

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



FILED

06-09-10
04:59 PM

Application of Pacific Gas and Electric Company for Approval of 2008 Long-Term Request for Offer Results and for Adoption of Cost Recovery and Ratemaking Mechanisms.

Application 09-09-021
(Filed September 30, 2009)

**MOTION OF THE INDEPENDENT ENERGY PRODUCERS
ASSOCIATION FOR RECONSIDERATION OF THE
ADMINISTRATIVE LAW JUDGE'S RULING**

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Date: June 9, 2010

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Pursuant to Rule 11.1 of the Commission's Rules of Practice and Procedure, the Independent Energy Producers Association (IEP) submits its motion for reconsideration of the *Administrative Law Judge's Ruling Substituting Replacement Version of Proposed Decision*, issued on May 26, 2010.

The May 26 Ruling resulted from the inclusion of information considered confidential by Pacific Gas and Electric Company (PG&E) in a Proposed Decision (PD) issued on May 25 in this proceeding. In general terms, the information related to various bid evaluation criteria used in PG&E's 2008 long-term request for offers (RFO). The May 26 Ruling was accompanied by the release of a Replacement PD that removed the information PG&E considers confidential. The Ruling directs that "parties that have reviewed and/or printed the original

version of the Proposed Decision shall disregard and/or destroy that document and continue to treat the information as confidential, and subject to the nondisclosure agreement.”¹

IEP seeks reconsideration of the ruling because the information in the initial PD directly relates to one of the topics that will be addressed in the recently opened long-term procurement plan (LTPP) proceeding, Rulemaking (R.) 10-05-006. The order instituting that rulemaking included a preliminary scoping memo that identified “Refinements to Bid Evaluation in Competitive Solicitations (particularly with respect to UOG [Utility-Owned Generation] Bids)” as one of the policy issues that will be addressed in Track III of that proceeding.² The order described “the need to ensure that the bid evaluation process is fair, just and reasonable,” and acknowledged “the need to determine whether and how bid criteria can be developed to improve head-to-head comparisons of UOG and IPP [independent power producer] bids.”³ These issues are particularly important in light of the Replacement PD’s conclusion that “at key junctures [in the bid evaluation process] PG&E appears to have acted to give its interests disproportionate weight and exercise unilateral control over the selection process.”⁴

IEP has long expressed its concerns to the Commission about how the utilities compare their own projects with the bids of non-utility IPPs. IEP intends to pursue that issue in the LTPP proceeding, and the preliminary scoping memo for that proceeding recognizes a need

¹ IEP notes with some irony that it is effectively barred from signing the model protective order adopted in D.08-04-023, because it is classified as a “Market Participant” that can review confidential material only through a “Reviewing Representative,” defined in a way that excludes any individuals with the necessary background and expertise to make sense of the materials. The May 26 Ruling nevertheless appears to subject IEP to the terms of that order, and IEP will of course comply with that ruling.

² Order Instituting Rulemaking 10-05-006, p. 16.

³ Order Instituting Rulemaking 10-05-006, p. 16.

⁴ Replacement PD, p. 20. PG&E’s Long-Term RFO at issue in this proceeding included a UOG project that would be permitted and constructed by an entity other than PG&E but would be turned over to PG&E for ownership and operation on the completion of construction.

to examine the details of the utilities' bid evaluation process, particularly when IPP bids are compared with UOG projects. The information that was included in the initial PD but removed in the Replacement PD would help support a thorough investigation of the utilities' bid evaluation processes, as contemplated in the Preliminary Scoping Memo for R.10-05-006.

Decision (D.) 06-06-066 adopted a presumption in favor of public disclosure of procurement-related information and declared that claims for confidential treatment of information should be balanced against “the policy goals of public disclosure, full participation and transparency.” In this case, the ability of IEP and other parties to fully participate in the LTPP proceeding and the transparency of the LTPP proceeding will be compromised if this information is withheld from the public. The ability to discuss—freely, among *all* parties, in *public* hearings and *publicly available* briefs—a concrete example of how one utility applied the bid evaluation criteria would greatly enhance the Commission's ability to improve the use of bid evaluation criteria in the utilities' procurement process.

The Commission should also recognize that the inadvertent release of the information in the initial PD had the practical effect of making the information public. The initial PD containing the information was served on all parties to this proceeding and posted on the Commission's website, where it remained overnight and into the following day. Anyone with an internet connection could have downloaded the initial PD and the information in question during that time, and doubtless some unknown individuals did so. For example, investors, lenders, and arbitrageurs have a keen interest in staying up-to-date on the Commission's pronouncements and inclinations, and it is almost inconceivable that *no* individual associated with the financial industry downloaded the initial PD while it was available on the Commission's website. Those individuals are outside the Commission's jurisdiction and are not

constrained by the May 26 Ruling in their use of this information. In addition, once information becomes available on the internet, retracting or deleting it is nearly impossible, and electronic copies of the initial PD remain available to anyone who is technically savvy enough to find it. No matter how strongly the Commission and the parties may desire to bring the information back under the confidentiality protections it previously enjoyed, at this point the information is, in fact, irreversibly public.⁵

In balancing the claim that this information is still confidential against “the policy goals of public disclosure, full participation and transparency,” the Commission should recognize that this information has little, if any, commercial sensitivity or value at this point. However, the information has considerable value as an indication of one utility’s approach to bid evaluation, and for that reason this information is central to one of the core policy matters to be considered in the LTPP proceeding. Re-classifying the information as confidential, after it has already been available to a broad array of stakeholder, eliminates any potential for an effective and transparent discussion on this topic in the LTPP proceeding.

For all of these reasons, IEP respectfully urges the Commission to reconsider and reverse the May 26 Ruling. The Commission should recognize the reality that the information in question has been widely and publicly dispersed and that merely re-labeling the information as confidential will not alter this fact. At this point, it makes no sense to pretend that the information continues to be confidential, and parties should be permitted to refer to this information freely and publicly as part of a transparent consideration of bid evaluation in R.10-05-006.

⁵ IEP notes that some of the information that the May 26 Ruling apparently sought to protect is still present in the Replacement PD, underscoring the difficulty of removing physical references to the information. Removing electronic references is more difficult by several orders of magnitude.

Respectfully submitted this 9th day of June, 2010 at San Francisco, California.

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CERTIFICATE OF SERVICE

I, Melinda LaJaunie, certify that I have on this 9th day of June 2010 caused a copy of the foregoing

**MOTION OF THE INDEPENDENT ENERGY PRODUCERS
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LAW JUDGE’S RULING**

to be served on all known parties to A.09-09-021 listed on the most recently updated service list available on the California Public Utilities Commission website, via email to those listed with email and via U.S. mail to those without email service. I also caused courtesy copies to be hand-delivered as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of June 2010 at San Francisco, California.

/s/ Melinda LaJaunie
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