidential contracts, stifling meaningful dialogue with interested parties. For example, in some instances, the environmental impacts of solar projects can be significantly avoided or minimized by moving the project, or slightly reducing the project to avoid sensitive plant or animal resources. Yet, the interested parties

[10] D.06-06-066, p.63.

cannot obtain sufficient information to work through these issues at the Commission where these contracts are deliberated and ultimately decided.

The Commission should provide for a maximum amount of transparency, because California law and public policy support open government.[11] The Public Utilities Code incorporates the requirements of the Bagley-Keene Open Meeting Act, Gov. Code §§ 11120-11132 ("Bagley-Keene Act" or "Act") and reinforces the Commission's duty to provide public meetings and public notice.[12] California's Public Records Act ("PRA") also favors public disclosure,[13] and states that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."[14]

The Procurement Review Groups ("PRGs") suffer from being a "black box." PRGs are limited to certain participants in the Commission process, and not open to the public. Each PRG consists of an exclusive group of non-market participants that partially substitutes for an open and transparent procurement review process. PRG members are required to execute non-disclosure agreements with broad remedy provisions. While PRG members may have sufficient access and dialogue with the utilities, members of the public do not. Sierra Club and other groups should not be bound by onerous secrecy requirements when discussing issues that should be open and transparent to the public.

Fortunately, California state law provides an essential part of the solution and Sierra Club once again renews its request that the Commission apply the Bagley-Keene Act to the PRGs and develop rules to ensure the Act's implementation. The IOUs' and other parties argue that the

---

[11] *See, e.g.,* Cal. Const. Article I, § 3(b).
[12] Pub. Util. Code § 306(b).
[13] Cal Gov. Code § 6250 *et. seq*.
[14] Gov. Code § 6250.

Bagley-Keene Act does not apply to the PRGs, because the PRGs are advisory bodies to the IOUs and not the Commission,[15] but this ignores the plain language of the statute.

The Bagely-Keene Act requires that "[a]ll meetings of a state body" be "open and public and all persons . . . be permitted to attend any meeting," unless the agency is specifically authorized to meet in closed session. (Gov. Code, §§ 11123, 11126, 11132.) The Bagley-Keene Act defines "state body" to mean any of the following:

> (b) A board, commission, committee, or similar multimember body that exercises any authority of a state body delegated to it by that state body.
>
> (c) An advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multimember advisory body of a state body, if created by formal action of the state body or of any member of the state body, and if the advisory body so created consists of three or more persons.
>
> (d) A board, commission, committee, or similar multimember body on which a member of a body that is a state body pursuant to this section serves in his or her official capacity as a representative of that state body and that is supported, in whole or in part, by funds provided by the state body, whether the multimember body is organized and operated by the state body or by a private corporation.[16]

The Commission defines the roles that the PRGs play in the procurement process. In 2002, the Commission allowed each utility to establish a Commission-authorized PRG.[17] The Commission continued relying on PRGs to assess up-front reasonableness standards of procurement activities.[18] In D.03-12-062, the Commission described the role of the PRG: "Though it only has consultative and informal advisory functions, the Commission finds the PRG to be an effective vehicle for IOU dialogue with Commission staff familiar with the

---

[15] *See, e.g.*, Reply Comments of Pacific Gas and Electric Company (U 39 E) Regarding Track 3 Issues, pp. 16-17; Reply Comments of Southern California Edison Company (U 338-E) to Parties' Comments on Proposed Track 3 Procurement Rules, pp. 17-19.

[16] Gov. Code § 11121

[17] D.02-08-071, p.24-25

[18] *See, e.g.*, D.03-12-062, p. 44-48.

nuances of their energy portfolios and the necessary policies/strategies needed to mitigate portfolio risks."[19] Similarly, in the 2007 LTPP decision, the Commission explained:

> Procurement Review Groups (PRGs) were initially established in D.02-08-071 as an advisory group to review and assess the details of the IOUs' overall procurement strategy, RFOs, specific proposed procurement contracts and other procurement processes prior to submitting filings to the Commission as an interim mechanism for procurement review. PRG recommendations are advisory and non-binding, and no participants in the PRG process give up any rights associated with future litigation of issues addressed in PRG meetings.[20]

In last LTTP, the Commission once again explained the role of the PRGs to "review the utilities' procurement strategy, processes, and specific transactions, and provide non-binding recommendations to the utility on their procurement activities."[21] The Commission also assigned the PRGs review of certain greenhouse gas compliance mechanisms.[22]

