

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



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Application of Pacific Gas and Electric Company  
for Approval of the Manzana Wind Project and  
Issuance of a Certificate of Public Convenience  
and Necessity

Application 09-12-002

**REPLY BY NON-PARTY IBERDROLA RENEWABLES, INC.  
TO THE RESPONSE OF THE DIVISION OF RATEPAYER ADVOCATES  
TO THE MOTION TO QUASH THE SUBPOENA DUCES TECUM**

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**I. INTRODUCTION AND SUMMARY**

Appearing specially as a non-party in this proceeding, and pursuant to Rule 11.1(e) of the Rules of Practice and Procedure of the California Public Utilities Commission (the “Commission”), Iberdrola Renewables, Inc. (“Iberdrola”) submits this Reply to the Response of the Division of Ratepayer Advocates’ Response to Iberdrola’s Motion to Quash the Subpoena Duces Tecum. In a telephone conversation May 6, 2010 Administrative Law Judge Ebke authorized the filing of this Reply Brief on or before 12:00 pm on May 12, 2010.

As set forth in the Motion to Quash and supporting Declaration of Carrie Plemons, DRA’s Subpoena seeks the production of documents that contain highly sensitive confidential and proprietary business and trade secret information entitled to protection under California law. Moreover, the DRA Subpoena seeks to compel the production of Iberdrola’s estimated costs of constructing the Manzana Wind Project that are immaterial to the inquiry mandated by the Scoping Ruling.

DRA's Response relies heavily on fairy tale analogies rather than accurate facts and properly reasoned legal analysis. We will address only the most egregious errors in DRA's response. Contrary to the assertions in DRA's response, we will explain below that:

- The filing of a Notice of ex parte communication does not constitute an "appearance" in a Commission proceeding;
- The filing of a Motion to Quash is not a "general appearance" in a Commission proceeding;
- Iberdrola's estimates of the cost of constructing the Project and the turbine price information are clearly protected as Trade Secrets;
- DRA's affidavit supporting the Subpoena did not set forth in full detail the materiality of the requested documents or things to the issues raised in the proceeding;
- DRA seeks Iberdrola's estimated costs of construction because DRA wants to litigate whether PG&E could have negotiated a better deal with Iberdrola and this question is outside the scope of the proceeding as defined by the Scoping Ruling;
- DRA's request for detailed, estimated costs are burdensome and unprecedented; and
- Iberdrola was not required to meet and confer with DRA prior to filing a Motion to Quash, because the requirements to meet and confer apply expressly to Motions to Compel or Limit Discovery among parties. However, even though Iberdrola was not required to meet and confer with DRA, Iberdrola did meet and confer with DRA and Iberdrola's offer for further discussion was not accepted.

For the foregoing reasons, Iberdrola's Motion to Quash the Subpoena Duces Tecum should be granted

## II. ARGUMENT

### A. THE FILING OF AN EX PARTE NOTICE DOES NOT CONSTITUTE AN APPEARANCE IN A COMMISSION PROCEEDING.

DRA's response asserts that Iberdrola has already "appeared" as a party to this proceeding by filing a Joint Notice of Ex Parte Communication on February 11, 2010.<sup>1</sup> The term "appear" as used in the Commission rules is a term of art that refers to the act of becoming a party to the proceeding.<sup>2</sup> DRA asserts that by filing a notice of ex parte communication, "Iberdrola has already acted as...a party to this proceeding."<sup>3</sup>

DRA's assertion is incorrect for two reasons. First, the Commission's rules are quite explicit that there are only four ways in which to become a party. Rule 1.4 provides:

- (a) A person may become a party to a proceeding by:
  - (1) filing an application, petition, or complaint;
  - (2) filing (i) a protest or response to an application or petition, or (ii) comments in response to a rulemaking;
  - (3) making an oral motion to become a party at a prehearing conference or hearing; or
  - (4) filing a motion to become a party.

The filing of a notice of ex parte communication is not an authorized method of becoming a party and has never been recognized by this Commission as "entering an appearance" in a proceeding. Iberdrola has done none of the other actions noted in Rule 1.4 and thus, is not a party to this proceeding.

Second, under the Commission rules, one who files a notice of ex parte communication is not necessarily a party to the proceeding. Rule 8.2 requires the filing of notices of ex parte communication in certain instances by "interested Persons." Rule 8.1.d defines interested persons to include any of the following:

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<sup>1</sup> Division of Ratepayer Advocate's Opposition to Iberdrola's Motion to Quash, Motion for a Protective Order, and Motion to Make Iberdrola a Party to Proceeding A. 09-12-002, pp. 5,6 ( submitted May 3, 2010) (hereinafter "DRA Response").

<sup>2</sup> Commission Rules of Practice and Procedure, Rule 1.4.b.

<sup>3</sup> DRA Response, p. 5.

