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 CENTER FOR ENERGY EFFICIENCY AND RENEWABLE TECHNOLOGIES ON PRELIMINARY STAFF PROPOSAL ON RPS CONFIDENTIALITY RULES

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The Center for Energy Efficiency and Renewable Technologies (CEERT) respectfully submits these Comments on the Administrative Law Judge's Ruling Requesting Comments on Preliminary Staff Proposal to Clarify and Improve Confidentiality Rules for the Renewables Portfolio Standard (RPS) Program issued in R.11-05-005 (RPS) on July 1, 2013 (July 1 ALJ's Ruling). These Comments are timely filed and served pursuant to the Commission's Rules of Practice and Procedure, the July 1 ALJ's Ruling, and the ALJ's Ruling sent by electronic mail to the service list on July 16, 2013, extending the due date for these Comments to August 5, 2013.

I.
NO BASIS EXISTS TO CREATE SEPARATE "RPS CONFIDENTIALITY RULES" THAT CONTINUE TO INAPPROPRIATELY "SILO," BURDEN, AND DISADVANTAGE RENEWABLES PROCUREMENT.

During CEERT's more than two decades of advocacy before this Commission to advance clean resource solutions to meet California's energy needs, CEERT has often emphasized the value of transparency in generation procurement in terms of facilitating sound and well-understood decision-making. Such a goal has particular importance to CEERT, which, due to its mix of non-utility businesses providing energy resources or services and public interest environmental organizations, is not eligible for intervenor compensation, participation on any utility Procurement Review Group, or access to "market sensitive" information.

Thus, it could be said that CEERT represents the audience for a broader "public" dissemination or disclosure of information about utilities' generation procurement. However, from CEERT's perspective, "increasing the public availability of information" just for "RPS-eligible procurement" can and should only be undertaken if it (1) *fully accounts for and fairly treats all generation procurement in the same manner* and *(2) ensures that no adopted "rule" serves to competitively disadvantage or reduce the value of any resource, especially in terms of meeting California's energy goals (i.e., gas (GHG) emissions reductions) and the Loading Order of preferred resources.*

Of great concern for CEERT here is that neither the July 1 ALJ's Ruling nor the Staff Proposal on RPS Confidentiality Rules ("Staff Proposal") have either of these attributes. Further, while the July 1 ALJ's Ruling provides "background" on both this Commission's adopted "comprehensive" confidentiality rules and the new proposal, it also fails to address the following two key issues required to establish any *foundation* for moving forward with *separate confidentiality rules tailored to and imposed on the RPS Program alone.*

(1) Is there a statutory mandate for this Commission, at this time, to use its limited resources to develop "confidentiality rules" that are defined by and *add* to the already burdensome RPS procurement requirements and, to do so, separate from the consideration of "comprehensive" rules applicable to all generation procurement?

(2) If there is no a statutory mandate to do so, is there any public policy basis for developing RPS-specific confidentiality rules, especially in the manner pursued in the July 1 ALJ's Ruling and proposed in the Staff RPS Confidentiality Rules Proposal?

The answer to both questions is "No." On the first issue, the overarching statutes governing "confidentiality" of information provided by the investor-owned utilities (IOUs), as

the July 1 ALJ's Ruling notes, are PU Code §§454.g and 583.[1] These statutes make *no* reference to or require *different rules* for RPS procurement.

In fact, these "statutory obligations about confidentiality" for the Commission have been implemented through *a generally applicable rulemaking* (R.) 05-06-040, resulting in the seminal D.06-06-066, as modified, that the July 1 ALJ's Ruling concedes is the "*comprehensive* expression of the Commission's policies with respect to the confidentiality of information related to electricity procurement."[2] This rulemaking has been the subject of decisions over the years applicable to all stakeholders and generation procurement and was only recently closed in late 2011.[3]

In these "confidentiality" orders, the Commission has made clear that its "challenge" is "to balance the policy goals of public disclosure, full participation and transparency with the statutory provisions allowing and indeed requiring confidential treatment of data," which treatment may, in fact, "be required' to "carry out our statutory and constitutional duties."[4] That "balancing between the broadest disclosure and the narrowest confidentiality," including consideration of "greater public access to RPS data," *is fully* embedded in "two appendices" to D.06-06-066, as modified, which "provide detailed guidance to parties."[5] Nothing in these decisions, including those issued through 2011, directs the Commission *in this RPS rulemaking* to adopt *RPS-specific confidentiality rules* outside or in addition to the "appendices" that form the "matrices" (IOU Matrix (Appendix 1); ESP Matrix (Appendix 2)) by which the IOUs and energy service providers (ESPs) determine and treat confidentiality of information applicable to *all* procurement.

