

**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)

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

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PRELIMINARY STAFF 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”) and the subsequent extended comment deadline, approved by email by Administrative Law Judge Simon on July 16th, 2013, Sierra Club California, Defenders of Wildlife and Center for Biological Diversity (collectively, the “conservation groups”) respectfully submit the following reply comments.

I. Increased transparency will benefit non-market participant public interest groups and individuals.

The current confidentiality rules for electricity data do not serve the public interest. These rules keep members of the public in the dark about energy investments made by Investor Owned Utilities (“IOUs”). This lack of publically available data is a problem because it is ultimately the public that bears the burden for decisions that have wide implications for California and its natural resources. Without access to electricity data, the public is prevented from participating in the complicated balancing necessary to meet California’s energy needs in a sustainable, defensible and cost-effective manner.

In opening comments, the IOUs argue that market participants (energy companies) are the only constituency unable to access confidential electricity data under the current rules.¹ They base this position on the argument that the current structure allows non-market participant advocates to see and comment on price² through joining procurement review groups (“PRGs”) or entering into non-disclosure agreements (“NDAs”) and/or submitting to a protective order.³ This is incorrect.

As discussed in our opening comments, there are a number of issues with the current rules that keep public interest groups and members of the public from accessing electricity data. Joining the PRG or signing the IOUs NDAs or protective orders would expose non-market participants to the open-ended remedies (including uncapped monetary damages) specified in the NDA and protective orders.⁴ These provisions could expose the signatory to significant financial risk in the event of dispute over the terms of the NDA, regardless of the underlying merits of the claim. Sierra Club is unable to sign NDAs or other agreements which would expose the organization to uncapped monetary damages. This issue is magnified for smaller grassroots organizations and individuals without the financial buffer to defend a lawsuit from IOUs. NDA provisions restricting who the signatory can share information with limit public interest organizations which represent clients from sharing pertinent information with their own clients.

¹ San Diego Gas & Electric Company (U 902 E) Comments on Preliminary Staff Proposal Regarding Confidentiality Rules (“SDG&E Comments”), p. 8.

² Pacific Gas and Electric Company’s (U 39 E) Comments on Preliminary Staff Proposal to Clarify and Improve the Confidentiality Rules for Renewable Portfolio Standard (“PG&E Comments”), p 10.

³ Southern California Edison Company’s (U 338-E) Comments on Administrative Law Judge’s Ruling Requesting Comments on Preliminary Staff Proposal to Clarify and Improve Confidentiality Rules for the Renewables Portfolio Standard Program (“SCE Comments”), p. 6.

⁴ PG&E asks that the Commission, prior to revisiting confidentiality protections, approve the advice letters for model Non-Disclosure Agreements and Protective Orders jointly filed by the IOUs in November, 2011. (PG&E Comments, p. 3). We ask that the Commission not take this step, as the revised Non-Disclosure Agreements and Protective Orders continue to contain open-ended remedies and restrictions on sharing information limiting the ability of smaller advocacy organizations or individuals to view confidential information. Instead, we ask the Commission to revisit these agreements.

Other organizations choose not to sign NDAs because they would ultimately be prevented from using this information in public filings, stymying their advocacy efforts.⁵

Participating in a PRG requires extensive time and resource commitments which limit participation by smaller public interest organizations and individuals. The intersection of the current confidentiality rules and the PRG 'black box structure' does not allow for members of the public to submit written comments through an open process. This keeps the public at large from providing pertinent information when it would be most meaningful—prior to contract negotiation.⁶ Increasing access to electricity data will provide a clear benefit to the public. The measures in the Preliminary Staff Proposal, as augmented by the suggestions in our opening comments, will allow a greater range of public interest groups and individuals to advocate more effectively on a broad range of issues, ultimately improving Commission and IOU decision-making.

