BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider Refinements to and Further Development of the Commission's Resource Adequacy Requirements Program.	Rulemaking 05-12-013 (Filed December 15, 2005)

COMMENTS OF THE CALIFORNIA FORWARD CAPACITY MARKET ADVOCATES ON REVISED PROPOSED DECISION ON PHASE 2 – TRACK 2 ISSUES: ADOPTION OF A PREFERRED POLICY FOR RESOURCE ADEQUACY

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Pursuant to Rule 14.3 of the Rules of Practice and Procedure of the California Public Utilities Commission (Commission), and the *Administrative Law Judge's Ruling Providing for Comments and Replies Regarding the Revised Proposed Decision* issued on March 30, 2010, California Forward Capacity Market Advocates (CFCMA)[1] submit the following comments.[2]

I. INTRODUCTION

CFCMA is composed of a group of utilities and independent power producers with a common vision for the future of resource adequacy (RA) for California's electricity markets. This vision is centered on robust, transparent, and competitive markets for energy, ancillary services, and capacity, in order to meet California's future electricity needs in an efficient and cost-effective manner. Throughout this proceeding, CFCMA has taken the view that the only RA option that is consistent with all these requirements is a multi-year forward centralized capacity market. Consequently, we are extremely disappointed that the Commission proposes now to take make no meaningful changes to the existing RA program, despite its many and manifest flaws highlighted in the original notice of this proceeding and as presented in the record throughout this multi-year proceeding.

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1 CFCMA is a coalition of intervenors NextEra Energy Resources, LLC, (formerly FPL Energy), NRG Energy, Inc., RRI Energy, Inc. (formerly Reliant Energy, Inc.), San Diego Gas & Electric Company, and Southern California Edison Company.

2 The other members of CFCMA have provided counsel for CFCMA permission to sign this pleading on their behalf.

The policy direction of the Revised Proposed Decision (Revised PD) is fundamentally incompatible with the development and success of a market-based approach to building and maintaining the vital energy infrastructure of the state. Furthermore, the Revised PD imposes undue risk and costs on utilities and their customers, is potentially inconsistent with AB 380, can lead to unjust and unduly discriminatory compensation to capacity resources for their provision of the Standard Capacity Product, and will undermine the viability of direct access – the purported reason behind the changes in the Revised PD. Moreover, critically, adopting this Revised PD would abdicate to California Independent System Operator (CAISO) and its regulator, the Federal Energy Regulatory Commission (FERC) the leadership role in guiding multi-year forward reliability needed to ensure that the state's reliability needs will be met.

II. COMMENTS

A. The Revised PD Undermines Core Business Models

In our comments on the Preliminary Decision, CFCMA and other Joint Parties made the point that a multi-year forward requirement without a centralized capacity market would undermine the business model of competitive direct access providers in the state, for whom, under these models, making long-run financial commitments to capacity suppliers is either infeasible because of the counterparty risk and credit requirements, or risky because of the lack of a transparent, liquid market for capacity. Although the Revised PD swings at this problem, it misses by a mile with its aim to rely on the IOUs to be the buyers and builders of capacity to meet the needs of all customers. In so doing it raises even more serious challenges to the financial viability of the state's utilities and independent power producers (IPPs) while, at the same time, signals the opening round of what we expect to be an on-going battle of exceptions, waivers, opt-out requests, and jurisdictional challenges for years to come. Moreover, instead of facilitating Direct Access which is a stated goal of the Revised PD, reliance on the IOUs to develop system resources will actually create long-term viability concerns for retail competition.

Leaning on the IOUs as envisioned in the Revised PD is unreasonable and potentially inconsistent with state law. It is unreasonable because it places the utility shareholders at risk for the costs and liabilities of these assets with no assurance that the

Cost Allocation Mechanism (CAM) will allow full and fair sharing of all these costs and liabilities to all customers relying on these assets. It is potentially inconsistent with state law if it allows for any opt-out provision that does not result in like-for-like obligations. Moreover, any opt-out provisions adopted by the Commission could place a disproportionate share of costs on the utilities' bundled customers, which is inequitable on its face as it burdens the remaining customers with even higher charges.[3]

Furthermore, the CAM authorized by state law leaves notable gaps that limit the ability of the IOUs to recover capacity costs equitably from all who benefit from their resources. First, the CAM only applies to Commission-jurisdictional load-serving entities (LSEs). Consequently, non-jurisdictional LSEs, such as municipal utilities, may benefit from utility resources (particularly for meeting locational capacity requirements) but escape any cost allocation. Under a CAISO-administered centralized capacity market, by contrast, capacity costs, including the potentially higher cost of meeting locational requirements, would be spread *pro rata* among all loads. Second, the CAM does not provide for recovery of costs for utility-owned capacity resources. This limitation not only constrains the options for meeting future reliability needs, but if direct access results in significant load migration from the IOUs, it may also strand generation assets at the IOUs, even when those assets are essential for system reliability.

