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

Order Instituting Rulemaking to  
Develop an Electricity Integrated  
Resource Planning Framework and to  
Coordinate and Refine Long-Term  
Procurement Planning Requirements

Rulemaking 16-02-007

(Filed February 11, 2016)

**GENON HOLDINGS, INC.'S APPLICATION FOR REHEARING OF THE  
FINAL DECISION REQUIRING ELECTRIC SYSTEM  
RELIABILITY PROCUREMENT FOR 2021-2023**

**Public Version  
(With Redactions)**

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December 13, 2019

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**I. Introduction**

In accordance with Sections 1731(b) and 1732 of the Public Utilities Code and Rule 16.1 of the California Public Utilities Commission’s (“CPUC” or “Commission”) Rules of Practice and Procedure, GenOn Holdings, Inc. (“GenOn”) hereby submits this Application for Rehearing of Decision 19-11-016, the Decision Requiring Electric System Reliability Procurement for 2021-2023 (“Final Decision” or “Decision”), issued pursuant to Rulemaking 16-02-007. The Final Decision was issued by the Commission on November 13, 2019 after a public review and comment period. As GenOn has made clear in comments throughout the proceeding, it generally supports the Decision as a reasonable approach to maintaining electric reliability while continuing implementation of the Once-Through Cooling (“OTC”) Policy. GenOn supports the recommendation to extend the OTC compliance deadline for the Ormond Beach Generating Station (“Ormond Beach”). However, the Decision recommends limiting that extension to one year and waives the provisions of Decision 12-04-046, which bars utilities from signing power purchase agreements with a term beyond the OTC compliance deadline, for the same one-year period. GenOn seeks a rehearing on each of these aspects of the Decision. The one-year

limitation lacks substantial supporting evidence, is not supported by factual findings, and is outside the scope of this proceeding. Accordingly, GenOn seeks a rehearing to request that the CPUC remove the one-year limitation and restore the three-year OTC extension recommended in the original proposed decision.

GenOn is currently negotiating a plan for the future of Ormond Beach with the City of Oxnard. These discussions have involved representatives of the Oxnard City Council and the City Attorney's Office. [REDACTED]

[REDACTED] Because the terms of this agreement are still under negotiation, GenOn is concurrently moving to file portions of this Application under seal. Once an agreement is finalized, GenOn will provide details of the agreement in a Petition to Modify the Commission's Decision. If the CPUC grants that Petition to Modify, GenOn will withdraw this Application for Rehearing as moot.

## II. **Background**

The Commission's inquiry into the potential for near- or medium-term reliability issues began with a November 16, 2018 joint Assigned Commissioner and Administrative Law Judge (ALJ) Ruling seeking comment from parties on reliability issues. Feedback to that ruling led to the initiation of the "procurement track" of this rulemaking. To further the exploration of potential reliability issues and spur the development of possible procurement options, another assigned Commissioner and ALJ Ruling was issued on June 20, 2019. That ruling recommended the Commission pursue the potential for OTC deadline extensions from the State Water Resources Control Board (the "Water Board"). The Water Board will be advised by the

Statewide Advisory Committee on Cooling Water Intake Structures (“SACCWIS”), of which the Commission is a member.

The specific generation resources under consideration for OTC extensions are: Alamitos Generating Station, Units 3-5, totaling approximately 1,200 MW; Huntington Beach Generating Station, Unit 2, approximately 200 MW; Redondo Beach Generating Station, Units 5, 6, and 8, totaling approximately 850 MW; and GenOn’s Ormond Beach Generating Station, Units 1 and 2, totaling approximately 1,500 MW. Together, these resources represent approximately 3,750 MW of system capacity.

In its Final Decision, the Commission recommended that the Water Board grant up to a three-year extension of the available Alamitos and Huntington Beach units, totaling approximately 1,400 MW of capacity. Its reasoning was that “of the units available, these offer the potential for the least detrimental impact to their communities and to the sea life affected by the OTC units.”<sup>1</sup> By contrast – and even though its original Proposed Decision recommended a three-year extension for Ormond Beach – the Commission in its Final Decision limited the extensions available to Redondo and Ormond Beach. It explained:

Though the proposed decision also recommended extensions for the Ormond Beach and Redondo Beach power plants, we were persuaded by the comments of parties that these plants create more harm in their communities and/or would interfere with other plans already underway to redevelop their sites for community use. To mitigate against those effects, we will request that the SACCWIS pursue with the Water Board an extension of up to two years for the Redondo Beach units (approximately 800 MW) and an extension of up to one year for the Ormond Beach units (approximately 1,500 MW).<sup>2</sup>

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<sup>1</sup> Final Decision, at 20.