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[1] July 1 ALJ's Ruling, at pp. 2-3, nn. 2, 3.
[2] July 1 ALJ's Ruling, at pp. 2-3; emphasis added.
[3] D.11-08-018.
[4] D.06-06-066, at pp. 2-3.
[5] D.06-06-066, at p. 3.

At the time of its issuance, D.06-06-066 confirmed that there was no specific statute governing RPS data, but that its rules did accommodate providing "*somewhat* greater public access to RPS data than other data, due to the strong public interest in the RPS program," while still retaining certain "narrow" confidentiality requirements."[6] Today, the manner of publicizing RPS data is now governed by PU Code §§910 and 911 enacted in 2011 (Senate Bill (SB) 836 (Padilla), Stats. 2011, ch. 600), which directly address what and how cost information related to the RPS program (i.e., on an "aggregated" basis) is to be reported publicly by the Commission each year to the Legislature. The first such report was issued just over 18 months ago (February 2012) and the second only a few months ago (March 2013).[7] While the July 1 ALJ's Ruling references that report, it provides no analysis of why the "new" rules advocated by Staff are required by or even necessary in light of these statutes.[8]

In fact, the July 1 ALJ's Ruling and the Staff RPS Confidentiality Rules Proposal are not based on any statutory or decisional mandate, but rest on the assertion that "developments…in the RPS market, as well as the expanded role of RPS-eligible energy in California's energy market as a whole," as an apparent policy basis for these changes.[9] These summary, declarative statements, however, ignore the facts that R.05-06-040 remained a venue for changes to confidentiality rules through 2011 and, in that same year, the Legislature did act to define what and how RPS cost data should be reported publicly.[10] In fact, *nothing* has changed in the "RPS market" in the short time since the publication of the first Padilla Report in 2012 to warrant *adding* more rules to an already highly complex program, especially outside a "comprehensive"

[6] D.06-06-066, at pp. 59-60, 71; emphasis added.
[7] Padilla Report 2012 (http://www.cpuc.ca.gov/NR/rdonlyres/F0F6E15A6A04-41C3-ACBA-8C13726FB5CB/0/PadillaReport2012Final.pdf, at p. 1.
[8] July 1 ALJ's Ruling, at p. 27.
[9] July 1 ALJ's Ruling, at p. 11.
[10] July 1 ALJ's Ruling, at p. 11.

consideration of procurement confidentiality rules and in a manner that may well further disadvantage renewables procurement versus fossil procurement.

In this regard, by the July 1 ALJ's Ruling's own admission, the RPS Program now "has more parameters to examine" and has become "more detailed."[11] Yet, despite that admission, the July 1 ALJ's Ruling fails to acknowledge that the RPS today is actually locked into a procurement "silo" that continues to inappropriately isolate and impose a ceiling on renewables procurement both by its rules and by excluding it from meeting all utility resource needs, notwithstanding the Loading Order of preferred resources.[12]

On this point, as CEERT has repeatedly noted, the Governor signed the 33% RPS with the intention that such a target would be a "floor," not a "ceiling," on renewables procurement, *and* the Commission itself has made clear that the utility's obligation to procure preferred renewable generation is "ongoing" regardless of whether a "target" has been "hit" for that preferred resource to "satisfy other obligations of the utility."[13] Yet, the Commission seems intent on "piling on" barriers to renewable development, as evidenced not just by this new proposal, but its recent Decision (D.) 13-07-018. That decision aggravates the already significant barrier for renewables created by scarce and costly interconnection facilities by imposing great risks, costs, and delay for renewable generators reliant on the Tehachapi Renewable Transmission Project (TRTP).[14]

In fact, with reference to the recent utility 2013 RPS Procurement Plans, which include the already dizzying list of regulatory hoops and barriers to RPS procurement, it begs the

[11] July 1 ALJ's Ruling, at p. 10.
[12] See, e.g., R.11-05-005 (RPS) CEERT Comments on 2013 RPS Procurement Plans, at pp. 1-2; CEERT Comments on Second ACR on RPS Procurement Reform Proposals, at pp. 1-3.
[13] R.11-05-005 (RPS) CEERT Comments on 2013 RPS Procurement Plans, at p. 2; D.12-01-033, at p. 20; Finding of Fact 7, at p. 46, Ordering Paragraph 4, at p. 51.
[14] See, R.11-05-005 (RPS) CEERT Comments on 2013 RPS Procurement Plans, at pp. 3, 4, 8-10.

