

**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)

**OPENING COMMENTS OF SIERRA CLUB CALIFORNIA, DEFENDERS OF
WILDLIFE AND CENTER FOR BIOLOGICAL DIVERSITY ON
PRELIMINARY STAFF PROPOSAL TO CLARIFY AND IMPROVE
CONFIDENTIALITY RULES FOR THE RENEWABLES PORTFOLIO
STANDARD PROGRAM**

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PROPOSAL TO CLARIFY AND IMPROVE CONFIDENTIALITY RULES FOR
THE RENEWABLES PORTFOLIO STANDARD PROGRAM**

In accordance with the Administrative Law Judge’s Ruling Requesting Comments on the Preliminary Staff Proposal to Clarify and Improve Confidentiality Rules for the Renewables Portfolio Standard Program (the “Preliminary Staff Proposal”), Sierra Club California, Defenders of Wildlife and Center for Biological Diversity (collectively, the “conservation groups”) respectfully submit the following comments. The conservation groups support the Preliminary Staff Proposal as a whole, and with respect to its components, and submit specific suggestions to augment the Preliminary Staff Proposal. If the conservation groups do not comment on a specific issue, they reserve the right to address that issue on reply.

I. Suggested Additions to Preliminary Staff Proposal.

We offer the following suggestions to augment the Preliminary Staff Proposal:

- ⊗ **Least-Cost Best Fit Analysis:** We recommend that quantitative evaluation of the contract for least-cost, best fit analysis also be provided prior to Commission approval of RPS contracts (F(7)), standard form contracts (F(9)) and UOG planned to be RPS eligible (F(11)). This information should also be made available for shortlisted bids (F(2)) as well as bids not shortlisted (F(1)). Providing information on least-cost best-fit

analysis will provide greater transparency into the Investor Owned Utilities (IOU) s' decision-making and improve effective engagement by the public. Providing information on how IOUs evaluate projects and project sites will promote consideration of environmental values earlier in the site selection process.

- ⌘ **RPS evaluations and scores:** We recommend that RPS project-specific evaluations and scores for IOUs' procurement contracts (G(1)) be made available to the public prior to the time identified in the Preliminary Staff Proposal. We believe greater transparency into the factors considered by the IOUs, and in particular, greater transparency into environmental valuation, will incentivize strategic investments which protect California's customers and their natural resources.

- ⌘ **Non-Market Sensitive Contract Terms:** We recommend that certain contract terms in RPS contracts(F(7)),(D (3)) and for UOG generation planned to be RPS eligible (F (11)) which are currently confidential and that would remain confidential under the Preliminary Staff Proposal be made available to members of the public who are non-market participants. A number of provisions in RPS contracts provide potential to reduce the impacts of energy projects on California's threatened and endangered plant and animal species.¹ These include: ability to reduce contract capacity, flexibility to change the site and/or interconnection point, ability to delay projects, force majeure provisions,

¹ An example is the Desert Stateline contract mentioned in the Preliminary Staff Proposal, which is located in rich habitat for numerous rare species, including a genetically distinct population of the threatened desert tortoise. The advice letter for this contract states: "(A)s explained in more detail in Appendix C, the Desert Stateline Contract provides for reductions in contract capacity under certain circumstances." Because Appendix C is confidential, it is not possible for non-market participants to review these terms without signing a confidentiality agreement exposing them to unlimited monetary remedies, yet reducing the project size could potentially reduce impacts to desert tortoise. It is difficult to see how this information, for a contract originally executed in 2009, could materially affect the price of energy.

and curtailment provisions. We recommend the Commission either: (i) provide a redlined copy of the specific contract against the relevant form power purchase agreement with advice letters for all RPS contracts, (ii) provide these specific provisions with advice letters for all RPS contracts, or (iii) provide the contract or the relevant contract terms upon request from non-market participants without requiring confidentiality agreements.²

- ⊗ **Transmission Implications:** Given the long lead time and enormous cost of building transmission projects, as well as the role transmission plays in guiding generation, sometimes to hitherto undisturbed areas with high biological values, it is imperative that the most complete information possible regarding necessary transmission investments should be provided to the Commission and members of the public when decisions involving generation investments are made. Increasing coordination between generation and transmission planning will ultimately reduce market inefficiencies, avoiding costs to customers and potentially reducing conflict in siting decisions. Greater access to information prior to the time energy investment decisions are made will improve the quality of public comments in generation and transmission planning. We support the Preliminary Staff Proposal to include information on the interconnection point with advice letters for RPS contracts and applications, however we encourage the Commission to consider ways to provide further transparency into the transmission implications of generation projects at the time generation investment decisions are made. Because the most-up-to date information should be used in transmission planning, and to allow members of the public to meaningfully participate in transmission investment decisions, we also recommend information on meeting project milestones for RPS contracts (F(7))

(D(3)) and Utility Owned Generation (UOG) planned to be RPS eligible (F(11)) be made publicly available.

