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January 13, 2006

Docket Clerk  
California Public Utilities Commission  
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505 Van Ness Avenue  
San Francisco, CA 94102

**Re: R.04-04-003 - Constellation Post-Workshop Reply Comments**

Dear Clerk:

Attached for filing, one day out of time, is the “Reply Of Constellation Energy Commodities Group, Inc. And Constellation NewEnergy, Inc. To Post-Workshop Comments On Assigned Commissioner’s Ruling Regarding Next Steps In Procurement Proceeding”. Administrative Law Judge Brown granted the extension to file one day out of time in a telephone conversation with me yesterday afternoon.

Sincerely,

Eric Janssen  
Legal Assistant to Andrew B. Brown

Attorneys for Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Promote  
Policy and Program Coordination and  
Integration in Electric Utility Resource  
Planning.

Rulemaking 04-04-003  
(Filed April 1, 2004)

**REPLY OF  
CONSTELLATION ENERGY COMMODITIES GROUP, INC. AND  
CONSTELLATION NEWENERGY, INC. TO POST-WORKSHOP COMMENTS  
ON ASSIGNED COMMISSIONER'S RULING  
REGARDING NEXT STEPS IN PROCUREMENT PROCEEDING**

January 13, 2006

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ASSIGNED COMMISSIONER’S RULING REGARDING NEXT STEPS IN  
PROCUREMENT PROCEEDING**

**I. Introduction and Summary**

On January 5, 2006, several parties submitted post-workshop comments as permitted pursuant to the procedures set out by the Assigned Commissioner’s Ruling Regarding Next Steps in Procurement Proceeding, dated December 2, 2005 (“ACR”). The post-workshop comments were submitted in follow-up to two separate workshops conducted by the Staff of the California Public Utilities Commission (“CPUC” or “Commission”) on December 14, 2005, both of which provided a forum for market participants to discuss with Staff critical issues that will be addressed during the 2006 Long Term Procurement Planning process (“2006 LTPP”). The ACR also permits the filing of reply comments to the Post-Workshop Comments of other parties and Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (collectively, “Constellation”) do so herein.

As discussed below, Constellation respectfully disagrees with Southern California Edison’s (“SCE”) and San Diego Gas and Electric’s (“SDG&E”) dismissal of any need to review the hybrid market structure, as it exists in California, and SDG&E’s view that this is not an appropriate proceeding for evaluation of the “slice-of-load” approach first introduced by

Constellation in the 2004 long-term procurement planning proceeding. Constellation also provides comments on Pacific Gas and Electric's ("PG&E") call that all LSEs should be required to submit long term procurement plans pursuant to the AB 57 requirements.

**II. Reexamination of the Hybrid Market Structure and Definition of the Retail Market are Both Vitally Important to the 2006 LTPP Process.**

SCE states at page 3 of its comments:

SCE sees little value in reexamining the "hybrid market" for generation in this proceeding. Of far greater importance is defining the retail market, including the roles and responsibilities of LSEs. The current "hybrid market" has led to thousands of megawatts of newly contracted generation resources, especially third party-owned renewable resources.

SDG&E states at page 18 of its comments:

Constellation – Procurement practices and hybrid market structure issues should not be addressed at this time as they have recently been litigated and decided. "Slice of load" issues are not ripe for review and should be considered at the appropriate time in another proceeding looking at market structure issues.

Constellation respectfully disagrees with SCE as it relates to the value of reexamining the "hybrid market", and agrees with SCE on the import to long-term planning in defining the retail market. Furthermore, Constellation respectfully disagrees with SDG&E that this is not an appropriate venue for addressing the "slice-of-load" approach to utility procurement practices.

Hybrid Market Structure. Constellation incorporates by reference herein the reply comments submitted by the Independent Energy Producers ("IEP") yesterday that demonstrate the shortcomings of the hybrid market structure in introducing competitive procurement practices. Beyond the facts presented by IEP, however, there are other reasons for re-evaluating the hybrid market structure, reasons that Constellation discussed in its pre- and post-workshop comments and reiterates here briefly.

