BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Review, Revise, and Consider Alternatives to the Power Charge Indifference Adjustment.	Rulemaking 17-06-026 (Filed June 29, 2017)

OPENING BRIEF OF THE INDEPENDENT ENERGY PRODUCERS ASSOCIATION ON TRACK 2: THE EVALUATION AND POSSIBLE MODIFICATION OF THE PCIA

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Pursuant to Rule 13.11 of the Commission's Rules of Practice and Procedure and the Amended Scoping Memo and Ruling of Assigned Commissioner, dated March 2, 2018, the Independent Energy Producers Association (IEP) respectfully submits its Opening Brief related to Track 2: Evaluation and Possible Modification of the Power Charge Indifference Adjustment Methodology (PCIA). IEP's Opening Brief addresses matters that fall primarily within Section VII: Portfolio Optimization and Section VIII: Other Issues of the common briefing outline.

I. Executive Summary

II. Introduction

In Track 2 of Rulemaking (R.) 17-06-026, the Commission is examining the current PCIA methodology and considering alternatives to that mechanism. As stated in the Scoping Memo and Ruling of Assigned Commissioner, issued September 25, 2017 (Scoping Memo), this proceeding is not revisiting prior Commission determinations regarding the reasonableness of the investor-owned utilities' (IOUs') past procurement practices.[1] Moreover, any PCIA

[1] Scoping Memo, p. 19.

methodology or alternative methodology shall respect the terms of existing power purchase agreements between power suppliers and the IOUs.[2]

In the context of optimizing the IOUs' portfolio to lower PCIA cost-allocation, parties have argued that the Commission should consider tools to minimize above-market costs subject to PCIA treatment, including contract modifications or renegotiation and contract assignment. To the extent that the Commission considers tools such as these within the context of the PCIA framework, the Commission must respect the sanctity of existing contracts. Bilateral contracting, particularly long-term contracting, is a key foundation upon which the Commission's market model relies.[3] Undermining the sanctity of existing contracts risks litigation, undermines the perception of the sanctity of future contracts approved by the Commission, and thereby undermines a critical mechanism for the state to foster investment in the infrastructure needed to achieve public policy goals in a timely, cost-effective manner.

III. Cost Shifts Under the Current Methodology

IV. Scope of PCIA-Eligible Resources and Costs

V. Portfolio Valuation Methodologies

VI. Proposed Allocation Methodologies

VII. Proposed Portfolio Optimization of IOU Portfolio Management

A. Contract Termination or Extension

Some parties propose that Community Choice Aggregators (CCAs) and Energy Service Providers (ESPs) should be allowed to strategically accelerate retirement or extend retirement of

[2] Scoping Memo, p. 14.
[3] See Decision (D.) 10-06-018.

utility bilateral contracts.[4] The Commission should not endorse this proposal. Bilateral contracts represent the terms and conditions mutually agreed to between a Buyer and Seller. Once executed, contract terms are legally binding. The Commission may not unilaterally impose contract modifications to existing contracts.

Fundamentally, CCAs and ESPs are market participants. If market participants as a matter of state policy are positioned to interfere in contracts of their competitors (*e.g.,* if they are afforded the right to unilaterally accelerate retirement or delay retirement of existing contracts), the Commission will seriously undermine the sanctity of contracts. The litigation likely to ensue would create harmful barriers to future contracting with any load-serving entities subject to the Commission's jurisdiction.

B. Contract Securitization

CalCCA proposes to securitize various PCIA-eligible power purchase agreements (PPAs) to buydown PCIA-eligible costs. Specifically, CalCCA proposes a voluntary reverse auction format.[5] IEP is not necessarily opposed to securitization to flatten PCIA charges over time, for example. On the other hand, IEP is concerned about the proposed reverse auction format. Any program or mechanism for securitizing utility contracts through an auction mechanism must be strictly voluntary (as proposed by CalCCA).

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[4] Exh. CalCCA-1, Prepared Direct Testimony of The California Community Choice Association (CalCCA), Vol. 2, Chapter 3, p. 15: "[Q]uestions must be answered as to whether the utility acted reasonably in maintaining or extending the contractual commitment over the life of the project, in keeping the resource, and whether it has done so as to address future bundled load needs." See also Prepared Direct Testimony of Dr. Eric Woychik on behalf of the Utility Consumer's Action Network (UCAN), p. 18, where UCAN argues that CCAs and ESPs should be allowed to strategically accelerate retirement or extend retirement of resources/contracts to capture greater economic value.