- ⊗ **Land-Use Planning:** It is also important to align energy planning with relevant land use planning processes at the local, state and federal levels. The state and federal governments have recently invested enormous resources into renewable energy land-use planning efforts, yet this information is used haphazardly or not at all in generation and transmission planning³. Additionally, local, state and federal wildlife and land management designations often indicate which project sites will cause permitting complexity, additional costs, delays and controversy. Unfortunately, this information is not currently provided to the Commission or the public through the advice letter or application processes. We propose including information on federal and state renewable energy and land management designations as well as local planning and zoning information in applications(D(3)) and advice letters for RPS contracts (F(7)), standard form contracts (F(9)) and UOG which the utility plans to make RPS eligible (F(11)). This information should also be made available with respect to shortlisted bids (F(2)) and bids which were not shortlisted (F(2)).

³ For example, the Solar Programmatic Impact Statement for Solar Development in Six Southwestern States (Solar PEIS) identified solar energy zones on public lands, as well as 'exclusion areas' inappropriate for development, yet this information is not considered in procurement or transmission planning. The Desert Renewable Energy Plan (DRECP), currently under way, will provide a more granular look at public and private lands in the California desert, and will cover solar, wind and geothermal development, as well as transmission. This effort, spearheaded by the California Energy Commission (CEC) and the Bureau of Land Management, is a massive stakeholder effort which will persist at least until 2040. Transmission will be a key incentive in the success of the plan and prioritizing those generation and transmission projects now which conform to the values of the DRECP is pivotal to the success of the DRECP.

- ※ **Confidentiality for non-RPS projects:** Currently, the confidentiality protections for non-RPS contracts and planning data impedes effective advocacy by members of the public and the non-market participant advocacy groups which represent them, who are unable to review this information without first signing overly-protective confidentiality agreements.. Given the near-term decisions to be made around the replacement power for San Onofre Nuclear Generating Station (SONGS) as well as the once-through cooling facilities, it is imperative that the Commission immediately reform confidentiality requirements for non-RPS contracts and planning information so that the public can participate in decisions around all proposals for replacement power with full information. We encourage the Commission to revisit the confidentiality protections for non-RPS contracts and general planning information related to non-RPS planning as soon as possible.⁴

II. Discussion of the Preliminary Staff Proposal.

1. The Preliminary Staff Proposal promotes transparency and the public interest with respect to the Renewables Portfolio Standard (RPS) program.

The Preliminary Staff Proposal increases transparency into the Commission's decision-making process by providing the public greater access to the information relevant to generation

⁴ These include: utility gas price forecasts, utility gas demand forecasts, long-term fuel (natural gas) buying and hedging plans, utility recorded gas and procurement information, utility electric price forecasts, and utility-retained generation.

investment decisions, thus improving the ability of members of the public to effectively advocate for just and reasonable rates and protection of resources. The Preliminary Staff Proposal seeks the correct balance between “ ...the rights of the public to open decision making, particularly with regard to the expenditure of ratepayer money, and the realization of market efficiencies through better information flow on the one hand, and the prevention of market manipulation on the other.”⁵

2. The Preliminary Staff Proposal will lead to improved decision-making by the Commission.

The interplay between California’s open-meetings law (the Bagley-Keene Act) and the current broad confidentiality protections for data has created an awkward situation in which Commissioners cannot discuss confidential information during open meetings. Allowing the Commissioners to freely discuss key terms during open meetings will improve decision-making by allowing for meaningful discourse on the issues at hand.

The current confidentiality system unduly restricts members of the public who are non-market participants from accessing relevant information until many years after decisions are made. The quality of advocacy to the Commission when it matters---prior to a decision being made---is impeded by the interplay between the current confidentiality rules and the overly broad terms and remedies of the confidentiality agreements non-market participants must sign prior to

⁵ D. 07-05-032, at 14.

reviewing confidential information Limiting confidentiality protections as outlined in the Preliminary Staff Proposal and as further suggested in these comments will reduce the amount of information subject to confidentiality protections, improve public access and participation, provide an even playing field for members of the public who wish to present arguments to the Commission, and provide stronger evidence as the basis for the Commission's decisions—ultimately improving the quality of the decisions made by the Commission

3. The Preliminary Staff Proposal will contribute to improved coordination between the Commission and other agencies with respect to California's energy policy, procurement and/or transmission planning.