- (1) any party to the proceeding or the agents or employees of any party, including persons receiving consideration to represent any of them;
- (2) any person with a financial interest, as described in Article I (commencing with Section 87100) of Chapter 7 of Title 9 of the Government Code, in a matter at issue before the Commission, or such person's agents or employees, including persons receiving consideration to represent such a person; or
- (3) a representative acting on behalf of any formally organized civic, environmental, neighborhood, business, labor, trade, or similar association who intends to influence the decision of a Commission member on a matter before the Commission, even if that association is not a party to the proceeding.

Clearly, the rules provide that a person other than a party to the proceeding may be required to file a notice. Conversely, the filing of a notice does not constitute an admission, as DRA would imply, that the one who filed the notice must be a party.

Iberdrola filed a Joint Notice of Ex Parte Communication not because it was a party or wanted to be a party, but because it was "a person with a financial interest" in the matter at issue before the Commission.

Even DRA does not really believe its argument that Iberdrola already appeared as a party in this proceeding by filing a notice of ex parte communication. If DRA had believed Iberdrola to be a party to this proceeding, DRA should have submitted a data request to Iberdrola under the rules that provide for discovery among parties. DRA did not do so. Instead, DRA sought a subpoena to compel information from a company that is not a party to the proceeding. By seeking the subpoena, DRA expressly conceded that Iberdrola is not a party to the proceeding.

**B. THE FILING OF A MOTION TO QUASH IS NOT A "GENERAL APPEARANCE" IN A COMMISSION PROCEEDING.**

DRA contends that Iberdrola appeared generally, not specially, in this proceeding by filing a Motion to Quash.<sup>4</sup> Citing the case of *California Overseas Bank v. French American Banking Corporation* ("*California Overseas Bank*"), DRA argues that Iberdrola's Motion to Quash is a request for a decision on the merits and therefore constitutes a general appearance.

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<sup>4</sup> DRA Response, p. 5

*California Overseas Bank* clearly supports the long recognized proposition that the filing of a motion to quash does not constitute a general appearance. In *California Overseas Bank*, the Court did not find that French American Bank (“FAB”) had made a general appearance because it filed a motion to quash. Instead, the Court found that FAB had made a general appearance because Counsel for FAB made substantive arguments at a hearing on the question of the issuance of a temporary restraining order. Counsel then proffered two reasons why the court should not interfere with the payment to FAB by Security Pacific of California Overseas Bank’s letter of credit obligation. The Court explained that “[r]ather than confining his remarks to a denial of the court’s jurisdiction over FAB or simply to clarifications of fact in order to assist the court, counsel addressed the propriety of the issuance of the temporary restraining order and, thus, FAB’s right to payment. Inasmuch as the underlying suit involved just that question, we cannot but conclude that counsel addressed the merits of the case when he opposed the temporary restraining order. Having addressed the merits of the case, FAB submitted itself to the jurisdiction of the court.”<sup>5</sup> Thus, the court found FAB made a general appearance not because FAB had filed a motion to quash, but because FAB acted in a manner to obtain a ruling going to the merits of the issuance of the temporary restraining order.<sup>6</sup>

To constitute a general appearance, a party must be found to act “for the purpose of obtaining any ruling or order of the court going to the merits of the case.”<sup>7</sup> In the instant case, Iberdrola has not appeared at a hearing to address the propriety of the relief PG&E requests in

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<sup>5</sup> 154 Cal.App.3d 179, 185-186.

<sup>6</sup> *Cal. Overseas Bank v. French Am. Banking Corp.*, 154 Cal.App.3d 179, 185-186 (1984).

<sup>7</sup> *Chilcote v. Pacific Air Transport*, 24 Cal. App. 2d 32, 35 (Cal. App. 1937), citing to *Davenport v. Superior Court*, 183 Cal. 506, 509 (1920), also see *Cal. Overseas Bank v. French Am. Banking Corp.*, 154 Cal. App. 3d 179, 184 (1984).

this proceeding. Iberdrola has not requested any ruling going to the merits of this case.

Therefore, Iberdrola's Motion to Quash does not constitute a general appearance.<sup>8</sup>

**C. IBERDROLA'S ESTIMATES OF THE COST OF CONSTRUCTING THE PROJECT ARE CLEARLY PROTECTED AS TRADE SECRETS.**

Of the many misstatements in DRA's Response, perhaps the most surprising is DRA's assertion that Iberdrola's estimated project costs are not trade secrets. DRA questions as a threshold matter whether project cost information is a trade secret under California Law.<sup>9</sup> The type of cost information that is the target of DRA's subpoena has been recognized as a trade secret by both California courts and by this Commission. In the leading case of *Whyte v. Schlage Lock Company*, the court held that information relating to Schlage's pricing, profit margins and costs of production were trade secrets:

“These categories identify Schlage's pricing, profit margins, costs of production, pricing concessions, promotional discounts, advertising allowances, volume rebates, marketing concessions, payment terms and rebate incentives. These categories relate to “the price that Schlage sells its lock products to its big box retailer and other non-retail customers like The Home Depot” and is used by Schlage to price its products competitively. The information in these categories has independent economic value because Schlage's pricing policies would be valuable to a competitor to set prices which meet or undercut Schlage's.