- The hybrid market structure bifurcates the wholesale market such that the generating infrastructure is owned and operated under: (i) the traditional cost of service (utility owned generation) and traditional cost pass throughs (i.e., power purchase agreements) and (ii) merchant generating assets competing to provide energy and ancillary services. The wholesale market is simply not developing properly under this bifurcated structure of ownership because the non-merchant assets have guaranteed cost recovery and return on equity that allows them to operate outside the competitive market structure, with the effect that market prices are not appropriately reflecting the assets' values. The merchant assets that exist in the market already suffer because the non-merchant assets that do not rely on competitive market forces to earn their return, serve to suppress market prices. Without price signals in the market place that support investment, investment does not (and is not) occurring outside the traditional cost of service and cost pass through mechanisms with customers bearing the market risks associated with those investments.<sup>1</sup>
- Development of assets under the hybrid market structure that rely on cost-of-service and cost pass through mechanisms has been used to limit customer choice for electric service on the grounds that customers who leave the utility cost of service regime will impose costs on those that remain.

In the 2004 LTPP, Constellation suggested another approach – the slice-of-load approach - for managing utility procurement practices and bringing the benefits of competition to all consumers, and the Commission directed in its order in that case that the slice-of-load concept should be addressed in a subsequent procurement-related proceeding.<sup>2</sup> Constellation recognizes that implementation of the slice-of-load approach represents a significant paradigm shift for the California energy market, but Constellation believes that its implementation will serve to support true competition in the California energy markets that will bring lower costs, more innovation, and better management of risks to all consumers. Thus, Constellation respectfully reiterates<sup>3</sup> the requests that it made in its earlier workshop comments that the Commission specifically address the following questions during the 2006 LTPP process:

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<sup>1</sup> There are other features of the wholesale market design impeding price signal formation that would otherwise incent new investment, particularly the existence of low bid caps that provide a regulatory hedge against price spikes and disincent bilateral contracting for new resources. The opportunity to address these issues is being afforded through the Resource Adequacy Requirement Order Instituting Rulemaking (“RAR OIR”), R.05-12-013.

<sup>2</sup> See, D.04-12-048, discussion pages 22, 175-176, and Finding of Fact No. 117. “Slice of Load” and “Standard Offer Service” (SOS) are synonymous terms for a competitive utility supply procurement process.

<sup>3</sup> See Constellation pre-workshop comments, pages 8 and 9.

- Is the existing policy that supports the hybrid market structure, in which the assets owned by vertically integrated utilities receive cost recovery under traditional costs of service rates, appropriate for California?
- If not, how can California transition away from this structure?
- If so, how can it be maintained without compromising the effectiveness of competitive market structures, such as capacity markets?
- How can the independent evaluation of the procurement options be accomplished? Should standardized RFOs be utilized in the procurement process?
- How are slice-of-load utility procurements conducted in other jurisdictions and how could those mechanisms be adapted for use in California as a means for Investor Owned Utilities (“IOUs”) to satisfy their required procurement needs?
- What would the benefits be for consumers, the utilities, and wholesale and retail suppliers, if the slice-of-load approach to utility procurement is adopted in California?

Definition of the Retail Market. Constellation, in its post-workshop comments, recommended that the Commission require the utilities to provide scenarios of load migration in their LTPPs that included assumptions for low, most-likely and high load migration due to Direct Access and Community Choice Aggregation migration from utility service. Constellation agrees that there is uncertainty as to whether, when and how the retail market will be re-opened, which is why scenario analysis is important in this proceeding. This is particularly necessary in the absence of (or until) the implementation of Constellation’s recommended slice-of-load approach, an approach that would effectively transfer the risks of customer attrition away from the utilities to the wholesale suppliers who serve their load, thus precluding the possibility that utilities will purchase too much or too little infrastructure to meet their load obligations. The matter of how and when to re-open the retail market should be more thoroughly investigated by the CPUC, so as to resolve many of the uncertainties that pertain to how a retail market may be structured, but

Constellation does not believe that this proceeding is the correct docket in which to explore these issues.

