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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion Into the Operations and Practices of Constellation NewEnergy, Inc.; Notice of Opportunity for Hearing; and Order to Show Cause Why the Commission Should Not Impose Fines and Sanctions For Constellation NewEnergy, Inc. January 2009 Violation of System Resource Adequacy Requirements.

Investigation 10-04-010
(Filed April 8, 2010)

**ADMINISTRATIVE LAW JUDGE'S RULING
ON MOTION TO MODIFY ORDER INSTITUTING INVESTIGATION**

By motion filed May 28, 2010, Constellation NewEnergy, Inc. (CNE) requests that the order instituting investigation (OII) be modified to avoid identifying CNE's monthly resource adequacy procurement obligation, the duration of particular contracts and their contract volumes. As discussed below, the motion is granted in part and I hereby request the Executive Director to issue an order correcting the OII to delete CNE's monthly resource adequacy procurement obligation; the motion is denied in all other respects.

Procedural Background

In view of the highly unusual nature of this ruling and the facts and circumstances leading up to it, I will summarize the procedural background.

The Commission issued this OII on April 8, 2010. As part of the order, the Commission directed CNE to file a motion in order to obtain confidential treatment of the concurrently served Consumer Protection and Safety Division

(CPSD) report underlying the OII. Counsel for CNE contacted me on April 19, 2010 seeking procedural guidance on how to caption the required motion and the time for filing it. In the course of that contact, counsel noted that the OII discloses the contract identifiers and the identity of the counterparties to the contracts at issue, and stated that CNE believed that this information is confidential and should not have been disclosed in the OII.

CNE timely filed its “Motion of Constellation NewEnergy, Inc. to Redact Portions of CPSD Confidential Report Pursuant to Ordering Paragraph no. 2” on April 27, 2010. That motion specifically requests confidential treatment of identified portions of the CPSD report containing information that CNE asserts is entitled to confidential treatment. Buried in its argument in support of its motion, CNE mentions that similar information is contained in page 6 of the OII, stating, “Disclosure of the information contained in those pages of the CPSD Report, *as well as page 6 of the OII which effectively reproduces that section of the confidential CPSD Report*, should not occur.” (CNE motion, at 2, emphasis added.) CNE summarizes its requested relief stating, “In conclusion, CNE asks that the indentified portions of the CPSD Report continue to remain subject to confidentiality protections.” (CNE motion, at 4.)

I have no record or personal knowledge of how CNE’s interest in revising the OII may have been brought to the attention of the Executive Director. Nevertheless, on May 20, the Executive Director issued Decision (D.) 10-05-053, Order Correcting Error, stating that the OII inadvertently includes contract identifiers and the names of counterparties to CNE’s contracts that are potentially confidential and, in any event, unnecessary to the OII, and directing that the OII be revised to remove this information; the order expressly refrains from predetermining whether the information is in fact confidential.

On May 24, counsel for CNE contacted me for procedural guidance on how to seek a protective order governing confidential information in discovery by CPSD, in discovery on the California Independent System Operator, in the CPSD report and in the revised OII. I advised counsel that confidential treatment of discovery is governed by Rule 11.3 of the Rules of Practice and Procedure, that I will resolve the pending motion for confidential treatment of the CPSD report pursuant to Rule 11.5 which governs confidential treatment of evidentiary exhibits, and that it may file a motion for an order further revising the OII at any time (see, e.g., Rule 11.1(b).)

CNE filed this motion on May 28, 2010, and requested that the time for responses be shortened to five days consistent with my intent as previously expressed to the parties. With my leave, CPSD filed its opposition on June 3, 2010, whereupon CNE requested and I granted its request to file a reply pursuant to Rule 11.1(f). Accordingly, CNE filed a reply on June 14, 2010.

Discussion

As discussed above, D.10-05-053 revised the OII to remove the identification of counterparties to CNE's contracts at issue in this proceeding (without determining whether the information is in fact entitled to confidential treatment). By this motion, CNE seeks further revision of the OII in order to remove identification of its monthly resource adequacy procurement obligation, and the duration and volumes of the contracts at issue.