<sup>2</sup> *Id.*

It is this one-year limitation on Ormond's OTC compliance deadline extension and power purchase agreement contracting that GenOn contests in this Application.

### III. **Applicable Standards**

Under Public Utilities Code section 1757(a), and as applicable here, the Commission commits legal error where: (1) the Commission acted without or in excess of its jurisdiction; (2) the Commission has not proceeded in the manner required by law; (3) the decision of the Commission is not supported by the findings; or (4) the decision is not supported by substantial evidence in light of the whole record.<sup>3</sup>

The Public Utilities Code provides that “[a]fter an order or decision has been made by the commission, a party to the action or proceeding . . . may apply for a rehearing in respect to matters determined in the action or proceeding[.]”<sup>4</sup> The Commission may grant an application for rehearing “if in its judgment sufficient reason is made to appear.”<sup>5</sup> During a rehearing, the Commission is charged with “a consideration of all the facts, including those arising since the making of the order or decision.”<sup>6</sup> Once this is complete, if the Commission believes “the original order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate, change, or modify it.”<sup>7</sup>

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<sup>3</sup> Cal. Pub. Util. Code § 1757(a); *see also id.* § 1757.1(a).

<sup>4</sup> Cal. Pub. Util. Code § 1731.

<sup>5</sup> *Id.*

<sup>6</sup> Cal. Pub. Util. Code § 1736.

<sup>7</sup> *Id.*

#### IV. **The Decision Modifies the Commission’s Original Recommended OTC Extension for Ormond without Substantial Supporting Evidence or Findings of Fact**

California law requires the Commission to base its decisions on evidence.<sup>8</sup> Requiring the Commission to provide a factual basis for its decisions helps it avoid careless or arbitrary action. Additionally, findings of fact are essential to “afford a rational basis for judicial review.”<sup>9</sup> The Commission has broad discretion in deciding what factors are “material” to its decision based on the issues before it. But in a ratemaking proceeding like this one, it must state what those factors are, and base its decision on them.<sup>10</sup>

The Commission has failed to support, with substantial supporting evidence or findings of fact, its recommendation to limit any OTC extension and power purchase agreement contracting for Ormond Beach to one year. In its original Proposed Decision Requiring Electric System Reliability Procurement for 2021-2023, published September 12, 2019 (“Proposed Decision”), the Commission announced its recommendation that the Water Board extend OTC compliance deadlines for all units slated to retire by December 31, 2020 “for up to three years beyond their current 2020 deadlines.”<sup>11</sup> This was based on findings of fact regarding the need for additional procurement to ensure system reliability through 2023, and Ormond Beach’s ability to satisfy part of that need. The final decision on the term of any extension of the OTC

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<sup>8</sup> Cal. Pub. Util. Code § 1757(a)(3), (4); *id.* § 1757.1(a)(4).

<sup>9</sup> *Greyhound Lines, Inc. v. Public Utilities Com.*, 65 Cal.2d 811, 813 (1967). *See also California Manufacturers Assn. v. Pub. Utilities Com.*, 24 Cal. 3d 251, 258–59 (1979); *Toward Utility Rate Normalization v. Public Util. Com.*, 22 Cal.3d 529, 537 et seq. (1978); *City of Los Angeles v. Public Utilities Commission*, 7 Cal.3d 331, 337 (1972); *Pacific Tel. & Tel. Co. v. Public Util. Com.*, 62 Cal.2d 634, 648 (1965); *California Motor Transport Co. v. Public Utilities Com.*, 59 Cal.2d 270, 274-275 (1963).

<sup>10</sup> *City of Los Angeles*, 7 Cal. 3d at 337; *California Motor Transport Co.*, 59 Cal.2d at 275; *See also Clean Energy Fuels Corp. v. Pub. Utilities Com.*, 227 Cal. App. 4th 641, 659 (2014), as modified (June 27, 2014).

<sup>11</sup> Proposed Decision, at 2.

compliance deadline for specific OTC resources was to be made by the Water Board. Then, in its Revised Proposed Decision of October 21, 2019, and again in its Final Decision, the Commission reversed course, limiting Ormond Beach’s recommended extension to one year only. But there were no corresponding additions to the Final Decision’s findings of fact that supported the change.