question of why the Commission and its staff are devoting precious time and resources on developing *more RPS-specific rules* that are not statutorily mandated when key provisions of SB 1X 2 (33% RPS) are still not implemented and opportunities for new RPS contracts (outside pre-approved (both as to prices and terms) programs such as the Renewable Auction Mechanism (RAM) or the Feed-in Tariff (FiT)) are limited at best. Further, while consideration of RPS portfolios may have now migrated into Long Term Procurement Planning (LTPP), as noted by the July 1 ALJ's Ruling,[15] *procurement of renewable generation resources in the LTPP has not.* On this point, despite repeated advocacy by CEERT and Southern California Edison Company (SCE) for inclusion of a renewable procurement product in *pre-approved* bundled LTPP procurement,[16] the Commission has rejected this request and continues to exclude renewables from such LTPP procurement in conflict with the Loading Order and even the RPS statute that has long contemplated that renewables procurement planning will be part of a "general procurement plan process."[17]

These actions only continue to create a wide gulf in the treatment of renewables and fossil procurement by the Commission. In terms of both procurement and confidentiality, SCE's second quarter 2013 Assembly Bill (AB) 57 Bundled Procurement Plan Compliance Report, submitted on July 30, 2013 (Advice Letter (AL) 2928-E) is particularly instructive and illustrates the *already significant gaps and differences between renewable and fossil procurement opportunities and treatment* that a proposal like the one at issue here will only exacerbate. In its second quarter 2013 AB 57 Report, SCE states that it has executed over 4,200 *non-renewable* procurement transactions that do not require pre-approval to the extent the

[15] July 1 ALJ's Ruling, at p. 11.
[16] See, e.g., R.10-05-006 (LTPP) CEERT Opening Brief on Track II Bundled Procurement Plans (June 17, 2011).
[17] PU Code §399.13(a)(1); see, e.g., R.10-05-006 (LTPP) CEERT Opening Brief on Track II Bundled Procurement Plans (June 17, 2011).

contracts are under five years and comply with a procurement limit methodology approved by the Commission.[18] Yet, as SCE's AL 2928-E also confirms, "[t]hese transactions do *not* include bids awarded to … renewable energy transactions, the latter of which require Commission pre-approval."[19]

Of note specific to "confidentiality" rules, SCE's AL 2928-E report further makes clear that its supporting documentation meets the Commission's D.06-06-066 and D.08-04-028 "guidelines for distinguishing public data from confidential data in procurement-related data submissions to the CPUC and other entities" in a manner that "increase[s] the amount of information available to all … advice letter recipients, while concurrently protecting market-sensitive information as provided for in the *D.06-06-066 Investor-Owned Utility (IOU) Matrix*, as modified by D.08-04-023."[20] The result are attachments and appendices that hold confidential and subject to non-disclosure information about *this non-renewable procurement* related to "trade secrets, proprietary, and/or market sensitive information."[21]

These current circumstances mean that fossil resources have the greatest procurement opportunities and the greatest protection, a fact that will only be made worse by the Staff RPS Confidentiality Rules Proposal, as *confirmed* by the July 1 ALJ's Ruling. Thus, the July 1 ALJ's Ruling makes clear: "By increasing the public availability of information about RPS-eligible procurement, this staff proposal would also *increase the differences* between the confidentiality treatment of procurement from *fossil-fuel resources* and procurement from *RPS-eligible resources*."[22]

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[18] AL 2928-E, Attachment 1, at p. 5.
[19] AL 2928-E, Attachment 1, at p. 5, n. 3.
[20] AL 2928-E, Attachment 1, at p. 4.
[21] See, e.g., AL 2928-E, Attachments 1-4, 6, 9.
[22] July 1 ALJ's Ruling, at p. 12, n. 20; emphasis added.

Today, RPS procurement is not only subject to more disclosure than fossil procurement as a result of D.06-06-066, et al., but continues to have restricted procurement opportunities, while continuing to be subjected to higher regulatory standards (e.g., separate Commission approval of RPS transactions) and information disclosure requirements (PU Code §§910, 911) than fossil resources. Instead of attempting to level the playing field between renewables and fossil procurement by focusing on providing *greater* access to information on *fossil* procurement, the Staff RPS Confidentiality Rules Proposal only seeks to raise the bar (i.e., require more information) for renewable procurement.[23]

The Staff's proposal further *begins and builds from* RPS-specific requirements not imposed on fossil procurement, including the Commission's separate approval by resolution (a decision subject to vote at a Commission meeting) of *RPS contracts*. Thus, in support of a new rule that would require price disclosure for RPS contracts, the Staff RPS Confidentiality Rules Proposal reasons that this change will permit Commissioners to discuss "price" in voting out its decision on that contract. The "convenience" of a Commissioner being able to justify a vote by reference to specific price terms is *not* a basis for allowing such disclosure unless it applies to *all* procurement, including a comparison of the *value* provided by each resource type to meeting California energy and environmental goals. The redacted portions of SCE's AL 2928-E makes clear that no such disclosures – whether as to price or value – are prerequisites for fossil procurement undertaken pursuant to its AB 32 bundled procurement plan.