“Cases have recognized that information related to cost and pricing can be trade secret. (See *Courtesy Temporary Service, Inc. v. Camacho*, *supra*, 222 Cal. App. 3d at p. 1288 [billing and markup rates “irrefutably” of commercial value]; *SI Handling Systems, Inc. v. Heisley* (3d Cir. 1985) 753 F.2d 1244, 1260 [cost and pricing information trade secret]; *Lumex, Inc. v. Highsmith* (E.D.N.Y. 1996) 919 F. Supp. 624, 628-630 [pricing, costs, and profit margins treated as trade secrets].)

“Whyte contends Schlage's cost and pricing information is merely “general methods of doing business,” which cannot be protected as trade secret. (See *Fortna v. Martin* (1958) 158 Cal. App. 2d 634 [323 P.2d 146] [pricing and bidding methods not trade secrets if only general methods of doing business].) In

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<sup>8</sup> Consistent with the longstanding principle that a Motion to Quash does not constitute a general appearance, on April 23, 2010 ALJ Ebke advised the docket office and the parties to this proceeding: “I am advising the ALJ Docket office to accept Iberdrola's motion for filing. I will add Iberdrola as a party to this proceeding for the limited purpose of addressing this motion. Iberdrola will be removed from the service list once this matter is resolved through a ruling.”

<sup>9</sup> DRA Response, p. 8.

so arguing, Whyte fails to distinguish between cost and pricing data unique to Schlage (which may qualify as trade secrets) and commonly used industry formulas for setting prices (which do not). The court in *SI Handling Systems, Inc. v. Heisley, supra*, 753 F.2d at page 1260, drew this distinction to conclude that cost and pricing information not readily known in the industry--information such as the cost of materials, labor, overhead, and profit margins--was trade secret.”<sup>10</sup>

Similar to the Schlage and SI Handling Systems cases, information such as the cost of materials, labor, overhead, contingencies and profit margins that Iberdrola may forecast for the Manzana wind project is cost information not readily known to the industry and is clearly a trade secret. The Commission also has clearly recognized this type of cost information to be a trade secret. In Decision 08-04-049 (Rulemaking 08-03-008), the Commission held that FCE’s commercially sensitive production cost data and cost projections associated with FCE’s products qualified as “trade secrets” under Government Code Section 6254.7(d). The Commission found that the information at issue was a trade secret as defined in the Government Code as the information involved production data known only to certain individuals, and would give its user an opportunity to obtain a business advantage over its competitors. The Commission noted that if revealed, the information would subject FCE to competitive disadvantage with respect to other fuel cell manufacturers. FCE argued, as Iberdrola contends herein, that the competitive retail environment in which FCE competes necessitates confidential treatment of this information. The Commission found that FCE has stated a valid legal reason to grant confidentiality, and held that FCE’s production cost data and cost projections in its filing were commercially sensitive trade secrets under Government Code Section 6254.7(d). The construction estimates and turbine price information that DRA seeks through this Subpoena are equally sensitive trade secrets as the information the Commission protected in D.08-04-049.

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<sup>10</sup> *Whyte v. Schlage Lock Company*, 101 Cal. App. 4th 1443 (2002).

As DRA concedes, if the requested information is a trade secret, the burden shifts to DRA to demonstrate that the requested information is *necessary* to resolve the case.<sup>11</sup> DRA's Response has not even attempted to show that the requested trade secrets are necessary to resolve the case. Instead, DRA attempts, and fails, to meet the lesser standard that the information is material to the issues raised in the proceeding.<sup>12</sup> Because DRA has not shown that the production of these trade secrets is necessary to resolve the current case, the Motion to Quash must be granted.

**D. THE TURBINE COST INFORMATION AND OTHER TERMS OF THE CONTRACTS BETWEEN IBERDROLA AND GENERAL ELECTRIC ARE CLEARLY PROTECTED AS TRADE SECRETS**

DRA's Response asserts that Iberdrola is not barred from disclosing the turbine cost information because General Electric has not objected to the Subpoena.<sup>13</sup> Attached as Exhibit A to this Reply is a letter from General Electric stating its support of the motion by Iberdrola to quash the subpoena duces tecum. The letter explains that the Master Turbine Purchase Agreement contains highly sensitive and confidential business information and trade secrets which are not generally known to the public. The letter also describes why disclosure of this information would harm General Electric, chill competition and would not be in the best interests of ratepayers.

