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Response of CPUC to Intervenor City of Redondo Beach Motion for Issuance of Subpoena Duces Tecum to So. CA Edison & CPUC

Additional submitted attachment is included below.

STATE OF CALIFORNIA
CALIFORNIA ENERGY COMMISSION

In the Matter of:

REDONDO BEACH ENERGY PROJECT,
APPLICATION FOR CERTIFICATION

Docket No. 12-AFC-03
CPUC'S RESPONSE TO CITY OF
REDONDO'S MOTION FOR SUBPOENA

**RESPONSE OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION
TO INTERVENOR CITY OF REDONDO BEACH'S MOTION
FOR ISSUANCE OF SUBPOENA DUCES TECUM TO SOUTHERN CALIFORNIA
EDISON AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION**

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I. INTRODUCTION

In Response to the City of Redondo Beach's ("City") Motion for Issuance of Subpoena Deuces Tecum ("Motion") to Southern California Edison ("SCE") and the California Public Utilities Commission ("CPUC"), the CPUC now files this response. The City's Motion must be denied as it inappropriately attempts to usurp the CPUC's authority and interferes with the CPUC's deliberative process. Application ("A.") 14-11-012 filed by SCE remains open and thus the City must file a formal motion in that proceeding asserting its challenges to the confidentiality of SCE's Exhibit to the assigned Administrative Law Judge ("ALJ") and Commissioner presiding over that proceeding. In doing so, the assigned ALJ and Commissioner will make a formal decision regarding the confidentiality of SCE's Exhibit in that proceeding as required under Public Utilities Code Section 583 and Decision ("D.") D.06-06-066.

The CPUC provided clear instructions in the letter dated August 12, 2015 (*see* Motion at Exhibit 4) to the City in response to its Public Records Act request ("PRA" # 1591) and instructed the City to file a formal motion to the assigned ALJ and Commissioner in proceeding A.14-11-012 so that the ALJ and Commissioner can make a formal determination regarding the confidentiality of SCE's information. The City's Motion to the CEC is therefore premature as proceeding A.14-11-012 remains open and the CPUC has not yet approved the bids or contracts submitted by SEC. By filing this motion, the City now inappropriately asks the CEC to interfere with the CPUC's authority and deliberative process.

Furthermore, the authorities cited by the City in its Motion [Pub. Util. Code § 583, *In re California Public Utilities Commission* (1989) 892 F.2d 778, 783, and CPUC Decision 06-06-066] requires that the City make a formal motion to the CPUC in the proceeding challenging the confidentiality of SCE's Exhibit so that the CPUC can make a formal decision. None of the

parties in proceeding A.14-11-012 have challenged the confidential treatment of the information, and as a result, the Commission hearing no challenges, has received SCE's Exhibit under seal. While this proceeding remains open, the PRA is the improper method to challenge the confidential treatment afforded SCE's exhibit because the assigned ALJ and Commissioner has the authority to make a determination regarding the confidentiality of that information under Pub. Util. Code §§ 583 and §454.5(g). Therefore, the PRA cannot be used as a means to usurp the authority of the ALJ and Commissioner in a formal proceeding, nor can the City interfere with the CPUC's authority and deliberative process by filing this motion for subpoena.

For these reasons, the CPUC respectfully requests that the CEC deny the City's Motion and order the City to file a formal motion to the ALJ and assigned Commissioner presiding over proceeding A.14-11-012.

II. PROCEDURAL BACKGROUND

In D.13-02-015 and D.14-03-004, the CPUC authorized SCE to procure 1,900 to 2,500 Megawatts of electrical capacity in the Western Los Angeles sub-area of the Los Angeles Basin. On November 21, 2015, SCE filed A.14-11-012 before the CPUC seeking approval of the results of its 2013 local capacity requirements Request for Offers for the Western Los Angeles Basin. SCE filed a public version of its testimony [Exhibit SCE 1-which redacted certain information that SCE alleged was confidential] and a confidential version [Exhibit SCE 1C]. Several parties subsequently filed protests to SCE's application and several other parties filed motions for party status. Throughout the course of the proceeding, no motion was submitted by any of the parties challenging the confidential treatment of SCE's redacted information. Therefore, after evidentiary hearings were conducted, the assigned ALJ and Commissioner received SCE's

confidential testimony under seal. The proceeding is currently open and no Commission decision has been issued.¹

On July 15, 2015, the CPUC received a PRA request [PRA #1591] from Lisa Bond requesting the following information:

- 1) An unredacted version of the November 21, 2014 "TESTIMONY OF SOUTHERN CALIFORNIA EDISON COMPANY ON THE RESULTS OF ITS 2013 LOCAL CAPACITY REQUIREMENTS REQUEST FOR OFFERS (LCR RFO) FOR THE WESTERN LOS ANGELES BASIN," submitted in support of A.14-11-012, at a minimum, unredacted pages 35-39 of that testimony.

and

- 2) The name and location for each proposed site for a gas-fired generation facility contained in each bid submitted in response to the Southern California Edison 2013 Local Capacity Requirements Request for Offers for the Western Los Angeles Basin.