**III. This Proceeding Must Clearly Distinguish Between The Compliance Responsibilities Imposed On Jurisdictional IOUs And Electric Service Providers (“ESPs”) Pursuant To AB 57 And AB 380.**

PG&E states:

Requiring all Commission –jurisdictional LSEs to submit an LTPP that is reviewed by the Commission is an essential part of insuring resource adequacy, including issues regarding new generation procurement and cost allocation. Moreover, it will be difficult for the Commission to assess the IOUs’ LTPPs if the LTPPs of other Commission-jurisdictional LSEs are not submitted at the same time. The Commission cannot evaluate assumptions regarding LSE specific loads and resources without the benefit of information from all Commission regulated LSEs to review. The OIR initiating the 2006 LTPP proceeding should include all Commission-jurisdictional LSEs, not just the IOUs.

PG&E post workshop comments, page 8-9.

In footnote 11, PG&E goes on to say:

PG&E recognizes that all Commission-jurisdictional LSEs have been named as respondents in the Commission new Resource Adequacy Proceeding. See R.05-12-013 (December 20, 2005). However, to the extent there is overlap between that proceeding and the 2006 LTPP proceeding, or new generation or cost/benefit allocation issues are addressed in the 2006 LTPP proceeding rather than in the resource adequacy proceeding, it is essential that all Commission-jurisdictional LSEs be named as respondents in both proceedings.

PG&E post workshop comments, page 9.

Constellation believes that PG&E is correct that there are likely to be significant crossover issues between the Resource Adequacy Requirement (“RAR”) proceeding and the 2006 LTPP; indeed, as discussed in its pre-workshop comments, Constellation is concerned that the two proceedings may be at cross purposes with respect to how each will help to ensure much

needed investment in California. Thus, Constellation agrees that careful attention must be given to coordinating the policies and procedures that are developed in each proceeding.

However, as Constellation has already stated in its pre-workshop comments (as have others), requiring ESPs to submit long term procurement plans raises serious issues with respect to the jurisdictional authority granted to the CPUC pursuant to AB 57 and AB 380. This LTPP proceeding should not seek to impose requirements on ESPs that exceed this jurisdictional authority. Thus the focus of this proceeding with respect to ESPs should recognize the important distinctions that exist between the ESPs and the IOUs. IOUs make AB 57 procurement plan filings for Commission approval and in exchange have much greater assurances of cost recovery and avoidance of *ex post* disallowances, while their customers have the benefit of timely Commission oversight and use of competitive procurement mechanisms. AB 57 applies to public utility electrical corporations, not ESPs. AB 380 calls for ESPs to meet the same requirements for RAR and the Renewable Portfolio Standard (“RPS”), essentially calling for the establishment of a mechanism by which LSE compliance with RAR and RPS requirements can be measured rather than how the ESPs will fulfill these requirements. To the extent PG&E’s comments suggest that the Commission should treat ESPs as if they are public utilities, Constellation objects to this suggestion as exceeding the statutory directives.

#### **IV. Conclusion**

Constellation looks forward to working with the Commission and other parties to help create durable utility procurement mechanisms that utilize competitive structures to increase benefits for ratepayers. In this vein, Constellation believes that the procurement proceeding should, as previously stated by the Commission, explore the development of a slice-of-load approach to utility procurement. Moreover, this review can be undertaken as part of a re-examination of the flawed hybrid market structure. In addition, the Commission must recognize



the importance that load migration will have on utility procurement activities, and make sure that the potential for load migration is not omitted from any needs analysis. However, Constellation recommends that the Commission explore the issues associated with re-opening direct access in a separate proceeding. Lastly, the Commission must recognize the critical distinctions that exist between public utility electrical corporations and ESPs when undertaking its responsibilities under AB 57 and AB 380.

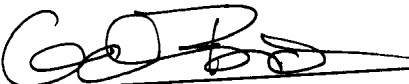
Respectfully submitted,

January 13, 2006

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Certificate of Service

I hereby certify that I have this day served a copy of “Reply of Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. to Post-Workshop Comments on Assigned Commissioner’s Ruling Regarding Next Steps in Procurement Proceeding” on all known parties to R.04-04-003 by transmitting an e-mail message with the document attached to each party named in the official service list. Parties without e-mail addresses were mailed a properly addressed copy by first-class mail with postage prepaid.

Executed on January 13, 2006 at Sacramento, California

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Eric Janssen

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600 ANTON BLVD., SUITE  
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