II. Confidentiality Rules should not favor conventional generation.

We agree with Southern California Edison (“SCE”), the Center for Energy Efficiency and Renewable Technology (“CEERT”) and Pacific Gas and Electric Company (“PG&E”) that confidentiality protections for renewables should not be examined in isolation. Increasing transparency for RPS generation, without changing confidentiality rules for conventional generation could further widen the gap between procurement of conventional generation and renewables⁷ and creates disincentives for procuring renewables.⁸

⁵ Comments of the Green Power Institute on the Proposal on Confidentiality Rules (“GPI Comments”), p. 2.

⁶ For example, members of the public often have insight on which projects will ultimately be difficult to develop due to wildlife impacts and land use impacts. Providing this information at the shortlist stage will ultimately save customers money. As conservation groups have mentioned on several prior occasions, the entire PRG structure may violate California’s Open Meeting Laws, the Bagley-Keene Act.

⁷ Comments of the Center for Energy Efficiency and Renewable Technologies on Preliminary Staff Proposal on RPS Confidentiality Rules (“CEERT Comments”), p. 6.

Increased transparency for conventional generation data, including transparency on the health and environmental impacts of carbon and other pollutants, is imperative given the near-term decisions to be made around replacement power for San Onofre Nuclear Generating Station (“SONGS”) and the repowering of once-through cooling (“OTC”) facilities. Confidentiality protections for conventional generation data impedes effective advocacy by public interest groups and individuals concerned that these decisions occur thoughtfully and sustainably.

SCE⁹ and PG&E¹⁰ each recommend the confidentiality protections for conventional and renewable resources be examined comprehensively. PG&E recommends the Commission open a new confidentiality proceeding. We support increasing transparency without burdening renewable generation. However, we are concerned that a new proceeding could take many years, and consume finite staff and advocate resources, while near-term procurement decisions go forward without full public participation and complete information.

We urge the Commission to go forward with examining confidentiality rules for conventional and renewable generation, while exploring ways to provide greater transparency into conventional generation as part of the SONGS proceedings. In particular, we urge the Commission to incorporate suggestion that procurement decisions support the loading order.¹¹

III. Current confidentiality rules are over-inclusive regarding types of information.

One of the major issues with the current confidentiality rules is the vast categories of information which would not have a material impact on the market price of energy but which are

⁸ We agree with the Union of Concerned Scientists (“UCS”) that *“(A)ny proposed changes to RPS confidentiality rules should not create information requirements that effectively discourage retail sellers from procuring renewables if, in the absence of additional approval hurdles, they would voluntarily seek out renewables beyond the current 33% by 2020 requirement.”* (Opening Comments of the Union of Concerned Scientists on the Preliminary Staff Proposal to Clarify and Improve Confidentiality Rules for the Renewables Portfolio Standard Program (“UCS Comments”), p 3.)

⁹ SCE Comments, p. 7.

¹⁰ PG&E Comments, p. 3.

¹¹ UCS Comments, p.2.

protected as market sensitive. We urge the Commission to consider in a workshop the concept of a hierarchy of types of information that should receive confidential treatment.¹²

We recommend any discussion of a hierarchy of information consider the value of increased transparency around the bid evaluation process. Information on how projects are evaluated has less risk of impacting the market price of electricity, and could provide value in improving the quality of renewable energy bids, and ultimately, the RPS program. Specifically, we recommend full transparency for the inputs and application of the least-cost best fit (“LCBF”) methodology, and the application of the project viability calculator (“PVC”). Clarity on criteria and process will help improve future bids (under the assumption that clear guidance and an understanding of *how* projects will be measured will result in a better offer package that emphasizes the points of analyses). Transparency around the PVC and LCBF will ultimately formalize and strengthen each of these tools, improving the IOUs ability to systematically value non-price attributes in procurement. Information on application of the PVC and LCBF should be provided with respect to both the shortlist process and the projects ultimately selected as part of the contract approval process.