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<sup>11</sup> DRA Response, p. 8.

<sup>12</sup> DRA Response, p. 8.

<sup>13</sup> DRA Response, p. 14

**E. DRA’S AFFIDAVIT SUPPORTING THE SUBPOENA DID NOT SET FORTH IN FULL DETAIL THE MATERIALITY OF THE REQUESTED DOCUMENTS OR THINGS TO THE ISSUES RAISED IN THE PROCEEDING, NOR DOES IT SPECIFY THE EXACT DOCUMENTS OR THINGS TO BE PRODUCED.**

While discovery among parties is routine in Commission proceedings, the power to subpoena information from non-parties is an extraordinary remedy that is rarely utilized. Where it has been utilized, it has been applied cautiously, narrowly and only where there has been a clear showing in full detail of the materiality of the requested documents. The Commission’s Rules codify this principle. Rule 10.2(c) provides that if the subpoena seeks the production of documents or other things, it must be served with a copy of an affidavit showing good cause for the production of the documents or other things described in the subpoena, specify the exact documents or things to be produced and set forth in full detail the materiality of the requested documents or things to the issues raised in the proceeding.

The affidavit in support of DRA’s Subpoena does not set forth *in full detail* the materiality of the requested documents. The affidavit makes a blanket assertion that the requested documents are material to the Commission’s investigation and DRA’s testimony regarding “whether the proposed capital cost of the proposed Manzana wind project...are [sic] reasonable and competitive and whether it is reasonable [sic] for PG&E to recover the Manzana capital and operating costs through cost of service ratemaking.”<sup>14</sup> The affidavit correctly states that the PSA and PCA costs are a significant component of PG&E’s total project costs. The affidavit then merely states that the requested documents “relate” to the components and bases of such costs and then reasserts the blanket assertion that the documents are “material to the

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<sup>14</sup> DRA Response, Attachment A, Declaration in Support of Subpoena Duces Tecum.

determination of the reasonableness of the PSA and PCA costs as well as the additional project costs that PG&E seeks to recover in rates.”<sup>15</sup>

The affidavit consists therefore of two blanket assertions of materiality, but no showing, much less a showing in “full detail” of why such documents are material to the issues raised in the proceeding.

DRA’s response does not argue that the affidavit sets forth in “full detail” the materiality of the requested documents. DRA’s Response carefully avoids reference to the “full detail” requirement of Rule 10.2. Instead, DRA asserts that the affidavit gives “sufficient detail” without pointing to where that detail is provided.<sup>16</sup>

DRA also argues in defense of the defective affidavit that “DRA was not required to serve a brief with the Subpoena providing all theories that support the materiality, relevance, necessity and essentiality of the documents to this case.”<sup>17</sup> We agree with DRA that it was not required to provide a “brief” in support of the Subpoena. On the other hand, DRA was required to provide more than the mere assertion that the documents are material. The Commission’s rules plainly require that DRA provide a showing in “full detail” of the materiality. We also agree with DRA that it is not required to provide “all theories” that support the materiality of the requested documents.<sup>18</sup> But certainly, it must provide in the affidavit at least *one* valid theory to support the materiality, and clearly it has not done so.

The Commission has quashed subpoenas where Commission Staff have not clearly and conclusively demonstrated the materiality of the requested documents. In *Golden West Airlines, Inc.’s Motion to Quash Subpoena Duces Tecum, Served Upon Hollis B. Roberts, granted*.

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<sup>15</sup> DRA Response, Attachment A, Declaration in Support of Subpoena Duces Tecum.

<sup>16</sup> DRA Response, p. 15.

<sup>17</sup> DRA Response, p. 15.

<sup>18</sup> DRA Response, p. 15.

Decision No. 79221, Case No. 52297, 72 CPUC 544 (Oct. 5, 1971), staff submitted a subpoena duces tecum for a witness to provide personal financial information in a proceeding where the issue for the Commission was whether to approve an interim fare increase for Golden West Airlines (“GWA”). The witness, Hollis Roberts, was the principal stockholder of GWA. The staff argued that “Hollis Roberts has controlling interest in the airline; GWA has a negative stockholders’ equity of more than \$6,000,000; and projections of revenue and expenses under the increased fares indicated that GWA will operate at a loss under such fares. The staff asserts that the financial position of GWA is critical and that it is essential for the Commission to determine the nature and extent of Hollis Roberts’ financial resources to back up present and future capital needs of GWA.”<sup>19</sup> The Commission found that “the materiality and relevance of the production of Hollis Roberts’ detailed personal financial data to the need for a permanent fare increase to alleviate an operating loss has not been shown,” and quashed the subpoena. Similarly here, the materiality and relevance of the production of Iberdrola’s confidential cost estimates to the comparison [of PSA and PCA costs] to other relevant projects has not been shown. DRA’s Subpoena should be quashed.