[5] Exh. CalCCA-1, Prepared Direct Testimony of the California Community Choice Association, Vol. 2, Chapter 3, p. 7.

C. Risk Mitigation in Departing Load Forecasting

CalCCA proposes that the Commission should require "risk mitigation in departing load forecasting" by employing a more expansive review of portfolio costs to reduce stranded cost risk associate with the PCIA-eligible procurement.[6]

Currently, the California Energy Commission forecasts load (and thus load departure) in its biennial Integrated Energy Policy Report (IEPR). Indeed, the demand forecast used in the IEPR is updated annually. Similarly, the Commission's Integrated Resource Planning (IRP) proceeding integrates and updates as needed forecasts of future demand that implicitly integrate forecasts of load departure. Thus, a forum already exists to review the potential for load migration and demand growth. Given the existence of rigorous planning and modeling of multiple scenarios over a 10-year timeframe, the Commission should question the added value of and necessity for an additional forum for assessing forecast demand and departing load.

VIII. Alternatives to the PCIA/Other Issues

A. Assignment of IOU Contracts

An "assignment of contract" occurs when one party to an existing contract (the "assignor") hands off the contract's obligations and benefits to another party (the "assignee").[7] The assignee steps into the assignor's shoes and assume all its contractual obligations and rights.

Some parties recommend a process to *require* assignment of contract rights to resources procured by the utilities to individual CCAs or ESPs.[8] While IEP does not oppose voluntary

[6] Exh. CalCCA-1, Prepared Direct Testimony of the California Community Choice Association, Vol. 2, Chapter 3, p. 11.

[7] https://www.nolo.com/legal-encyclopedia/assignment-of-contract-basics-32643.html .

[8] Prepared Direct Testimony of Dr. Eric Woychik, p. 15, where UCAN recommends a process to require *assignment of contract rights* of resources procured by IOUs to CCAs or ESPs in order to preserve the benefits of longer-term contracts, and preserve the prior transaction costs incurred entering into these contracts, as well as the related hedge and option value of the resources.

contract assignments, contracts are legally binding, and the terms of a contract can be enforced by a court. Thus, any mandatory, "forced" assignment of a contract (or contract rights) risks contract infringement and litigation. The Commission should not adopt any measures that seek to impose contract assignment in any form unless the parties to the contract mutually agree to an assignment.

Some parties ask the Commission to establish a mechanism to *assign* the reasonably avoidable costs of green power contracts to shareholders, rather than forcing departing load to absorb these costs.[9] IEP is concerned that the Commission is being asked to mandate the assignment of renewable energy contracts to third parties. As noted above, assignment has a specific meaning in the context of contracts. To the extent that the use of the term "assign" is imprecise and the request is for the Commission to *allocate* the avoidable costs of green power contracts to shareholders within a PCIA mechanism, IEP has no objections. We reiterate, however, our strong opposition to the involuntary *assignment* of any contract in whole or in part absent agreement of the parties to the contract.

B. Termination or Extension of Contracts

CalCCA argues that whenever an opportunity arises that allows a utility to terminate a contract or extend a contract, that opportunity should mark a new procurement date for purposes of PCIA cost allocation.[10] CalCCA bases its conclusion on the premise that changing conditions necessitate continual review of existing contracts to assess prudent management.

In California, there is an implied covenant of good faith and fair dealing in all contracts. A standard of performance as proposed by CalCCA would place the utilities (and by extension

[9] Exh. POC-1, Testimony of Bill Powers, p. 3.
[10] Exh. CalCCA-1, Prepared Direct Testimony of the California Community Choice Association, Vol. 2, Chapter 3, p. 15.

the Commission) in an untenable situation with unforeseen consequences. If the Commission requires a utility to terminate for the slightest variation from contract performance, the utility could face allegations and litigation that it breached its implied covenant. The legal principle is that contracts are unlikely to unambiguously address all possible future circumstances, and the parties are to act reasonably when unexpected events occur.

How would a utility prudently administer a contract under a standard of performance premised on "an opportunity to end an existing contract" as proposed by CalCCA? This standard is sufficiently vague as to be rendered meaningless; yet this standard would persist and impose an unclear standard on behavior with regard to utility administration of contracts. A standard of performance such as this would risk creating an unnecessary and unhelpful barrier to utility contracting in general. Furthermore, it may chill or skew contract renegotiation even in those instances in which clear benefits accrue to ratepayers.

