

**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 R.11-05-005

**REPLY COMMENTS OF THE GREEN POWER INSTITUTE
ON THE PROPOSAL ON CONFIDENTIALITY RULES**

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REPLY COMMENTS OF THE GREEN POWER INSTITUTE ON THE PROPOSAL ON CONFIDENTIALITY RULES

Pursuant to the July 1, 2013, *Administrative Law Judge's Ruling Requesting Comments on Preliminary Staff Proposal to Clarify and Improve Confidentiality Rules for the Renewables Portfolio Standard Program*, as modified by a July 16, 2013, *Ruling* by ALJ Simon granting an extension to file reply comments until August 27, 2013, in Proceeding R-11-05-005, the **Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program**, the Green Power Institute (GPI), the renewable energy program of the Pacific Institute for Studies in Development, Environment, and Security, provides these *Reply Comments of the Green Power Institute on the Proposal on Confidentiality Rules*.

Foundation for Proposal

A number of the Parties in their *Opening Comments*, including UCS, CEERT, Jan Reid, and the utilities, complain that a foundation for the *Preliminary Staff Proposal on confidentiality* has not been adequately established. The GPI agrees with these parties. While we support the spirit and intention of the proposal, we have to admit that it came unexpectedly, and without context or tie-in to other initiatives that are underway in the RPS proceeding. We are not calling for the withdrawal of this proposal, as some of the other Parties are, but we do think that a sound foundation needs to be established before going forward with the proposed changes.

Access to Information under Current Confidentiality Rules

One of the assertions made by the utilities in their *Opening Comments* is that the only beneficiaries of the preliminary staff proposal would be market participants, because non-market participants can already gain access to confidential information under current rules

by signing confidentiality agreements of their own with the Commission. We strongly disagree. While it is true that non-market participants have the right to sign confidentiality agreements and gain access to protected information on a confidential basis, that does not translate into the greater public having access to this information in an actionable format.

As we stated in our *Opening Comments*, despite the fact that GPI is a non-market participant, public-purpose intervenor in Commission proceedings, we have so far declined to sign a confidentiality agreement because we believe that while the information under seal that we could gain access to might very well help to inform our thinking about various issues before the Commission, the downside is that we would be prevented from using it in our public filings. We simply do not wish to be in the position of having to defend our arguments in public comments and testimonies on the basis of information that we can claim to have seen, but are unable to reveal. Indeed, there is a strong tendency among those handling confidential information to act conservatively and self-censor, often withholding from their public filings information that is contained in the confidential information, but that is also available in the public domain. We do not want to put ourselves in that position, and we do not think that doing so would further our ability to work on behalf of the public interest.

Another limitation of the current version of the confidentiality rules, which provide for confidential treatment of contract-pricing information during the approval process for new procurement contracts, is that it effectively limits the approval process to the cadre of Parties that have signed confidentiality agreements with the Commission. Parties like the GPI, which are public-purpose intervenors, but who choose not to be privy to confidential information, are unable to participate effectively in the contract-review process under the current rules. The proposed rule changes pertaining to price disclosure for contracts submitted to the Commission for approval would change that, and open up the approval process to a wider range of participants.

Economic Analysis Provided by the Utilities

In their *Opening Comments*, all of the IOUs favor the withdrawal of the *Preliminary Staff Proposal*, and retention of the Commission's current rules on confidentiality. In support of this position, they each present cases based, in part, on economic analyses that share a couple of key misperceptions. In this *Reply*, we discuss two issues of concern to us in this regard: a fundamental misunderstanding about the role of information in the marketplace, and the notion that if developers have access to information about the utilities' net short or long positions they will be able to manipulate the market in ways that they would not be able to do if they did not have access to that information.

At the most basic level, it is important to note that in free-market economic theory, one of the prerequisites for an efficient marketplace to be able to operate is broad access to accurate information on the part of all market participants. It is simply contrary to basic economic theory to assert that keeping information confidential can lead to a better deal for utility ratepayers due to more efficiently functioning markets. There are valid reasons for keeping some kinds of information confidential, but promoting the efficient operation of the marketplace is certainly not one of them. For example, SDG&E states, in their *Opening Comments*:

In ruling on this question, the Commission must consider, as it did in D.06-06-066, California's experience with market manipulation during the energy crisis and whether disclosure of non-public procurement data to market participants will improve or undermine the IOUs' ability to negotiate effectively on behalf of utility ratepayers (SDG&E *Opening Comments*, pg. 8).

The energy crisis was not caused by an excess of accurate procurement data in the public domain. The energy crisis was caused by a combination of deceit and market manipulation, including the reporting to this Commission of false information by a number of generators and marketers. What happened in the 2000/2001 energy crisis has no connection to today's RPS market, or the proposal on confidentiality that is before us.

