BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanisms for Generation Procurement and Renewable Resource Development.	Rulemaking 01-10-024 (Filed October 25, 2001)

EMERGENCY MOTION OF THE CALIFORNIA WIND ENERGY ASSOCIATION FOR AN EX PARTE ORDER REQUIRING CHANGES TO EDISON'S AUGUST 2003 RENEWABLE RESOURCE RFP

Joseph M. Karp
White & Case LLP
Three Embarcadero Center, Suite 2210
San Francisco, California 94111
Telephone: (415) 544-1100
Facsimile: (415) 544-0202
jkarp@whitecase.com

Attorney for the California Wind Energy Association

September 16, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanisms for Generation Procurement and Renewable Resource Development.	Rulemaking 01-10-024 (Filed October 25, 2001)

EMERGENCY MOTION OF THE CALIFORNIA WIND ENERGY ASSOCIATION FOR AN EX PARTE ORDER REQUIRING CHANGES TO EDISON'S AUGUST 2003 RENEWABLE RESOURCE RFP

I. Introduction and Summary

Pursuant to Rule 45 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure, the California Wind Energy Association ("CalWEA") submits this emergency motion for an ex parte order requiring changes to Southern California Edison Company's ("Edison") August 29, 2003 Request for Proposals from Eligible Renewable Resource (ERR) Suppliers for Electric Energy or for Electric Energy and Capacity ("RFP"). Because Edison has required potential bidders to submit their bids and commit themselves to comply with the onerous terms of the RFP by September 23, 2003, CalWEA respectfully requests that the Commission take action as quickly as possible, preferably on or before September 22, 2003.

In its current form, the RFP (i) contains terms that are unduly disadvantageous to and discriminate against wind-powered generators, including those seeking to repower existing facilities, (ii) contains terms that will unduly burden all renewable generators, wind and non-wind alike, and unnecessarily raise costs to ratepayers, (iii) fails to comply with applicable Commission requirements and (iv) threatens to undermine the Commission's emerging program under the California Renewables Portfolio Standard ("RPS"). Unless the Commission takes immediate corrective action, long-term adverse consequences are likely to result. In the sections that follow, CalWEA explains in detail these flaws with the RFP and, where appropriate, proposes specific remedies to address them.

II. The RFP Discriminates Against Wind-Powered Generators

The RFP is the second renewables procurement solicitation conducted by Edison within the past twelve months. The earlier solicitation was conducted under the requirements of Decision 02-08-071 at the end of last year. In response to that solicitation, CalWEA filed detailed comments listing numerous ways in which Edison had incorporated provisions that disadvantaged potential wind bidders (in addition to provisions that burdened other renewable technologies).[1] Not surprisingly, CalWEA understands that no wind resource was successful in Edison's earlier solicitation.

The instant RFP again contains a variety of terms and conditions that impose inordinate burdens upon potential wind bidders, including those seeking to repower existing facilities. While these provisions will disadvantage all wind projects, the negative impact of these terms will be felt most acutely by small developers that depend upon external financing (making it considerably more difficult, if not impossible, to obtain) and are unable to internalize the relevant risks.

Given the magnitude and complexity of the RFP documentation and the short time allowed by Edison for review thereof, the following is likely to be only a partial list of the offensive provisions, hopefully capturing the most egregious ones. In order to permit the RFP to proceed without undue delay, CalWEA proposes a reasonable solution that may be adopted by the Commission for each identified problem.

---

[1] See Comments of the California Wind Energy Association on the Status of Negotiations and Contracts between Investor-Owned Utilities and Existing Renewable Facilities, December 13, 2002. For example, Edison unilaterally determined that wind resources qualified for only 10% of the potential capacity payment. Id. at 8. Edison also required that it be able to schedule a capacity demonstration test at its discretion, even if it happened to coincide with a time when the wind was light. Id.

RFP Problem 1: Edison seeks to impose undue scheduling risks on wind developers and demands free energy generated or paid for by the developers.

In Sections 2.1(c) and 3.1(a) of the Sample Form Power Purchase and Sale Agreement included in the RFP ("PPA"),[2] Edison provides that it will pay for only the lesser of what the generator Schedules[3] with the ISO and what the generator actually produces. Notwithstanding the limitation on what it will pay for, Edison provides that it will retain title to all output of the Generating Facility and all environmental attributes associated therewith.[4]

Because the ISO will provide imbalance energy to Edison to make up for any under-delivery by the generator in relation to the Scheduled amounts and because the ISO will charge the generator for such imbalance energy, this means that if the generator Schedules more than it actually produces, Edison will obtain free energy for which the generator must pay. At the same time, Edison provides that, if the generator Schedules less than it actually produces, Edison will take the energy and the associated renewable attributes but not pay for them.[5]

While this unjust enrichment of Edison at the hands of the renewable generator should be unpalatable for all technologies, it is particularly onerous for wind projects. Even though wind forecasting technologies continue to improve, there remains a degree of uncertainty with wind that does not permit for the same Scheduling possible with a fossil fueled facility. While one might expect that over time, the amount by which a wind generator over-Schedules will be offset by the amount by which the wind generator under-Schedules,[6] Edison's refusal pay anything

---

[2] On page 8 of its Procurement Protocol, Edison states that it "strongly prefers Proposals that conform as closely as possible to the terms and conditions to [sic] the Sample Form Agreement." On page 9 of the Procurement Protocol, Edison requires each bidder to represent that it has the authority to execute an agreement with Edison in substantially the form of the PPA.