We also encourage the Commission to look at increased transparency for protective federal and state wildlife designations or other relevant information from wildlife agencies, federal state or local land use designations, and designations under state and federal planning processes such as the Desert Renewable Energy Conservation Plan (“DRECP) or the Bureau of Land Management’s Solar Energy Program (“BLM Solar Program”). This data is technically publicly available but not provided to the Commission or the public in either the planning or procurement processes. This information could be instrumental in improving Commission

¹² GPI Comments, p. 2.

decision-making as such land designations often indicate likelihood of permitting delays or project failure. We recommend this publicly available information be provided as part of the planning and contract approval processes.

IV. Project milestone information should be provided.

We support greater transparency for project milestone schedules and progress in meeting milestones. Providing project milestone information on a regular basis in a single location could significantly improve understandings of the projects timeline and viability which would be helpful in transmission and energy planning. Moreover, greater transparency on what permits are needed, and their status, will lead to improved coordination and break down silos between land management, wildlife, and energy planning entities.¹³ Additionally, members of the public and conservation groups often have valuable insight on what permits should be obtained and the potential timeline of obtaining permits. Providing information on state and federal land use and wildlife designations early in the process, in accordance with our opening comments, is integral to providing greater transparency and will also be helpful in assessing how realistic the project milestone schedule ultimately is.

Both SCE¹⁴ and PG&E commented that providing the public project milestone status information and their analysis of the projects success rate would have a chilling effect on financing. We disagree with this purported risk. Financing parties already track 'project milestones' (key permits, interconnection and site control agreements) as part of their due

¹⁴ See, SCE Comments, p. 24, PG&E Comments, p.19.

diligence prior to making investment decisions. Financing parties also carefully review power purchase agreements, including milestone schedules, as part of their due diligence.¹⁵

The IOUs also raised concerns that publicizing project milestone and other status data will cause generators to hold back¹⁶ and/or be less candid in providing data.¹⁷ We are surprised by this concern, as we believe generators are usually bound by the terms of power purchase agreements to provide accurate data, and could risk termination or other penalties by breaching those terms.

The IOUs also raised concerns that making project evaluation or status information publicly available could cause generators to leave the California market.¹⁸ Project investment decisions are long-term decisions based on a multitude of factors; including available land with good renewable resource, transmission access, and a market to sell power to. We find it very unlikely that confidentiality protections would trump these factors.

Increasing access to project milestone data will significantly improve energy planning in California and the Commission should require this data be provided to the public.

V. Increased transparency would improve energy coordination.

Improved transparency (as augmented by the conservation groups' proposal to provide information on federal and state wildlife and land management designations) will improve coordination between generation and energy and land use planning. Several parties suggested inter-agency coordination has not suffered as a result of the current confidentiality rules.¹⁹ We disagree. As stakeholders in the DRECP and participants/observers in the California Independent

¹⁵ Power purchase agreements often include a carve-out for financing parties or financing parties execute non-disclosure agreements.

¹⁶ See, SDG&E Comments, p. 21.

¹⁷ See, PG&E Comments, p. 19.

¹⁸ SDG&E Comments, p. 21.

¹⁹ See, PG&E Comments, p. 6.

System Operator's Transmission Planning Process as well as the Long Term Planning Proceeding, we see that current data²⁰ is not consistently used in energy planning, even with regards to state and federal efforts such as the DRECP and the BLM Solar Program. This is a key issue for coordination of transmission and land use planning. Given the huge costs of transmission and generation projects, any chance to improve transparency, public participation and advocacy should be taken seriously.

²⁰ The CPUC and the CAISO each rely on the Renewable Energy Transmission Initiative in their planning. That planning effort contains inaccurate information and is woefully out of date at this time as it has been dormant for several years. More accurate planning efforts, are underway, including the more robust and up-to-date DRECP.

CONCLUSION

The conservation groups request the Commission to adopt the Preliminary Staff Proposal in accordance with our comments above and those filed on August 5, 2013.

Respectfully submitted,

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Dated: August 27, 2013

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 *REPLY 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 27th day of August, 2013 at Los Angeles, California.

/S/ Sarah K. Friedman
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Sierra Club