As a practical matter, the Commission has the power to assess the cost and benefits of any contract or any contract modification. On the other hand, if every renegotiated contract is treated as a "new" contract or, alternatively, any failure to lower the costs of an existing contract is treated as a new contract for purpose of determining PCIA-eligible costs, the opportunity for utilities (and by extension the Commission) to secure benefits to ratepayers will be stymied.

C. Prudent Contract Procurement

Public Utilities Code Section 454.5 is intended to eliminate the need for after-the-fact reasonableness reviews of utility procurement.[11] If a utility executes a contract with a third party and that contract is approved by the Commission, then the Commission will have determined that the contract is just, reasonable and least-cost/best-fit (in the context of Renewables Portfolio

[11] Motion of San Diego Gas & Electric Company and Pacific Gas and Electric Company to Strike Portions of the Testimony of Bill Powers, April 6, 2018, p. 7.

Standard (RPS) contracts). To the extent that any party contests the Commission's approval of an individual contract, parties have a procedural path to challenge the approval and prove the alternative, *i.e.,* they have the right to attempt to prove that the contract is unjust, unreasonable, or not least-cost/best-fit (in the case of RPS contracts). But that procedural path lies in the proceeding in which the contract was brought forward for the Commission's review (application, Advice Letter). Challenging the reasonableness of contracts post hoc in another proceeding (*e.g.,* in the current or a future PCIA proceeding) places both Buyer and Seller at risk of double-jeopardy with regard to the sanctity of the contract. This is unnecessary and unreasonable. Clearly, this proposal, if adopted, would place a significant chill on future bilateral contracting that is a foundational element of the Commission's market design.

The Commission determined that the PCIA proceeding is not revisiting prior Commission determinations regarding the reasonableness of the IOUs' past procurement practices.[12] Parties have, however, questioned the prudency of utility contract *procurement* (separate from contract administration) in the context of valuing the PCIA-eligible "above market" component of utility portfolios.[13] Parties argue that the decision of the utility executing the contract (and by extension the decision of the Commission approving the contract) is relevant to understanding the outcomes of utility and by extension Commission approvals.[14]

With regard to contract procurement, utility contracts in general and RPS-eligible contracts specifically are subject to the rules governing utility procurement. For example, the utilities employ a Commission-approved least-cost and best-fit methodology when evaluating

[12] Scoping Memo, p. 19.
[13] Exh. CalCCA-1, Prepared Direct Testimony of the California Community Choice Association, Vol. 1, Chapter 1, p. 1; Exh. POC-1, Testimony of Bill Powers, p. 3ff.
[14] Administrative Law Judge Ruling Denying Motion of San Diego Gas & Electric Company and Pacific Gas Electric Company, issued April 13, 2018, pp. 4-5.

bids in competitive RPS solicitations.[15] Moreover, the Commission's adopted procurement framework includes a prominent role of an independent evaluator and a Procurement Review Group. Absent evidence that the utility acted outside the rules and procedures guiding procurement, a Commission-approved contract (including its pricing provisions) should be considered just and reasonable considering the alternatives at the time the decision was made. To do otherwise is to upend the entire procurement structure at the Commission.

Irrespective of the protections and assurances granted by Public Utilities Code Section 454.5, parties have suggested that utility procurement decisions ought to be subject to post hoc review in instances where contract pricing is determined post hoc to be "unjustifiably high."[16] As a practical matter, one cannot simply look at a single element of a contract (*e.g.,* pricing) and conclude that the contract was "unjustifiably high." Contract pricing negotiated between two parties and brought to the Commission for approval is the product of a competitive process at the time of contract execution. Moreover, final contract terms and conditions (including pricing) reflect a vast array of trade-offs, including term vs. pricing; deliverability (for purposes of Resource Adequacy) vs. price vs. location; location vs. capacity need, price vs. environmental benefits, etc. Focusing on any single factor in a contract (including pricing) after final approval is unjust and unreasonable.

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[15] D.03-06-071; D.04-07-029.
[16] Exh. POC-1, Testimony of Bill Powers, p. 3.

Respectfully submitted June 1, 2018 at San Francisco, California.

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