The CPUC responded to Ms. Bond informing her that SCE's testimony was received as a confidential exhibit in the proceeding A.14-11-012 and is therefore protected under Pub. Util. Code § 583 [see City's Motion at Exhibit 4].

On August 6, 2015, the CPUC received a letter from Kyle Brochard of the law firm Richard, Watson, and Gershon [referencing PRA #1591] challenging the confidential treatment of SCE's exhibits under the PRA. The CPUC responded that any confidentiality challenges should be submitted in a formal motion to the assigned ALJ and Commissioner as required by Pub. Util. Code § 583 and D.06-06-066 rather than through the PRA because the proceeding remains open and SCE's confidential exhibit was received under seal.

Rather than filing a motion to the assigned ALJ and Commissioner in proceeding A.14-11-012, on August 27, 2015, the City filed a motion with the CEC in Docket Number

¹ The docket of proceeding A.14-11-012 can be obtained from the following link: <http://delaps1.cpuc.ca.gov/CPUCProceedingLookup/f?p=401:56:9061307242575::NO>

12-AFC-03 requesting that the CEC issue a subpoena duces tecum to SCE and the CPUC to provide the names and locations of the 195 proposed facilities that was redacted from the public version of SCE's exhibit in A.14-11-012.

On September 14, 2015, CPUC received a letter from CEC's Hearing Officer II, Susan Cochran requesting that the CPUC submit comments to the City's Motion within 10 days from the date of the letter.

In response to that letter, the CPUC now submits its comments to the City's Motion.

III. CPUC'S COMMENTS ON THE CITY'S MOTION

In its Motion, the City raises the following contentions to SCE's redaction of the 195 proposals:

- A. SCE redacted the names and locations of the 195 proposals without legal basis;
- B. the requested information is essential to RBEP's Alternatives Analysis;
- C. there is no legal basis for classifying the requested information as confidential or market sensitive data.

However, regardless of whether the information requested by the City is essential to the RBEP's Alternatives Analysis, the City's Motion must be denied for the following reasons:

- A. The City's challenge to the confidential nature of SCE's exhibit requires a formal motion be submitted in CPUC proceeding A.14-11-012 to be decided by the presiding ALJ and Commissioner as required by Pub. Util. Code § 583 and D.06-06-066;
- B. The CEC does not have authority to grant the City's Motion and the issuance of a subpoena would not change the CPUC's confidential treatment of SCE's exhibit.
- C. The City's motion interferes with the CPUC's authority and deliberative process.

Therefore, the CPUC requests that the CEC deny the City's motion and order that the City abide by the CPUC's Rules, decisions, and orders in order to obtain the information it seeks.

A. The City is Required by Pub. Util. Code § 583 to Submit a Formal Motion to the Assigned ALJ and Commissioner in Proceeding A.14-11-012

Pub. Util. Code § 583 states:

No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, **or by the commission or a commissioner in the course of a hearing or proceeding.** Any present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor. [Emphasis added]

Therefore, when there is an open proceeding, the City must submit its challenge to the confidentiality of SCE's redacted information in a formal motion to the assigned ALJ and Commissioner in the proceeding. Proceeding A.14-11-012 is an open proceeding at the CPUC and the assigned ALJ and Commissioner have received SCE's confidential exhibit [SCE 1C] under seal. As a result, the information the City sought to obtain by making a PRA request was not publicly available, and CPUC employees are specifically restricted from providing confidential information under Pub. Util. Code § 583 and California Government ("Gov.") Code § 6254(k).² Therefore, the City is required to challenge the confidentiality of SCE's exhibit by submitting a formal motion to the assigned ALJ and Commissioner as required under Pub. Util. Code § 583.

² Gov. Code § 6254(k) states: "Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:...(k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege."