The Revised PD effectively terminates the merchant generation business in California going forward. All new generation will be funneled through the investor-owned utilities (or, possibly, through some future CAISO procurement processes), shifting many of the core risks inherent in the merchant generation model—such as location, and technology choice, and commodity price risk—from the resource owner to the utility customers. This is a clear retreat from what was, apparently in the past, the Commission's vision of a competitive wholesale market and customer choice. Implicit in the Revised PD is a model in which substantially all of the risks of when, where, and what new resources are built is borne by consumers, not the owners of those facilities. Lacking complete and efficient markets—in particular, lacking a forward capacity market and a forward reserves market—

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3 *See also* "Comments of Southern California Edison Company (U-338 E) on the Revised Proposed Decision on Phase 2 - Track 2 Issues: Adoption of a Preferred Policy For Resource Adequacy" at 3–5.

new resources will rationally require long-term contracts, which can be inefficient, non-liquid, non-transparent, and shift risks to consumers. This is an extraordinary about-face for the Commission to elect, especially with no record or debate on the subject. It is made all the more extraordinary by timing of this decision, coming when there are numerous technology risks and opportunities. It is precisely at times like this when vigorous and open competition should be fostered.

The Revised PD would create no market-based signal for new investment or retirement. Capacity prices should be exactly that signal, guiding not only the timing of new investment, but also its location and ability to support system reliability needs. This price signal will be increasingly important going forward as the state faces the substantial challenge of meeting many policy goals simultaneously. New renewable resources will be needed to meet Renewable Portfolio Standards; yet, these renewable resources differ markedly in their contribution to system reliability. On-shore wind resources may produce a lot of renewable electricity over the course of a year in particular hours of the seasons, but they provide minimal system capacity during peak demand periods. On the other hand, geothermal resources support system reliability on par with fossil-fueled generation. Without market-driven capacity prices, however, the value of this difference between competing renewable technologies will be misstated. The Revised PD recognizes that more transparency should increase economic efficiency and make market power more apparent, and that a central auction mechanism "would provide a more transparent market than the bilateral trading approach, even if an electronic bulletin board mechanism is included in the latter." Despite this acknowledgment, the Revised PD concludes that "an electronic bulletin board or equivalent mechanism with appropriate disclosure of price and other market information is needed." While a bulletin board may increase liquidity, it is a poor substitute for the systematic transparency provided by a centralized capacity market.

This model also places existing investment by IPPs at considerable risk. The state's generation will rapidly evolve towards a two-tier system: those with long-term contracts from an IOU, and those that must rely solely on short-term capacity and energy sales. While long-term contracts play a role in allowing load-serving entities to hedge capacity cost risks, the bifurcation becomes discriminatory when only high-cost resources, such as new supply or costly existing resources needed for reliability, are offered contracts, leaving the residual the opportunity to earn a suppressed price. This is unduly discriminatory and therefore—considering that these resources are all providing the same Standard Capacity Product established by and enforced through the CAISO's tariff—potentially illegal under the Federal Power Act. It also is ultimately costly to consumers. Existing resources that could continue to serve as RA resources economically for decades will retire prematurely (especially if faced with large capital expenditures, such as those required to address once-through-cooling or other environmental issues), only to be replaced by more costly resources funded through long-term contracts by the utility. Allowing full and fair competition among wholesale suppliers through a full set of energy, ancillary services, TREC, and capacity markets assures consumers of reliable service at a reasonable price; whereas, reverting to central planning and a command-and-control approach to the evolution of the state's energy infrastructure will undoubtedly lead to costly mistakes—and those costs will be borne not by capacity suppliers, but by customers.

Not only does the Revised PD place the business of IOUs and IPPs at risk, its vision of the future is ultimately corrosive to direct access. Direct access is intended to provide consumers choice—choice of supply resources, choice of price. Yet as more and more of the state's generation resources are procured by the IOUs through their LTPP processes, and fewer merchant resources remain on the system, what choices remain? Without choice, what then is the purpose of direct access? Moreover, if nearly all capacity resources are under contract to the IOUs, direct access providers will have little choice in meeting their RA requirements but to purchase capacity from the IOUs; absent any capacity prices developed in competitive and transparent markets, however, both parties to such transactions will have little confidence that the contract capacity price is just and reasonable. These problems, along with the goal of retaining direct access as a viable choice, will put pressure on the Commission to allow broader opt-outs to the CAM, shifting cost responsibility for legacy resources built for *system* needs to the subset of the utilities' bundled customers.