With respect to the need for confidential treatment of an IOU's current and three-year-forward net-short or long position for RPS energy, the utilities go to great length to try to

demonstrate how releasing this information, regardless of what it is (short or long), always leads to higher procurement costs for consumers. For example, SDG&E states, in their *Opening Comments*:

Thus, if the market becomes aware that SDG&E will experience a high net short position near the end of a compliance period, it is likely that renewable energy prices will rise in response to SDG&E's high demand. If, on the other hand, the market becomes aware that SDG&E has low demand for new projects, bidders in SDG&E's RPS solicitations may artificially reduce pricing and then seek contract re-pricing at a later point. Given the obvious potential for disclosure of net open information to affect market pricing, it is clear that RPS net open information is "market sensitive" procurement data that must be protected under §454.5(g) for a period long enough to ensure that disclosure will not impact market prices. [SDG&E *Opening Comments*, pg. 15.]

This paragraph simply does not stand up to scrutiny. Even if the utility's net-short or long position, as reported to the PUC, is kept confidential, the fact is that serious market participants are always making their own estimates of the utilities' positions, and while they may not be exactly the same as the estimates that the utilities have made, they are close enough to allow them to function effectively in the marketplace. If a utility is in a net-short position the market price will rise, but **not** as a result of disclosure of the utility net-short projections reported to the PUC. Rather, prices will rise because demand exceeds supply in the marketplace, and that, in and of itself, causes prices to rise. Indeed, if the withholding of this information, as is currently the practice, were to lead to a situation in which prospective bidders wrongly perceived that the IOUs were in a net-short position, that could lead to higher bids than would be the case if more accurate information were publicly available.

If the marketplace experiences a situation in which there is a surplus of RPS power, then SDG&E theorizes that bidders will artificially underbid their true costs, with the expectation that they can come back later and pursue contract amendments needed in order to move forward with their projects. This is not just a theoretical issue, it is an issue that has plagued the state's RPS program since its inception, and it has been occurring regularly even with the current confidentiality rules that are in place, and regardless of whether the market is in a net-short or long position. We agree with SDG&E that this is an issue worth

addressing, but we disagree that it has any connection to the Commission's rules regarding the confidentiality of RPS-related information, or information handled by the Commission more generally.

Cost vs. Quantity Information

In our *Opening Comments*, the GPI asserted that there is a natural hierarchy that should be recognized in terms of determining what kinds of information are legitimate candidates for receiving confidential treatment in Commission proceedings. Our proposed hierarchy consists of the following elements:

- Financial information is more likely to be deserving of confidential treatment than is quantity information, whether on a project-specific basis, or for companies.
- Information that is specific to a private, non-jurisdictional company is more likely to be deserving of confidential treatment than is information specific to a utility regulated by this Commission .
- In cases where there is a finding that confidential treatment is appropriate for a particular category of information, there should be a strong effort to provide the equivalent information in aggregate form.

We note that while other Parties, in their *Opening Comments*, do not explicitly reference our hierarchy, many of the Parties express far greater reservations with the proposals for the disclosure of cost or price information than for the disclosure of quantity information. We note this tendency in particular, in the *Opening Comments* of DRA, IEP, and Jan Reid, and see it on the part of the IOUs as well. We urge the Commission to take this into account as it decides how to move forward with the *Preliminary Staff Proposal*.

RPS Compliance Reporting

Proposal no. 4 in Group C of the *Preliminary Staff Proposal*, on RPS Compliance Reporting, is to redesign the reporting tool by separating historical compliance data from current data and future projections of procurement performance. As we stated in our

Opening Comments, we believe that this is a regressive proposal, and should be withdrawn. We note that UCS, in their *Opening Comments*, agrees with our position, and that DRA also explicitly recognizes the intrinsic link between past and future procurement performance. There is simply no good reason to split the database into two unconnected parts. Doing so will lead to a loss in the public's knowledge and understanding about the successfulness and effectiveness of the state's popular RPS program.

Dated August 27, 2013

Respectfully Submitted,

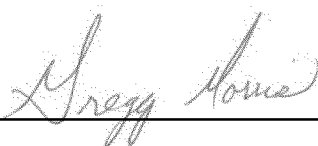


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VERIFICATION

I, Gregory Morris, am Director of the Green Power Institute, and a Research Affiliate of the Pacific Institute for Studies in Development, Environment, and Security. I am authorized to make this Verification on its behalf. I declare under penalty of perjury that the statements in the foregoing copy of *Reply Comments of the Green Power Institute on the Proposal on Confidentiality Rules*, filed in R.11-05-005, 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.

Executed on August 27, 2013, at Berkeley, California.



Gregory Morris