The current confidentiality protections perpetuate the 'silos' between California's energy planning processes. Protecting contract information until the online dates of generation projects means potentially important information is unavailable to most members of the public until many years after the relevant transmission decisions are made. The Preliminary Staff Proposal has the potential to improve coordination between California's various energy planning entities by providing each entity, and the public, access to the same core information (including, as discussed above, land designations which may indicate environmental risk).

Currently the varying levels of confidentiality protections for data provided by IOUs to the Commission ranges from no confidentiality protections for information on energy efficiency and demand response programs, to a term of three years from the stated contract energy delivery date for RPS and non-RPS contracts. Tracking these dates adds inefficiencies and impedes

coordination. The changes in the Preliminary Staff Proposal will reduce inefficiencies, ultimately resulting in customer savings.

4. The Preliminary Staff Proposal will improve the value received by the customers of retail sellers from RPS procurement.

Providing greater transparency not only on price, but also on land use and transmission implications will enable the Commission and others to make decisions that look at the entire costs of renewable energy projects. Developing energy projects in areas with high value to California's wildlife, plants, and natural communities can lead to high mitigation costs or even impacts which are unmitigable— potentially undermining years of conservation and recovery actions by wildlife agencies and past mitigation investments. Generation investments that require costly transmission upgrades and high mitigation costs can quickly lose their appeal when compared to projects close to available transmission.

5. The Preliminary Staff Proposal will contribute to the long-term stability of the RPS market.

California's RPS needs to be sustainable and defensible. Hiding key terms behind confidentiality rules allows detractors of the RPS to claim excessive implementation costs and undermines support for a robust and increasing renewable energy sector in California. We need to have an open dialogue about energy choices, involving the public and full information. The

current confidentiality rules, in excess of other states' and those of the Publicly Owned Utilities', stifle this dialogue and undermine public support for the RPS.

6. The Preliminary Staff Proposal will provide appropriate protection for information for which there is a legitimate need for confidentiality.

The Preliminary Staff Proposal provides the public access to information which is not market-sensitive while protecting information which could affect the market price an energy buyer pays for electricity. Given that the Preliminary Staff Proposal suggests disclosing terms for contracts which are already executed in solicitations already completed, and given the significant variability between solicitations, as well as the new structure for compliance periods, we do not see providing terms from past solicitations as affecting future solicitations. Rather, making key information public at this stage will support public involvement in a transparent process as the Commission considers whether or not to approve contracts.

Because of the success of the RPS program, the renewables market in California has grown enormously in terms of the number of players and scale of projects since the inception of the RPS program. Collusion and market manipulation by a few companies are less likely in a market with a wide range of developers and hundreds of renewable energy projects of various types and sizes in various stages of development.

7. There are no legal issues with respect to implementation of the Preliminary Staff Proposal.

The Public Utilities Code incorporates the requirements of the Bagley-Keene Act and reinforces the Commission's duty to provide public meetings and public notice.⁶ California's Public Records Act ("PRA") also 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."⁷ Senate Bill (SB) 1488 further requires the CPUC to ensure that its practices pursuant to Section 454.5 of the Public Utilities Code provide for "meaningful public participation and open decision-making."⁸ Because of our state's laws and policies supporting and in many cases requiring transparency and public access to information, reducing confidentiality protections for data provided to the Commission will improve legal defensibility.

The Commission has the authority to protect information which has the potential to materially affect the price of energy (market sensitive information)⁹ but as established by SB 1488, "must act carefully and more than a rubber stamp for the party seeking confidentiality."¹⁰ The broad swaths of data now protected as market sensitive in the Confidentiality Matrix, potentially include many types of information which do not have the potential to materially affect the price of energy. Limiting confidentiality protections should significantly reduce potential legal vulnerabilities.

⁶ Pub. Util. Code § 306(b).

⁷ Gov. Code § 6250.

⁸ 2004 Cal. Stats., Ch. 690, § 1 (Sept. 22, 2004).

⁹ D. 07-05-032, at 10.

¹⁰ D. 07-05-032, at 14.

CONCLUSION

For the foregoing reasons, the Commission should adopt the Preliminary Staff Proposal while adopting the conservation groups' additional recommendations.

Respectfully submitted,

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VERIFICATION

I, Sarah K. Friedman, am employed as a Senior Campaign Representative with SIERRA CLUB, a non-profit corporation. I am authorized to make this verification on behalf of Sierra Club California. The statements in the foregoing *COMMENTS ON PRELIMINARY STAFF PROPOSAL TO CLARIFY AND IMPROVE THE CONFIDENTIALITY RULES FOR RENEWABLES PORTFOLIO STANDARD* are true of my own knowledge, except as to matters which are therein stated on information and 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.

Executed on this 5th day of August, 2013 at Palo Alto, California.

/S/ Sarah K. Friedman
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Senior Campaign Representative
Sierra Club