Instead, the Commission explained that it altered its view because it was “persuaded by the comments of parties that these plants create more harm in their communities and/or would interfere with other plans already underway to redevelop their sites for community use.”<sup>12</sup> But under California law, comments are not evidence. The Public Utilities Code is clear, that while the CPUC “shall permit written comments received from the public to be included in the record of its proceedings . . . the comments shall not be treated as evidence.”<sup>13</sup>

Indeed, the Final Decision accepts at face value the comments of those who opposed an OTC extension for Ormond Beach without considering GenOn’s rebuttal evidence. One of the comments relied upon by the Final Decision is that an extension of the compliance deadline for the Ormond Beach Generating Station will delay the restoration of Ormond Beach.<sup>14</sup> This comment ignores the fact presented by GenOn that GenOn’s 37-acre property is not currently

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<sup>12</sup> Final Decision, at 20.

<sup>13</sup> Cal. Pub. Util. Code § 1701.1(g).

<sup>14</sup> Final Decision, at 20; *see* Comments of The Nature Conservancy on the Proposed Decision, at 4 (“An extension of the compliance deadline for the Ormond Beach Generating Station will impact the restoration, missing a critical opportunity to address challenges posed by the continued operation of the unit and align restoration and retirement planning.”); *see also* Comments of the City of Oxnard on the Proposed Decision, at 4-5 (“[C]ontinued operation of Ormond GS facilities that occupy land targeted for restoration work, including cooling-water intake and discharge pipes, will delay restoration efforts in these areas.”).

part of the 630-acre Ormond Beach Restoration and Public Access Project (“OBRAP”) area,<sup>15</sup> and that actual construction work on the current OBRAP project area is not set to begin until 2024, meaning Ormond Beach could continue to operate until the end of 2023 and not delay restoration efforts.<sup>16</sup>

Another claim incorporated into the Final Decision is that continued operation of Ormond Beach would create more harm to the community.<sup>17</sup> Again, the Final Decision does not cite to independent evidence, or even any specific comment. It merely relies on its prior assertion that the Commission was “persuaded by the comments of the parties.”<sup>18</sup> This is troubling, because it raises the possibility that the Commission relied on an incorrect analysis of the role low capacity factors play in reducing environmental impact.<sup>19</sup> When average water inflows are calculated correctly, factoring in zero-flow days as called for by federal Clean Water Act § 316(b) regulations,<sup>20</sup> it is evident that Ormond Beach’s low capacity factors are indeed correlated with less OTC water usage,<sup>21</sup> a fact that makes it an ideal candidate for an OTC extension. Moreover,

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<sup>15</sup> Reply Comments of GenOn on Proposed Decision, at 3; *see also* Ormond Beach Restoration and Public Access Project (“OBRAP”), Preliminary Restoration Plan (May 2019) at 2-52 [https://ormond.scc.ca.gov/files/2019/05/OBRAP\\_PrelimPlan\\_2019-05-13-PART-1.pdf](https://ormond.scc.ca.gov/files/2019/05/OBRAP_PrelimPlan_2019-05-13-PART-1.pdf).

<sup>16</sup> Reply Comments of GenOn on Proposed Decision, at 3; *see also* OBRAP Public Meeting #2 at 7 (July 31, 2019), [https://ormond.scc.ca.gov/files/2019/08/OBRAP\\_Public\\_Mtg2\\_Presentation\\_English.pdf](https://ormond.scc.ca.gov/files/2019/08/OBRAP_Public_Mtg2_Presentation_English.pdf).

<sup>17</sup> Final Decision, at 20.

<sup>18</sup> *Id.* (“[W]e were persuaded by the comments of the parties that these plants create more harm in their communities[.]”)

<sup>19</sup> Comments of the City of Oxnard on the Proposed Decision, at 5-7. Oxnard explains that since the OTC policy was implemented, “Ormond GS’s 2010 water inflow, 12 million gallons per day (MGD), rose to nearly 118 MGD in 2018.” But this figure was calculated without including days when the plant was not discharging or withdrawing seawater, i.e. zero-flow days. If zero-flow days are included (as called for by federal Clean Water Act 316(b) regulations), the water inflow in 2018 was only 51.5 MGD, less than half the value cited by the City.

<sup>20</sup> 40 C.F.R. § 125.92(a).