It is also impossible to determine a fair basis of comparison between the Staff RPS Confidentiality Rules Proposal and confidentiality rules applied to fossil procurement without a clear mark-up of the D.06-06-066/D.08-04-028 IOU or ESP Matrix to show how and where renewables procurement would be treated differently. While the July 1 ALJ's Ruling states that

[23] July 1 ALJ's Ruling, at p. 12, n. 20.

the "proposal also notes, where applicable the elements of the current 'Matrix'…that address topics taken up in the staff proposal," such "notes" are confusing and inconclusive on this key point. In fact, the July 1 ALJ's Ruling confirms that the "preliminary staff proposal …does *not* include detailed proposed language, such as a red-lined version of the current Matrix" and will not do so until adopted by the Commission.[24]

This approach is exactly *backward* from what it should be, especially in keeping with the admittedly "comprehensive" nature of the confidentiality rules and the long-standing effort to develop them in consideration of *broad* stakeholder input applicable to *all* resource procurement. As discussed further below, the Commission should, therefore, *not* move forward on the Staff RPS Confidentiality Rules Proposal at this time for the many reasons stated above or, at the least, should not do so unless and until such a "red-lined" matrix has been provided and the Staff has detailed how each change will preserve fair treatment among all resource types. Parties should not be left to "guess" what these outcomes may be.

Further, if there is to be greater access to information regarding procurement, it should not be limited to renewables generation only and should be addressed, as recommended below, in a separate confidentiality rulemaking applicable to all resource types. No legal or policy basis justifies any other outcome.

II.
IF CHANGES TO THE COMMISSION'S "COMPREHENSIVE" CONFIDENTIALITY RULES ARE DEEMED NECESSARY, THEY SHOULD BE UNDERTAKEN IN A SEPARATE RULEMAKING APPLICABLE TO ALL PROCUREMENT.

Based on the foregoing, CEERT strongly urges the Commission not to continue any action on the Staff Proposal on RPS Confidentiality Rules at this time. To the extent that the Commission believes that there should be changes in the confidentiality matrices adopted in

[24] July 1 ALJ's Ruling, at pp. 4-5.

R.05-06-040, CEERT urges the Commission to initiate a *new* confidentiality rulemaking that considers all applicable statutes and *all* procurement. Part of "balancing" the public interest here is to ensure that the rules that the Commission adopts do not adversely affect or disadvantage renewables procurement over fossil procurement.

Further, the Commission should be taking immediate steps to embed renewables procurement in meeting LTPP bundled, local, and system needs. Creating greater barriers for renewables procurement over fossil procurement does *not* further the Loading Order or this State's GHG emission reduction policies and energy goals. The Commission should be making every effort to ensure that the RPS Program does not increasingly become a vehicle for "limiting," as opposed to increasing, the role renewable generation procurement can and should play in meeting all of this State's energy needs.

III.
CONCLUSION

For the foregoing reasons, CEERT strongly recommends that the Commission abandon the Staff Proposal on RPS Confidentiality Rules now. Instead, the Commission should focus on the much more pressing need to ensure that Loading Order preferred resources, including renewable generation, are available and considered by the utilities in meeting all of their customers' energy needs, including those that are likely to arise in the face of the closure of the San Onofre Nuclear Generating Station (SONGS) and expected retirements of Once-Through Cooling (OTC) generating facilities.

In addition, if changes to the current confidentiality rules and matrices are deemed necessary, such changes should be examined and undertaken in a separate rulemaking that considers and ensures a level-playing field among *all* generation resource types. No basis exists

to adopt rules that unfairly differentiate and may disadvantage procurement of renewable generation over fossil generation.

Respectfully submitted,

August 5, 2013

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VERIFICATION
(Rule 1.11)

I am the attorney for the Center for Energy Efficiency and Renewable Technologies (CEERT). Because CEERT is absent from the City and County of San Francisco, California, where I have my office, I make this verification for said party for that reason. The statements in the foregoing Comments of the Center for Energy Efficiency and Renewable Technologies on the Preliminary Staff Proposal on RPS Confidentiality Rules, have been prepared and read by me and 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.

I declare under penalty of perjury that the foregoing is true and correct and executed on August 5, 2013, at San Francisco, California.

Respectfully submitted,

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