In summary, although the revisions to the earlier PD were apparently intended to keep direct access as a viable option, the Revised PD fails in this goal (though in a different way), jeopardizes the long-term viability of the IOUs and IPPs in the state, and harms most, if not all, consumers along the way. These problems would not arise were the Commission to adopt a centralized capacity market.

B. The Revised PD Fails to Provide the CAISO a Roadmap to System Reliability

The Revised PD bases its rejection of a centralized capacity market on jurisdictional concerns related to providing the FERC too much oversight over the RA program, and the fear that such a market will result in generic capacity. Some joint solution with the CAISO is required, because system and local reliability depends on the resources available not only from Commission-jurisdictional entities but also by other load-serving entities in the state. Therefore the CAISO is uniquely positioned—and required—to examine and, when necessary, augment the collective resource adequacy of its system. But by failing to address the legitimate concerns cited by the CAISO in support of a multi-year-forward RA construct, the Commission cedes its leadership on these important RA issues.

CFCMA understands some of the Commission's caution with respect to these issues, and has a suggestion that could potentially alleviate these concerns. FERC has historically expressed willingness to defer to the Commission, as evidenced by the CAISO Tariff. Therefore, in order to work collaboratively with the CAISO to address long-run RA *and* reliability needs jointly, the Commission may consider the use of certain FERC regulations that allow for a joint and cooperative effort between the Commission and FERC in creating a centralized capacity market. 18 C.F.R. §§ 385.1301 – 385.1306 (Cooperative Procedures with State Commissions) allows the Commission and FERC to engage in cooperative efforts through the use of an informal conference, joint or concurrent hearings, or the creation of a joint board with decision-making authority. These procedural vehicles will allow both agencies to use their knowledge and expertise to establish a centralized capacity market that will allow for the shaping of a market that will develop preferred resources through a competitive wholesale market. Thus, under such procedures, the Commission's concern that a FERC-approved centralized capacity market will result in generic resources would be addressed in that the Commission would have direct input in how the centralized capacity market is established

Unfortunately, the Revised PD ignores past deference to the Commission and the procedures for cooperation between the Commission and FERC noted above, instead arguing that "maintaining our current scope of jurisdiction over the RA program is a very important benefit of the bilateral approach" and the "bilateral approach rests on our jurisdiction over LSE procurement and therefore maintains our jurisdiction over much of California's RA program." The Revised PD further asserts that the "bilateral approach will maintain Commission jurisdiction with respect to LSE based procurement," and that "the bilateral approach ensures that the Commission is authorized to ensure that environmental policies are being met." These premises are seriously flawed. The Commission's jurisdiction—which includes its authority to direct its jurisdictional utilities to forbid new entrants, require existing facilities to retire, or limit new construction to renewable resources or take any other action consistent with the state's role as the regulator of generation facilities—is neither diminished nor enhanced by the Revised PD's RA construct or, indeed, by any other RA construct. The U.S. Supreme Court recently declined to hear the Connecticut DPUC's appeal of the D.C. Circuit's opinion in support of the ISO-NE Installed Capacity Requirement (No. 07-1375). That Decision makes very clear that state's rights to guide procurement are unaffected by the existence of a capacity market. Specifically, the D.C. Circuit found that "state and municipal authorities retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from the Commission."[4]

Notwithstanding this central role of the Commission with respect to resource adequacy, the FERC and CAISO also have responsibility and authority for reliability of the interstate transmission system. In its September 21, 2006 order accepting the MRTU Tariff, FERC stated that

> [W]e recognize the states' historical role in ensuring resource adequacy. The fact that we must, to fulfill our statutory responsibilities, be assured of a workable approach to resource adequacy does not mean that we should ignore the states' traditional role in this area. Rather, we can fulfill our jurisdictional responsibilities while also respecting the states' traditional role in this area. As a general matter, it is our responsibility to ensure that a workable resource adequacy requirement exists in a market such as that operated by the CAISO. This does not mean that we must determine all

4 *See* Opinion for the United States Court of Appeals for the District of Columbia Circuit, , No. 07-1375, Connecticut Department of Public Utility Control v. Federal Energy Regulatory Commission, Decided June 23, 2009, page 8-9.