1. The Ninth Circuit’s Interpretation of Pub. Util. Code § 583 Requires that the City File a Formal Motion in the Proceeding

In its Motion, the City stated that “[t]he Ninth Circuit Court of Appeals adopted a more expansive interpretation in the case of *In re California Public Utilities Commission* (1989) 892 F.2d 778, 783, stating that:

On its face, [Section] 583 does not forbid the disclosure of any information furnished to the CPUC by utilities. Rather, the statute provides that such information will be open to the public if the commission so orders, and the commission's authority to issue such orders is unrestricted. **Moreover, even in the absence of an order by the commission, the information may be made public by an individual commissioner during a commission hearing.**” [Emphasis added] [Motion at p. 4]

Clearly, even the Ninth circuit would require that the City file a formal motion to the assigned ALJ and Commissioner since SCE’s Exhibit is part of an open proceeding at the CPUC. The City was instructed to file its motion challenging the confidential treatment of SCE’s exhibit in the proceeding of A.14-11-012 so that the assigned ALJ and Commissioner can make a determination regarding whether SCE’s redacted information should remain confidential. Instead, the City inappropriately attempts to usurp the CPUC’s deliberative process by filing this motion for a subpoena against the CPUC.

There is nothing preventing the City from becoming a party in proceeding A.14-11-012. Under CPUC Rules of Practice and Procedure (“Rules”), Rule 11.1(b), “[a] motion may be made at any time during the pendency of a proceeding by any party to the proceeding. A motion may also be made by a person who is not a party if it is accompanied by a motion, pursuant to Rule 1.4, to become a party.” Therefore, the City could seek to obtain the information it is requesting by submitting a formal motion to the ALJ and Commissioner.

2. CPUC Decision (“D.”) 06-06-066 Does Not Support Disclosure of Names and Locations of the 195 Proposals that were Rejected by SCE.

In its Motion, the City relies on CPUC D.06-06-066 to support its allegation that the names and locations are not confidential [Motion at p. 5]. However, D.06-06-066 does not support disclosure of the information sought by the City. D.06-06-066 held that market sensitive information is protected under Pub. Util. Code § 454.5(g).³ D.06-06-066 also established a matrix for determining whether the information is confidential and also provides the length of time for which the information will remain under seal. [see D.06-06-066 Appendix 1] The matrix relied upon by the City does not explicitly authorize disclosure of the 195 names and locations nor does it prevent the assigned ALJ and Commissioner from independently determining whether the utility’s information is market sensitive and should be granted confidential treatment. The matrix requires that the company disclose the “total number of projects and megawatts bid by resource type (e.g. fossil, wind, solar, hydro-electric, etc.) – public after final contracts submitted to CPUC for approval.” [see D.06-06-066 Appendix 1 at p.18.] The names and locations of the rejected proposals may be regarded as market sensitive information and thus would be protected under Pub. Util. Code § 454.5(g). However, that determination must be made by the assigned ALJ and Commissioner in proceeding A.14-11-012.

³ Pub. Util. Code § 454.5(g) states: “The commission shall adopt appropriate procedures to ensure the confidentiality of any market sensitive information submitted in an electrical corporation's proposed procurement plan or resulting from or related to its approved procurement plan, including, but not limited to, proposed or executed power purchase agreements, data request responses, or consultant reports, or any combination, provided that the Office of Ratepayer Advocates and other consumer groups that are nonmarket participants shall be provided access to this information under confidentiality procedures authorized by the commission.”

The Interim Order of D.06-06-066 states:

“Where we find that data are market sensitive pursuant to Pub. Util. Code § 454.5(g) or otherwise entitled to confidentiality protection, in most cases, we adopt a window of confidentiality for Investor-Owned Utility (IOU) and Energy Service Provider (ESP) data that protects it for three years into the future, and one year in the past.” [Interim Order, at p. 80, paragraph 1]

In the proceeding A.14-11-012, the assigned ALJ and Commissioner received SCE’s Exhibit SCE 1C under seal which is protected under Pub. Util. Codes § 583 and § 454.5(g).

D.06-06-066 also establishes a process whereby non-market participant intervenors may obtain access to confidential market sensitive information. The Intervenor would be required to first enter into a confidentiality agreement and/or submit to a protective order.⁴ Therefore, the City must adhere to D.06-06-066 and Pub. Util. Code § 583 by either filing a formal motion in that proceeding in order for the assigned ALJ and Commissioner to determine whether the City is entitled to that information, or by entering into a nondisclosure agreement or protective order with SCE. This demonstrates that the City is not without viable options for obtaining the information that it is seeking. However, that information must be obtained by following Commission Rules and decisions.

B. The CEC Does Not have Authority to Grant the City’s Motion and the Issuance of a Subpoena would not Change the CPUC’s Confidential Treatment of SCE’s Exhibit.