Rule 10.2 also requires that the affidavit must “specify the exact documents or things to be produced.” In its Response, DRA asserts that it has described “the exact information sought and asked Iberdrola to produce documents in its possession that show that information.”<sup>20</sup> In stating its request in this manner, DRA concedes that the affidavit does not specify the “exact documents to be produced.”<sup>21</sup> Instead, DRA has proffered broad discovery requests for certain categories of information and is asking Iberdrola to guess which documents “are sufficient to

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<sup>19</sup> *Golden West Airlines, Inc.’s Motion to Quash Subpoena Duces Tecum, Served Upon Hollis B. Roberts, granted.* Decision No. 79221, Case No. 52297, 72 CPUC 544 (Oct. 5, 1971).

<sup>20</sup> DRA Response, p. 16.

<sup>21</sup> Commission Rules of Practice and Procedure, Rule 10.2.

show this information.”<sup>22</sup> Such blanket requests may be appropriate in general discovery between parties under Rule 10.1. Rule 10.2, however, requires a much more specific request for the “exact documents” that are being sought.

We agree with DRA that Rule 10.2 does not require DRA to spell out the precise file names or titles of the documents being requested.<sup>23</sup> On the other hand, as we explained in our Motion to Quash, the Subpoena does not specify the date or time period of the requested documents.<sup>24</sup> The Subpoena is a fishing expedition for any and all documents in Iberdrola’s possession relating to any and all forecasted costs of the Manzana wind project, disaggregated down to the finely detailed level of itemizing the title and time of each individual who may work on the Project. Moreover, the project has been in development for a number of years and the Subpoena does not state which estimates and budgets over this period are requested. The subpoena is plainly not a request for *specific* documents as the rules require.

Finally, DRA argues that the ambiguities in DRA’s subpoena should have been resolved in discussions between the parties. DRA asserts that Iberdrola should not have “requested the intervention of the Assigned Administrative Law Judge [i.e. should not have filed a Motion to Quash the Subpoena] as a starting point for working out these discovery details.”<sup>25</sup>

There are a number of serious problems with this statement. First, it was DRA, not Iberdrola, that first sought the intervention of the Administrative Law Judge Division as a starting point for seeking information. On April 5, 2010, without first undertaking *any* discussions with Iberdrola, DRA requested the intervention of the Chief Administrative Law

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<sup>22</sup> DRA Response, p. 16.

<sup>23</sup> DRA Response, p. 16.

<sup>24</sup> Motion to Quash the Subpoena Duces Tecum from Division of Ratepayers Advocates by Non-Party Iberdrola Renewables, Inc., p. 7 (submitted April 21, 2010).

<sup>25</sup> DRA Response, p. 16.

Judge and asked her to issue a Subpoena Duces Tecum ordering Iberdrola to produce records under threat of contempt of the Commission.<sup>26</sup>

Second, even after Iberdrola was surprised by this Subpoena, Iberdrola still made an effort on two occasions to discuss the Subpoena with DRA.<sup>27</sup> The Motion to Quash was not the “starting point” discussions with DRA.

Third, the Motion to Quash was filed on April 21, 2010, fifteen days after receipt of the Subpoena, on the last date that Iberdrola could file a timely response to the Subpoena. DRA is mistaken in suggesting Iberdrola should not have filed the Motion to Quash because had Iberdrola not done so, DRA would now surely argue that Iberdrola had waived its right to object.

Fourth, it is not Iberdrola’s responsibility to assist DRA in correcting the insufficiencies in its Subpoena through consultation. DRA has failed to make a proper claim for any specific documents as the Commission’s rules require. As a non-party, Iberdrola would be within its rights to object via this motion without having consulted with DRA, even though in fact it did initiate such discussions.

**F. DRA SEEKS IBERDROLA’S ESTIMATED COSTS OF CONSTRUCTION BECAUSE DRA SEEKS TO LITIGATE WHETHER PG&E COULD HAVE NEGOTIATED A BETTER DEAL WITH IBERDROLA; THIS QUESTION IS CLEARLY OUTSIDE THE SCOPE OF THE PROCEEDING DEFINED BY THE SCOPING ORDER.**

DRA’s Response states that “DRA is not asking whether PG&E could have negotiated a better deal with Iberdrola.<sup>28</sup> In fact, that is exactly why DRA seeks voluminous information regarding Iberdrola’s estimated costs of construction. Just one page after denying that it wants to litigate whether PG&E could have negotiated a better deal, DRA’s Response speculates: “PG&E may have had little incentive to negotiate for lower PSA/PCA costs both because higher

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<sup>26</sup> DRA Response, Attachment A.

<sup>27</sup> DRA Response pp. 4, 16, 18.

<sup>28</sup> DRA Response, p.10.