CNE argues that this information should be removed from the OII because it was extracted from its month-ahead resource adequacy compliance filing and is therefore entitled to confidential treatment pursuant to Section II.B of the ESP Matrix (D.08-04-023, Appendix B). Specifically, the Commission requires each load serving entity to submit month-ahead resource adequacy compliance filings

demonstrating that it has procured sufficient capacity to meet 100% of its peak load plus the planning reserve margin for each month of the year. D.08-04-023 characterizes these filings as supply forecast information and provides that such information shall be kept confidential for the first three years of the forecast period, consistent with the Commission's protection of utilities' supply forecasts. (*Id.* at 12-14 and App. B, Section II.B.) As CNE recognizes, D.08-04-023 explicitly affirms that contract summaries, including counterparty, capacity, expected deliveries, delivery point, length of contract and online date, shall be public. (*Id.* at 15-16 and App. B, Section IV.) CNE argues that, notwithstanding this fact, allowing this information to be extracted from protected resource adequacy supply submissions would eviscerate the protection afforded pursuant to Section II.B. Moreover, CNE asserts that the contract volumes and duration as well as CNE's procurement obligation are not critical to publicly disclose for purposes of this proceeding.

CPSD opposes the motion, asserting among other things that the public interest is served by releasing the original OII without redactions, especially in view of the fact that it was already released.

I find that CNE's resource adequacy procurement obligation is entitled to confidential treatment pursuant to Section II.B of the ESP Matrix. Notwithstanding the cumbersome history that precedes this ruling, it is not cause to waive confidential treatment of information deemed to be confidential pursuant to D.08-04-023: the OII anticipated CNE's confidentiality claim, D.10-05-053 acknowledged the possibility that the OII inadvertently disclosed confidential information, and there is no apparent compromise of the public interest in transparency of the Commission's proceedings by shielding CNE's procurement obligation as opposed to the amount of its alleged deficiency.

I will request the Executive Director to issue an order correcting the OII to remove identification of CNE's resource adequacy procurement obligation. In addition, as CPSD notes in its opposition to the motion, the assigned Commissioner's scoping memo and ruling repeats the OII's disclosure of CNE's resource adequacy procurement obligation. Consistent with this ruling, I will cause the scoping memo and ruling to be sealed, and a public version that redacts the confidential information to be published.

I deny CNE's motion in all other respects. The confidentiality of the information at issue is governed by the Commission's decisions implementing Senate Bill No. 1499 issued in Rulemaking 05-06-040, including D.08-04-023 and the adopted ESP Matrix. Section IV of the ESP Matrix expressly provides that contract volumes, duration and counterparties are public information, and D.08-04-023 expressly considered and rejected argument that this information should be kept confidential.

With regard to CNE's assertion that allowing this information to be extracted from protected resource adequacy supply submissions would eviscerate the protection afforded pursuant to Section II.B, I see no such conflict. Entitlement to confidential treatment reasonably stems from the substance of the information, not its source.

With regard to CNE's statement that public disclosure of its contract volumes and duration is not critical for the purposes of this proceeding, to the extent that CNE means to suggest that there is no public interest in conducting this matter publicly, CNE's suggestion is without merit. There is a fundamental interest in conducting the government's business in an open and public manner. To the extent that CNE means to suggest that contract volumes and duration are immaterial to the proceeding, CNE does not make this case and, in any event, I

will not presume to suggest that the Commission edit its OII on the basis that the order might have been drafted differently.

Therefore, **IT IS RULED** that:

1. I will request the Executive Director to issue an order correcting the OII as revised by D.10-05-053 to remove identification of CNE's resource adequacy procurement obligation, sealing the OII as revised by D.10-05-053, and publishing the OII as revised by D.10-05-053 and such further Executive Director's order.

2. The May 11, 2010, Assigned Commissioner's Scoping Memo and Ruling shall be sealed, and a public version that redacts the identification of the number of megawatts constituting CNE's January 2009 resource procurement obligation shall be filed and published on the Commission's website.

3. CNE's motion is denied in all other respects.

Dated June 15, 2010, at San Francisco, California.

 /s/ HALLIE YACKNIN
Hallie Yacknin
Administrative Law Judge

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Dated June 15, 2010, at San Francisco, California.

/s/ CRISTINE FERNANDEZ
Cristine Fernandez

N O T I C E

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