Each PRG fits the definition of a "state body" pursuant to Gov. Code section 11121 subsections (b), (c) and (d). Each PRG is a multimember body, created by the Commission, that exercises delegated authority to review IOU procurement activities. (*See* Gov. Code § 11121(b).) The PRG also meets the definition of "state body" because it is a "multimember advisory body of a state body" similar to an advisory committee that was "created by formal action of the state body" and has more than three members. (Gov. Code § 11121(c).); (see also 85 Ops.Cal.Atty.Gen. 145 (2002) at *3 ("Even advisory committees created by state bodies, rather than by statute, are subject to open meeting requirements.") Contrary to the claims of the IOUs, the PRGs provide more than just advice to the IOUs. Relevant Energy Division staff are

---

[19] *Id.*, p. 46.
[20] D.07-12-052, p. 119.
[21] D.12-04-046, p. 65.
[22] *Id.*, pp. 53, 55, 57.

informed about procurement activity.[23] Additionally, the PRGs play a formal role in the procurement process which is demonstrated by the Commission delineating the types of procurement activity reviewed and setting specific requirements related to the agenda and summaries of the meetings.[24]

Furthermore, the definition of state body in subsection (d) also applies. Both staff of Energy Division and Division of Ratepayer Advocates participate in each PRG.[25] Their activity within the PRGs is supported by public funds. In addition, other PRG members receive intervenor compensation for participation in the PRGs. The fact that an IOU organizes and operates its PRG is irrelevant to whether the PRG meets the definition of state body pursuant to subsection (d).

Since the PRG does meet the definition of state body, the confidential nature of PRG meetings violate the Bagley-Keene Act.[26] By holding confidential PRG meetings, the public is "denied the opportunity to learn about ongoing activities and challenges in real-time and instead [is] forced to review materials underlying the Advice Letter filings for the first time after the decisions ha[ve] been made and submitted for approval."[27] Although Commission meetings are open to the public, the dialogue between the PRG and IOUs, in combination with the expedited review process, removes some of the most important components of the IOUs' procurement activity from the public realm. The Commission must generally open all meetings to the public pursuant to the Bagley-Keene Act, but it may meet in closed session "to deliberate on the institution of proceedings, or disciplinary actions against any person or entity," or to discuss

[23] D.03-12-062, p. 46.
[24] D.12-04-046, pp. 65-66.
[25] *See, e.g.*, D.07-12-052, p.120 (listing PRG membership). Although the current membership may be slightly different, Energy Division and DRA have been constant members.
[26] *Cf.* Gov. Code §§ 11123, 11126, 11132.
[27] D.03-12-062, at 47 (quotation omitted).

pending legal action with legal counsel.[28] Since the Commission is not expressly authorized to conduct closed sessions for reviewing IOU procurement activities, neither may a PRG.

The same mechanisms for protecting confidential information may be applied in the PRG context, eliminating the need for closed meetings. The Commission established procedures for responding to requests for confidential treatment of documents.[29] A utility seeking to protect information that falls within the matrix has the burden to prove that its data matches the matrix category.[30] Because the Commission has already established a mechanism particular to IOUs for identifying and protecting confidential information, it is improper for the PRG to hold meetings completely closed to the public. Just as the Commission is able to open meetings to the public in accordance with the Bagley-Keene Act while still protecting confidential information, the PRG should be required to do the same.

b. How can bids and offers into request for offers (RFOs) be released publically? What other information could be released?

This information can be made public on the PUC website. The data should include bids, offers, price, volume, location, and date of delivery. If procurement decisions are based on just and reasonable rates, as they are required to be, there should be no justification for secrecy. All interested parties in PUC decisions should have the ability to review and understand decisions that relate to the core of the Commission's regulatory authority.

[28] Gov. Code § 11126(d)(2) and (e).
[29] *See generally* Decision 06-06-066.
[30] *Id.* at 77, Conclusion of Law No. 6; as discussed *supra*, Sierra Club also urges the Commission to limit the amount of information considered confidential.

3. Long-term contract solicitation rules

a. Should the Commission adopt a rule that explicitly indicates that existing power plants may bid upgrades or repowers into new-generation RFOs?

Yes. The rule should be designed to further the State's energy and environmental policy goals. As the state moves to a low carbon future, the State should not encourage large sunk costs in new fossil fuel plants that may operate for another thirty to forty years, and that will have a large vested financial interest in burning as much fuel as possible in order to improve their competitive status. Resources that will facilitate and/or enable the procurement and use of more preferred resources should be prioritized and thus, valued more highly. The Commission should make a distinction between a repower which in essence is a new fossil fuel power plant that could operate for thirty to forty years and an upgrade that may provide a relatively short-term capacity fix while the California transitions to low carbon future.

i. How should the existing and upgraded components of the repowers be valued differently in an RFO? How can additions such as energy storage be added to existing facilities and be valued against other types of offers?