PSA/PCA costs inflate PG&E's rate base and because it is difficult if not impossible to attack and recommend disallowances of specific PSA/PCA costs when they are unknown."<sup>29</sup> That, in DRA's own words, is why DRA sought this Subpoena - to obtain information that will allow it to attack and recommend disallowances of specific PSA/PCA costs.

DRA's Response also asserts that DRA seeks the information from Iberdrola in order to evaluate how the costs of the PSA and PCA compare "to the actual value of the assets" PG&E is purchasing.<sup>30</sup> However, the *actual* value of the assets PG&E will purchase are not known because the project has not been constructed. DRA requested Iberdrola's estimated costs of construction, and these estimates are in no way probative of the actual value that DRA claims to be seeking. Further, the actual value of a renewable energy project is not merely a sum of its costs—the environmental benefits of a carbon-free generation resource as well as helping to further PG&E's progress towards meeting its RPS goals are just two intangible benefits that add to the value of this transaction.

Finally, DRA argues that the Commission is not precluded from considering the actual project costs when deciding whether to approve PG&E's Application.<sup>31</sup> There are two problems with this argument. First, as noted above, the actual costs are not known, not even to Iberdrola, because the Project has not yet been built. Second, the examination of "actual project costs" has not been identified by the Scoping Ruling as one of the issues to be decided in the Scoping Ruling. The Scoping Ruling, not DRA, defines the issues that are relevant to this proceeding. The Scoping Order determined, as DRA requested in its Protest, that the reasonableness of the requested costs would be adjudged in comparison to other relevant projects.<sup>32</sup> The Scoping

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<sup>29</sup> DRA Response, p.11.

<sup>30</sup> DRA Response, p. 10.

<sup>31</sup> DRA Response, p. 10.

<sup>32</sup> Division of Ratepayer Advocates Protest, p. 3.

Order did not provide that the reasonableness of the requested costs would be adjudged in comparison to Iberdrola's estimated budgets.

**G. DRA'S REQUEST FOR DETAILED, ESTIMATED COSTS IS BURDENSOME AND UNPRECEDENTED.**

The scope of information requested by DRA's Subpoena is sweeping and unprecedented. For example, even though Iberdrola has not undertaken construction of the Project, the Subpoena requests the title and time allocated for each person who will work on development, construction or commissioning of the Project.<sup>33</sup> Iberdrola has and will employ a significant number of people for these activities. No single document in Iberdrola's possession contains this information. A "good faith" effort at compliance will require a comprehensive search of company records and the collection of hundreds of personnel records. But the request does not stop there. The Subpoena requests a breakdown of the estimated budget for the Project including, "without limitation, costs for labor, management, expenses, overhead, etc. for construction, permitting, pre-commercial operations, commissioning or maintenance costs," and each spreadsheet that relates to these estimates.<sup>34</sup> DRA emphasizes that it is not asking Iberdrola to create such a budget, but is instead asking Iberdrola to comb its records over an unspecified time period for any and all documents or spreadsheets that "relate" to these matters.<sup>35</sup>

Iberdrola's Motion to Quash asserted that this detail of information has not been requested by DRA from a third party developer in prior proceedings.<sup>36</sup> In response, DRA incorrectly quotes Iberdrola, omitting the specific reference to third party developers, and DRA

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<sup>33</sup> DRA Response, Attachment A, Documents to Be Produced, Item 5.

<sup>34</sup> DRA Response, Attachment A, Documents to Be Produced, Items 2, 3.

<sup>35</sup> DRA Response, Attachment A.

<sup>36</sup> Iberdrola Petition, pp. 11-12.

then replies that “This is simply not true.”<sup>37</sup> To be clear, the Motion to Quash states that this type of information has not been requested by DRA of third party developers.<sup>38</sup> That statement is uncontested. Both of the instances that DRA cites involve information provided to the Commission by regulated utilities.<sup>39</sup> In each of those cases, the developers had provided the information to the utility to justify the proposed Amendments. The utility in turn, provided this information to DRA. In contrast, in the instant case, Iberdrola did not provide PG&E with any information regarding project costs.<sup>40</sup> DRA has not cited a single example where the Commission has sought to compel production of this information from third parties.

Moreover, both of the cases cited by DRA involve amendments to previously approved Power Purchase Agreements where the increased project costs of the proposed Amendments had been reviewed by the utility. DRA has not cited any instance where the developers estimated costs have been reviewed in the approval of an initial PPA or UOG purchase, especially where the information has not been reviewed by the utility.

In both of the cases cited by DRA where limited Project cost information was provided to DRA by the regulated utility, the utility provided the information because the utility believed that the information was necessary to meet the utility’s burden of proof to justify the increase in cost of an Amended PPA. The question of whether to produce such information in the instant case should rest with PG&E and is not the proper subject of a Subpoena.