[3] Unless otherwise defined herein, initially-capitalized terms have the meanings given in the PPA.

[4] The PPA does not seem to specify whether SCE will apply this on an hourly or on a monthly basis. As Schedules are submitted hourly, CalWEA can only assume the worst, that Edison intends to apply it hourly.

[5] CalWEA does not fully understand how Edison proposes to accomplish this conversion, as generation above Scheduled amounts is absorbed by the ISO, which pays the generator for such positive deviation. Even with compensation from the ISO, there is no assurance that such compensation will reflect the contract price or be adequate compensation for the generator.

[6] This is the premise underlying the ISO's intermittent generator scheduling program embodied in its Tariff Amendment No. 42 ("Amendment 42 Program").

when the generator both over and under-schedules completely prevents the wind generator from achieving balance. Moreover, if wind generators participate in the ISO's Amendment 42 Program, which will be operational next month, they relinquish all Scheduling responsibilities to the ISO and lose any means of protecting themselves from Edison's imposed "Catch-22."[7]

Solution to RFP Problem 1: CalWEA's preferred solution would be for the PPA to provide that Edison will purchase the entire net output of the Generating Facility, irrespective of the amount Scheduled with the ISO. This would allow the generator to obtain the contract price for all of its output and entitle Edison legitimately to all of the environmental attributes associated with such output. This can be accomplished simply by requiring Edison to offer to (i) purchase the entire net output of the Generating Facility and (ii) agree to serve as the Scheduling Coordinator ("SC") for the facility.[8] Indeed, because Edison is already the SC for many other wind facilities (under standard offer contracts), and for substantial loads as well, Edison is in a far better position to manage the Scheduling responsibilities than is the average wind developer. Given that CalWEA has heard from Edison and the other utilities that they object to serving as the SC for new renewable resources, CalWEA has developed a potential alternate solution wherein the wind developer obtains its own SC services. In this case, Edison's offensive provisions should be replaced with the following:

> Buyer and Seller acknowledge that, because of the scheduling requirements of the California ISO, scheduled deliveries and metered deliveries may be unequal during any period. Buyer and Seller shall make regular monthly payments based upon the amount of Energy Scheduled through the California ISO, and shall reconcile differences between metered Output and the Energy Scheduled by Seller's Scheduling Coordinator in the next monthly period after actual meter data is available[9] and confirmed by the ISO as follows: (a) If the metered Output is

---

[7] Edison's provision creates the perverse incentive for generators to habitually under-Schedule. In the under-Scheduling scenario, the generator would, at least, expect to receive some compensation from the ISO for the excess generation, while in the over-Scheduling scenario, the generator pays for the imbalance energy (at substantial risk) and gets paid nothing. In fact, Edison expressly provides in Section 2.1(b) that generators can Schedule less than their full output to make up for potential imbalances earlier in the month. As CalWEA expects the ISO (which relies on Schedules to balance the system) would agree, this kind of gaming of Schedules is exactly the wrong thing to do; Edison should not, in the first place, create a problem that would involve a need to game Schedules.

[8] On page 6 of the Procurement Protocol, Edison states that it will not serve as the SC for any bidders.

[9] Although CalWEA proposes a monthly reconciliation to more closely match Edison's RFP, an annual reconciliation would reduce further the problems associated with the Scheduling issue and be much easier to implement.

> greater than the generation Scheduled through the California ISO, Buyer shall pay to Seller (in addition to amounts paid for Scheduled Energy) the amount equal to the positive difference, if any, between the Contract Price for the Output generated in excess of the Energy Scheduled and the actual price received by Seller (or its Scheduling Coordinator) from the California ISO for Uninstructed Deviations in respect of such excess Output, multiplied by the amount of the excess Output generated. If the actual price received by Seller (or its Scheduling Coordinator) from the California ISO is greater than or equal to the Contract Price, Buyer shall have no obligation to pay Seller any amount hereunder. All renewable attributes (as specified below) associated with such excess Output shall be transferred to Buyer upon the payment of any amount due under this section, or immediately upon the determination that no settlement payment hereunder is required. (b) If the generation Scheduled through the California ISO is greater than the metered Output, Seller shall retain all payments for Scheduled Energy and pay to Buyer the positive difference, if any, between the Contract Price for such generation and the actual price paid by Seller (or its Scheduling Coordinator) to the California ISO for such excess Scheduled generation as Uninstructed Deviations, multiplied by the amount of such excess Scheduled generation. If the price paid by Seller (or its Scheduling Coordinator) to the California ISO is greater than the Contract Price, Seller shall have no obligation to pay Buyer any amount hereunder.