Repowers of fossil fuel plants should not be valued differently, but upgrades should be valued for the role that the upgrades will play in the system. If an upgrade provides short term value that facilitates the opportunity for more preferred resources to be placed on the system, it should be a given a value for this function. Similarly, energy storage should be valued for the additional benefits that it can provide to the system that are not typically valued in the current RFO process, and that are environmentally and operationally superior to the performance of natural gas plants.

ii. Should contracts for repowering or upgrading of facilities be restricted to the same length of contracts as new facilities? If not, please explain why there would be different contract lengths or different terms, and how these differences would be reflected in the valuation of the bids.

No, contracts for upgrades can be for a more limited duration. For example, a relatively low cost upgrade may best be amortized rapidly in order to minimize life cycle costs to customers, and limit the time in which there is a strong vested financial interest in paying back the cost of fossil infrastructure. Thus, the valuation of the bid should be higher for lower cost upgrades that do not financially tie customers to long-term fossil fuel investments, and in this way better support the loading order and climate policies.

iv. How should cost allocation issues be addressed?

Not all of the resources should be locked down in long-term contracts. A margin amount of procurement in each cycle should be planned as short term with the specific objective of meeting future needs with higher loading order resources and allowing for departing load. There should be sufficient flexibility to account for the role that CCAs will play on the system. If there is a departing load, this approach results in less stranded costs. Additionally, cost allocation issues should be addressed in a separate proceeding that addresses the costs of all procurement mechanisms at the same time.

v. How would bilateral negotiations for upgraded or repowered facilities be reviewed?

There should be a transparent process that allows interested parties and the public an opportunity to evaluate the merits of the contract. Upgraded or repowered facilities should be procured through the standard RFO or a RFO specifically for repowering or shorter term contracts.

4. Specification of the rules that, if followed, would allow the IOUs to execute bundled procurement contracts without additional review by the Commission

Generally, the Commission should not enact rules that reduce or restrict its own regulatory oversight over IOU contracting. A fundamental purpose of the Commission is to ensure just and reasonable rates. Creating mechanisms that reduce the ability of the Commission and the public to review action approved by the Commission reduces the Commission's ability to provide effective oversight.

a. Please comment on the following potential new or modified rules to ensure competitive bundled procurement transactions:

ii. Any bilateral contract for a facility that did not make the shortlist of an RFO or an offer that has subsequently been negotiating with the utility for longer than six months since making the shortlist of an RFO must seek Commission approval through a tier III advice letter or application.

Sierra Club supports requiring an application in this situation to ensure oversight of the bilateral contract.

7. Refinements to the Independent Evaluator (IE) program

a. Please comment on the following proposal:

i. The rules for whom or which entity may qualify to be in the IE pool remain the same

ii. The IOUs may not limit the IE's interactions with the Commission, specifically in terms of nondisclosure agreements that restriction information sharing.

iii. IEs are positioned on particular assignments through a random selection process, removing IOU influence over which IE may be assigned

iv. IEs may remain in the selection pool for 10 years (rather than up to 6 years), subject to evaluation every 3 years (maintain current requirement for reassessment)

The IE program is part of the Procurement Review Group structure that already fails to comply with State's transparency laws. (*See infra* Question 1) Although making adjustments to

reduce conflicts of interests would improve the program (a.ii and iii), the Commission should also consider a different approach where the Commission employees its own auditors to do the evaluation. In the last LTPP, the Commission recognized that it would be preferable to have the Independent Evaluators be hired by and report to the Commission, but rejected this proposal because of "practical and administrative hurdles." Rather than perpetuating a system that has structural conflicts of interest built in the system, the Commission should assert its authority by having Commission auditors evaluate IOU procurement.

CONCLUSION

For the foregoing reasons, the Commission should adopt Track 3 rules that conform with Sierra Club's recommendations.

Respectfully submitted,

PAUL R. CORT
WILLIAM B. ROSTOV

/s/ William B. Rostov
By: William B. Rostov

Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111
Tel: (415) 217-2000
Fax: (415) 217-2040
pcort@earthjustice.org
wrostov@earthjustice.org

Attorneys for
SIERRA CLUB CALIFORNIA

Dated: April 26, 2013