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<sup>37</sup> DRA Response, p. 17. Specifically, the Declaration of Carrie Plemons actually states, “I am informed and believe that this type of cost information from a third-party developer has not been requested by the Commission in any prior proceeding involving utility-owned generation or power purchase agreements.”

<sup>38</sup> Iberdrola Petition, p. 12.

<sup>39</sup> DRA refers to the application for approval of an amended power purchase agreement between Calpine and PG&E for the Russell City Energy Company Project (A. 08-09-007) and application for approval of an amended power purchase agreement between Aero Energy and Southern California Edison (AL 2451-E).

<sup>40</sup> This was no accident. Iberdrola did not provide this information to PG&E—a potential competitor—precisely because this information is proprietary and confidential. On this point and others, DRA appears to conflate PG&E and Iberdrola, treating them as if they are one entity. Notwithstanding their agreement on the contracts at issue, PG&E and Iberdrola are very distinct entities with different interests and different legal obligations before this Commission.

For example, in Application 05-12-002, the Assigned Administrative Law Judge rejected the request by Greenlining Institute to subpoena the testimony of PG&E Corporation's CEO, Peter Darbee, for one hour of cross-examination during the forthcoming evidentiary hearings. Even though PG&E was already a party to the proceeding, even though Darbee's testimony might be relevant and even though Greenlining requested only one hour of his time, the ALJ denied the request for a subpoena. The ALJ held that "PG&E has the burden of demonstrating that Application 05-12-002 should be granted. That burden includes the responsibility for the selection of the specific individuals to appear as witnesses in support of Application." (ALJ Ruling.)

The same reasoning should apply in the instant case. PG&E is the Applicant and has the burden of demonstrating that the Application should be granted. That burden includes the selection of specific information to be offered into evidence. If DRA believes that the information offered by PG&E is inadequate, DRA can make that argument in its Brief. DRA should not be permitted to subpoena information from a non-party to support arguments or theories outside the scope of this proceeding.

**H. DRA'S PROPOSED PROTECTIVE ORDER WILL NOT PROTECT THE CONFIDENTIALITY OF IBERDROLA'S TRADE SECRETS.**

DRA's Response asserts that the information Iberdrola seeks to protect is not any more secret or difficult to protect than data from regulated utilities or other market participants.<sup>41</sup> However, DRA has not explained at all how it will the proposed Protective Order will both maintain the confidentiality of the information while allowing the information to be introduced into evidence in this proceeding.

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<sup>41</sup> DRA Response, p. 13

DRA's proposed Protective Order would bar market participants from receiving the confidential information. For the purposes of this Order, PG&E is a market participant. As Iberdrola emphasized in its Motion to Quash and supporting Declaration, the information sought by the Subpoena has not been disclosed to PG&E.<sup>42</sup> Iberdrola's Motion also describes the specific harm to Iberdrola if this information was disclosed to PG&E.

DRA's Response completely fails to explain how the confidential information sought by the Subpoena could be used in this proceeding without disclosure to PG&E. On the one hand, if the confidential information is used in this proceeding and disclosed to PG&E, Iberdrola would suffer substantial harm. On the other hand, the confidential information would not be admissible in evidence if PG&E - the Applicant - in this proceeding was denied the opportunity to review and rebut the confidential information. Placing the information under seal or barring market participants from the hearing room is not an option if the Applicant is also barred.

Iberdrola respectfully submits that DRA's Protective Order would not both protect the confidentiality of the information and, at the same time, allow the information to be admitted into evidence in this proceeding.

**I. IBERDROLA WAS NOT REQUIRED TO MEET AND CONFER WITH DRA PRIOR TO FILING A MOTION TO QUASH BECAUSE THE REQUIREMENTS TO MEET AND CONFER APPLY EXPRESSLY TO MOTIONS TO COMPEL OR LIMIT DISCOVERY AMONG PARTIES.**

**1. THE PARTIES MET AND CONFERRED ON APRIL 9 AND 13, 2010.**

DRA's Response asserts that the Motion to Quash should be denied because Iberdrola violated Rule 11.3(a).<sup>43</sup> Under Rule 11.3(a) a motion to compel or limit discovery is not eligible for resolution unless the parties have met and conferred in good faith in an effort to resolve the

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<sup>42</sup> Exhibit A to the Motion to Quash, Declaration of Carrie Plemons, Par. 6

<sup>43</sup> DRA Response, p. 18.

dispute. As we explain below, DRA's argument fails to recognize the difference between the Commission's discovery rules and the exercise of the Commission's subpoena powers.