> the elements of such a program in the first instance. Rather, we can, in appropriate circumstances, defer to state and Local Regulatory Authorities to set those requirements." (116 FERC P 61,274)

The Revised PD, however, fails to define meaningful "elements of such a [resource adequacy] program" that could provide a method of ensuring that all reliability requirements are met in full. As the CAISO states, "the single most important modification to the RA program that must result from this proceeding is the establishment of a multi-year forward procurement requirement and demonstration of committed RA capacity to serve consumers within the ISO balancing authority area."[5] "The CAISO believes that such multi-year forward assessment will support both forward bilateral procurement by LSEs and better integration with related transmission planning activities, and may inform other investment decisions, such as resource selection."[6] Without this forward visibility, the CAISO will not have assurance that system-wide and locational reliability needs are met by a combination of capacity resources and transmission. Consequently, the CAISO and its stakeholders are now left without the Commission's guidance on how this forward reliability assessment should be undertaken and how the CAISO should cure any deficiencies.

This is a pressing matter, because the CAISO is required to file a replacement for its Interim Capacity Procurement Mechanism (ICPM) to take effect by April 1, 2011. By declining to provide a workable mechanism to implement a multi-year forward capacity commitment and assure long-term resource adequacy and locational reliability, the Revised PD opens the door to arguments for a multi-year forward capacity market to be the successor to ICPM. Such a scenario increases the Commission's risk that FERC will find that it can no longer defer to the Commission and still meet it statutory responsibility to assure a workable approach to resource adequacy. Rather than being the low risk path with respect to preserving jurisdiction, the Revised PD may in fact increase the risk that certain resource adequacy authority is taken out of the Commission's hands.

Moreover, the proposed bilateral approach has no comprehensive market power mitigation. Consumers, therefore, are placed at risk that owners of capacity resources—particularly in constrained capacity zones—could command an unreasonable premium. This

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[5] Comments of the California Independent System Operator on Proposed Decision, p.4.

[6] CAISO, "Assessment of Centralized Capacity Market Proposals," September 14, 2007, p. 8.

concern is heightened by the lack of comprehensive multi-year forward procurement that would allow competitive entry to mitigate potential market power. The current program's "opt out" mechanism, which allows load-serving entities to be excused from RA obligations if no capacity is available at or below $40/kW-year, is fundamentally inadequate for the task of market power mitigation because it does not guarantee that sufficient resources are actually available. The resource owners with potential market power, however, are not jurisdictional to the Commission. It is necessary, therefore, that FERC jurisdictional power to impose reasonable market power mitigation be brought to bear through a CAISO-administered capacity market.

III. CONCLUSION

The extensive proceedings in this track developed a clear record that the existing RA program has failed, and will continue to fail, to procure new capacity in California. The complex patchwork of programs, processes, and procedures that have kept the lights on so far is in need of a fundamental overhaul if California is to meet the numerous challenges and policy goals facing the energy sector cost-effectively and equitably. In this Revised PD, the Commission walks away from this opportunity and sets the stage for a return to a command-and-control procurement process that is good for no one: not the state's utilities, its direct access providers, its capacity suppliers, or its citizens. All of the potential gains that could be realized by a rational, multi-year forward process, coordinated between the Commission and the CAISO, are sacrificed on the altar of local jurisdictional control. The greatest pity of this decision is that this sacrifice is being offered to a false god: the Commission's jurisdiction over RA is not enhanced by this Revised PD; indeed, as discussed above, the lack of any constructive response to the RA issues may open the door for an expanded federal role.

CFCMA urges the Commission, therefore, to take ownership of the real issues facing the existing RA program and to set in motion the development of a multi-year forward centralized capacity market, in coordination with the CAISO. As noted above, there are options by which the Commission can retain substantial ownership of such a market, even though it would ultimately be implemented in CAISO's FERC tariff. Moreover, the Commission and other state agencies would still retain its direct jurisdiction over many essential elements of resource development in the state. There is no conflict, therefore, between the Commission's desire to retain its jurisdiction, on the one hand, and achieving the numerous benefits of a transparent, well-regulated, and multi-year forward centralized capacity market, on the other hand. CFCMA submits, therefore, that the Commission should not accept the Revised PD, but rather adopt as the preferred policy of the state a centralized capacity mechanism. To the extent that the Commission is not prepared to adopt a specific centralized capacity market design at this time, the Commission should institute a subsequent proceeding to build a full and fresh record on how a centralized capacity market mechanism should be designed and implemented.

Respectfully submitted this April 16, 2010, at San Francisco, California.

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CERTIFICATE OF SERVICE

I, Linda Chaffee, certify that I have on this 16th day of April 2010 caused a copy of the foregoing

COMMENTS OF
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to be served on all known parties to R.05-12-013 via e-mail to those listed with e-mail on the attached service list, and via U.S. mail to those without e-mail service. I also caused courtesy copies to be hand-delivered as follows:

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I declare on penalty of perjury under California law that the foregoing is true. Executed this 16th day of April 2010 at San Francisco, California.

/s/ Linda Chaffee
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