While the CEC has the ability to issue a subpoena under California Codes of Regulations (“CCR”) § 1203(b),⁵ it does not have the authority to usurp the CPUC’s authority to regulate

⁴ D.07-05-032 – “Order Modifying D.06-06-066 & Denying Rehearing of the Decision, as Modified” at pp. 2-3.

⁵ CCR § 1203(b) states: “Issue subpoenas and subpoenas duces tecum at the direction of the commission, on his motion or upon application of any party. The application of a party shall be supported by a declaration of good cause.”

public utilities nor interfere with the CPUC's deliberative process. Under Section 8 of Article XII of the California Constitution, "a city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission...." Therefore, CEC is prohibited from interfering with the CPUC's regulation of SCE.

D.06-06-066, of which the CEC was an active participant, provides clear guidelines for parties challenging a utility's request for confidential treatment of information. D.06-06-066 provides that "if another party, or the Commission, questions the appropriateness of the confidential designation (by ruling, motion, letter, or other communication), the submitting party bears the burden of proving Items 1-5 above....The party seeking access to the data shall bear the burden of proof once the party whose data are at issue meets its burden of proving Items 1-5 above." [D.06-06-066 at p. 24.] SCE provided confidentiality declarations with its application (*see* Application 14-11-012) in support of confidential treatment for the redacted information. The assigned ALJ and Commissioner then received the confidential exhibits under seal. Therefore, the City must now submit its challenge to the confidential treatment of SEC's exhibits by filing a formal motion in proceeding A.14-11-012. Therefore, the CEC must require that the City abide by Commission Rules, decisions, and orders in order to appropriately request the information that it seeks to obtain.

In the event that the CEC issues a subpoena for this information against the CPUC, the CPUC would still assert that parties seeking SCE's information must do so by submitting a formal motion to the assigned ALJ and Commissioner in proceeding A.14-11-012 because SCE's confidential exhibits were received under seal and are therefore not subject to public disclosure absent Commission decision. The CPUC has not yet issued a decision regarding SCE's application and therefore, any attempt to obtain information from SCE's confidential

exhibits must be obtained by filing a formal motion in that proceeding. Thus the City's Motion must be denied.

C. The City's Motion Is an Inappropriate Attempt to Interfere with the CPUC's Authority and Deliberative Process.

The City inappropriately attempts to interfere with the CPUC's authority and its deliberative process by asking the CEC to issue a subpoena against the CPUC. The City has been made aware of the procedures that it must follow in order to obtain the information that it is seeking. The City falsely asserts that the CPUC has reviewed and approved the bids and thus the purchase power agreements are now final. [Motion at p. 5]. However, the Commission has not yet issued a decision in A.14.11-012 and therefore, the CPUC has not yet approved the bids or contracts.

The City's assertion that the CPUC has not met its burden of proof that the information sought by the City is confidential lacks merit. [Motion at p. 5] First, the City has not complied with the CPUC's instruction to submit a formal motion in the proceeding A.14-11-012 challenging confidential treatment of SCE's information. The assigned ALJ and Commissioner in proceeding A.14-11-012 has not received any challenges to SEC's request for confidential treatment, and thus received SCE's Exhibit SCE 1C under seal. As a result, the Exhibit SCE 1C is afforded the protections under Pub. Util. Code §§ 454.5(g) and 583. [See Motion at Exhibit 4]

Second, the City fails to recognize that the CPUC is required to adhere to Pub. Util. Code § 583 and 454.5(g). Therefore, CPUC staff is prohibited from disclosing information that has been granted confidential treatment in an open proceeding. Disclosure of confidential information requires a Commission decision which can be appropriately obtained by filing a motion in the open proceeding. The City must therefore, submit a motion in the proceeding A.14-11-012 challenging the confidential treatment of SCE's exhibits, as instructed.

By filing a Motion with the CEC to issue a subpoena against the CPUC, the City now seeks to interfere with the CPUC's authority and deliberative process. However, the CEC is prohibited from interfering with the CPUC's authority under Article XII Section 8 of the California Constitution. Therefore, the City's Motion must be denied.

IV. CONCLUSION

For the reasons stated above, the CPUC respectfully requests that the CEC deny the City's Motion and order the City to file a formal motion in the proceeding A.14-11-012 to appropriately challenge SCE's request for confidential treatment. In the alternative, the City may also obtain the information by signing a nondisclosure agreement or protective order as required by D.06-06-066.

Dated: September 24, 2015

Respectfully submitted,

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