But before we turn to the important legal distinctions between discovery among parties and the subpoena of information from non-parties, it is important to note that Iberdrola did, in fact, meet and confer with DRA regarding the Subpoena. As the Declaration of Candace Morey recites, Gregg Wheatland (counsel for Iberdrola) called Ms. Morey on two occasions. On the first occasion, Mr. Wheatland expressly offered to make employees of Iberdrola available at DRA's convenience to discuss the Subpoena. Ms. Morey did not accept the offer. On the second occasion, Mr. Wheatland again called Ms. Morey and there was an extensive discussion of the subpoena. Ms. Morey's declaration selectively recounts the discussion, but the declaration is sufficient to demonstrate that both parties discussed their differences in good faith, without reaching consensus on the materiality or sufficiency of the Subpoena. Mr. Wheatland again offered to make Iberdrola employees available to discuss the Subpoena and Ms. Morey again did not accept the offer. Therefore, as established by DRA's own declarant, the parties did meet and confer on the Subpoena on at least two occasions.

As we explain below, even though Iberdrola made an effort to meet and confer with DRA on the Subpoena, Iberdrola has no legal duty to do so.

## **2. RULE 11.3(A) DOES NOT APPLY TO A MOTION TO QUASH.**

Under established Commission practice, there are two processes for obtaining information in a Commission proceeding. These two processes are reflected under Rules 10.1 and 10.2 of the Commission's Rules. Under Rule 10.1, any party may obtain discovery from any other party regarding any matter, not privileged, that is relevant to the subject matter involved in the pending proceeding. Where a data request among parties is disputed, the Commission practice permits the requesting party to bring a motion to compel a response to the disputed data

requests. In rare instances, a responding party may bring a motion to limit data requests. Rule 11.3 provides that if a party brings a motion to compel or limit discovery, the parties must first meet and confer in a good faith effort to informally resolve the dispute.

The instant case, however, does not involve a discovery dispute between parties under Rule 10.1. Iberdrola is not a party. For that reason, DRA did not submit a data request to Iberdrola under Rule 10.1. Instead, DRA sought to obtain a Subpoena under Rule 10.2 from a non-party. In response to that Subpoena, Iberdrola filed a Motion to Quash the Subpoena. Iberdrola has not filed a motion to limit discovery. Rule 11.3, by its express terms requires parties to meet and confer prior to filing a motion to compel or a motion to limit discovery.

A previous version of the Commission's rules, Rule 61, expressly provided for the filing of a Motion to Quash a subpoena. This rule did not require parties to meet and confer prior to the filing of the Subpoena nor prior to the filing of the Motion to Quash. This rule provided that, "In response to such motions or upon the motion of the Commission, a Commissioner, or the administrative law judge after giving notice and an opportunity to be heard, the Commission, a Commissioner, or the administrative law judge may make an order quashing the subpoena entirely, modifying it, or directing compliance with it on appropriate terms or conditions, or may make any other order needed to protect the parties or the witness from unreasonable or oppressive demands, including unreasonable violations of the party's or witness's right to privacy."

### **3. DRA FAILED TO MEET AND CONFER WITH IBERDROLA PRIOR TO SEEKING THE SUBPOENA.**

As set forth in Iberdrola's Motion to Quash, DRA submitted data requests requesting from PG&E a detailed breakdown of Iberdrola's costs included in the PCA and PSA. DRA requested a response by April 14, 2010. However, prior to April 14, 2010 and without first

meeting and conferring with Iberdrola, DRA requested the issuance of a subpoena duces tecum to compel Iberdrola's response to DRA's questions. As we explain above, we do not believe Rule 11.3 regarding the obligation to meet and confer prior to the issuance of a motion to compel or limit discovery is applicable to subpoenas or motions to quash a subpoena. However, if the Commission finds this rule to be applicable to this case, the Commission must find that DRA failed to meet and confer in good faith with Iberdrola before seeking a Subpoena to compel the production of documents from Iberdrola. By DRA's own reasoning, DRA violated Rule 11.3 by obtaining a subpoena without first making a good faith effort to resolve the dispute informally with Iberdrola. The subpoena therefore should be quashed on that ground alone.

### III. CONCLUSION

For the reasons set forth above, Iberdrola respectfully requests that the Commission quash the Subpoena, and deny DRA's motion to make Iberdrola a party to the proceeding.

Dated: May 12, 2010

Respectfully submitted

By: \_\_\_\_\_/s/\_\_\_\_\_

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PROOF OF SERVICE

I declare that:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and am not a party to the within action. My business address is ELLISON, SCHNEIDER & HARRIS; 2600 Capitol Avenue, Suite 400; Sacramento, California 95816; telephone (916) 447-2166.

On May 12, 2010, I served the attached *REPLY BY NON-PARTY IBERDROLA RENEWABLES, INC. TO THE RESPONSE OF THE DIVISION OF RATEPAYER ADVOCATES TO THE MOTION TO QUASH THE SUBPOENA DUCES TECUM* by electronic mail or, if no e-mail address was provided, by United States mail at Sacramento, California, addressed to each person shown on the attached service list.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on May 12, 2010, at Sacramento, California.

/s/

\_\_\_\_\_  
Karen A. Mitchell

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