<sup>21</sup> Final Decision, at 21; *see also* State Water Resources Control Board, WATER QUALITY CONTROL POLICY ON THE USE OF COASTAL AND ESTUARINE WATERS FOR POWER PLANT COOLING,



GenOn is already contributing significantly to reducing environmental burdens on surrounding communities, both through the early-retirement of the Mandalay Generating Station<sup>22</sup> and its commitment to work with the City of Oxnard to retire Ormond Beach once its capacity is no longer needed to ensure reliability.<sup>23</sup>

Finally, the Commission recommends a longer extension for Redondo Beach (two years) than for Ormond Beach (one year), even after noting ongoing disagreement between the City of Redondo Beach and AES over safety issues at that facility.<sup>24</sup> In contrast, Ormond Beach possesses and is complying with all environmental permits required for its operation, and there are no enforcement or compliance concerns associated with continuing operation to 2021 or beyond.<sup>25</sup>

**V. The Decision to Modify the Commission’s Recommended OTC Extension for Ormond Beach is Outside the Scope of this Proceeding**

In attempting to set OTC policy for Ormond Beach, the Commission has acted outside the prescribed scope of this proceeding. The Water Board, not the CPUC, is the agency charged with making decisions related to implementation of the state’s OTC policy. Section 316(b) of the Clean Water Act provides for the implementation of OTC policy through the National Pollutant Discharge Elimination System (NPDES) permit system, which authorizes the point

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Final Substitute Environmental Document (“Final SED”) at 40, Figure 10 (2000-2005 Combined Annual Cooling Water Flow Versus Total Energy Generated) (May 4, 2010)  
[https://www.waterboards.ca.gov/water\\_issues/programs/ocean/cwa316/docs/cwa316may2010/otcpolicydraftfinal.pdf](https://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/docs/cwa316may2010/otcpolicydraftfinal.pdf)

<sup>22</sup> Reply Comments of GenOn on the Proposed Decision, at 5.

<sup>23</sup> See *infra* Section VI.

<sup>24</sup> Final Decision, at 67.

<sup>25</sup> Comments of GenOn on Revised Proposed Decision, at 3.

source discharge of pollutants to navigable waters.<sup>26</sup> In California, the Water Board is the designated agency for implementing programs under the Clean Water Act, including NPDES permits.<sup>27</sup> Therefore, the Water Board has final authority over decisions pertaining to OTC policy.

Accordingly, the recommended one-year limitation on any OTC extension for Ormond Beach falls outside the scope of this proceeding. The Commission has acknowledged this fact several times. The Proposed Decision and Final Decision are clear that final authority for OTC extensions rests with the Water Board, which will consider a recommendation from SACCWIS.<sup>28</sup> At no point prior to its Revised Proposed Decision had the CPUC indicated any intent to weigh the merits of individual OTC extension proposals, or formally recommend specific facilities to SACCWIS or the Water Board for OTC extension. Moreover, when it acknowledged the ongoing disagreement between the City of Redondo Beach and AES over safety concerns surrounding the Redondo Generating Station, the Commission recognized that it “is not in a position to adjudicate this dispute, but trusts that the Water Board will take this issue into consideration when deciding whether to extend the OTC compliance deadline for the Redondo Beach facility.”<sup>29</sup> It should apply the same standard to Ormond Beach, and allow the

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<sup>26</sup> 33 U.S.C. § 1326 (“Any standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.”).

<sup>27</sup> Statewide Water Quality Control Policy on the use of Coastal and Estuarine Waters for Power Plant Cooling, [https://www.waterboards.ca.gov/water\\_issues/programs/ocean/cwa316/docs/policy100110.pdf](https://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/docs/policy100110.pdf).

<sup>28</sup> Proposed Decision, at 21 (“We are also aware that the authority for OTC compliance deadline extensions ultimately rests with the Water Board.”); Final Decision, at 22 (“We are also aware that the authority for OTC compliance deadline extensions rests with the Water Board.”).

<sup>29</sup> Final Decision, at 68.

Water Board to determine an OTC extension – including the length of any extension – for Ormond Beach.

**VI. The Decision to Modify the Commission’s Recommended OTC Extension for Ormond Beach Should Be Reheard In Light of GenOn’s Current Negotiations with the City of Oxnard**

GenOn and the City of Oxnard are in active discussions regarding the future of the Ormond Beach station.<sup>30</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**VII. Conclusion**

For the reasons stated above, the Commission should grant rehearing on the one-year limitation to any OTC compliance deadline extension and authorization to sign power purchase agreements for Ormond Beach, remove the one-year limitation, and restore the three-year limitation, for the reasons discussed above.

Dated: December 13, 2019

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<sup>30</sup> Comments of GenOn on Revised Proposed Decision, at 2.

Respectfully submitted,

/s/ Daniel McDevitt

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