This provision is fair to Edison, as it ensures that Edison never pays more than the contract price and, since Edison may be required to pay some amount for output in excess of Scheduled amounts, it better entitles Edison to all of the environmental attributes. It is fair to the developer, as the developer receives at least the contract price for all of its actual output and, in exchange for taking the risk that the ISO imbalance price that the generator has to pay to supply power to Edison in the over-Scheduling scenario exceeds the contract price, the developer is entitled to benefit when the ISO imbalance price that the generator receives in the under-Scheduling scenario exceeds the contract price. Please be aware that CalWEA cannot be sure that this mechanism will be acceptable to all developers and lenders. As such, CalWEA prefers simply requiring Edison to serve as SC notwithstanding its objections.

RFP Problem 2: Edison seeks to impose unduly harsh performance requirements and penalty mechanisms on wind developers.

In Section 3.3 of the PPA, Edison requires generators providing as-available capacity (which wind developers are likely to provide) to deliver at least 80% of their good faith estimate of output in each time of delivery period, every month, on a rolling twelve-month basis. If the

generator fails to meet the 80% annual threshold in any month, the generator must pay liquidated damages to Edison based on the replacement costs of the shortfall for the full remaining term of the PPA, and the estimate of the generator's annual output is permanently reduced accordingly.

First, requiring wind developers to deliver at least 80% of their good faith estimate of annual deliveries on a rolling twelve-month basis is far too stringent a performance requirement for wind generation and for as-available capacity payments. In fact, an 80% delivery threshold is akin to a firm capacity requirement (albeit with respect to a lower capacity factor). Two or three unusually bad wind months in a row easily could cause a wind generator to miss the annual estimate by more than 20%. Wind developers must estimate their output assuming average wind conditions, but average wind conditions do not occur in every year. Sometimes wind conditions may exceed the average by more than 20% and sometimes wind conditions may fall below the average by more than 20%. This should not, however, be the cause for substantial liquidated damages risk by wind developers offering to supply energy when and if it is available (and for reduced prices on this basis). Edison's performance standard is particularly onerous for developers at new sites or using new technology who will be challenged to estimate precisely their output during average years, let alone years during which abnormal conditions persist.[10]

Second, subjecting the wind developer to a liquidated damages payment based upon replacement costs for the remaining term of the PPA and permanently reducing the estimate is far too draconian a remedy.[11] As discussed above, the failure to meet the threshold may result from a few unusually bad wind months. These may be isolated conditions never to repeat themselves during the PPA term. Edison's damages formula should not assume that, because the

---

[10] At the recent workshop on standard contract terms and conditions under the RPS program, Edison commented that by looking back at historical wind generator data, its existing wind facilities would have been able to comply with the 80% requirement. The Commission should appreciate that a back-cast showing an observed phenomenon is far different than a forecast with strict consequences for inaccuracy. Just because wind projects may have been within 20% of an average generation point in the past, developers are not going to be able to rely on this occurring again in the face of substantial penalties. In addition, this factoid offers no comfort at all to developers at new sites or using new technology (whether in repowering an existing site or building a new project). At the same time, this history should provide significant comfort to Edison that wind projects, in general, perform within reasonable bounds.

[11] The importance of the annual estimate, apart from establishing Edison's draconian performance standard, is discussed below.

Generating Facility missed its output estimate in one year, that it will do so in every other year as well.

Solution to RFP Problem 2: An appropriate performance standard for a provider of as-available capacity from an intermittent energy source is one based not upon actual energy generation but upon mechanical availability. In essence, the developer will commit that its wind facilities are in good working order and able to generate, assuming adequate wind resource conditions. CalWEA proposes the following provision:

> On and after the date of Firm Operation, Seller shall attain a Project availability of at least 80% on an annual basis in each TOD Period. Project availability shall be equal to the average capacity rating of the Project available during such hours, not including hours in which deliveries were prevented due to Force Majeure or Forced Outages, divided by the Net Nameplate Contract Capacity of the Project. If Seller fails to achieve the required Project availability in any year, Seller's Capacity payments for that year shall be reduced by a factor equal to 80% minus the actual availability for the Project expressed as a percentage of Net Nameplate Contract Capacity. Seller's failure to achieve the required availability in three consecutive years during the Delivery Period shall constitute an Event of Default under the Agreement.

The Project availability is not to be measured by comparing the actual output of the turbines to output assuming optimal, or even average, wind conditions; rather it reflects the mechanical ability of the generators to produce energy at prevailing wind conditions.

CalWEA appreciates that Edison will be relying on the output of its wind generators to help meet renewable purchase obligations and is not opposed to a reasonable minimum output requirement that is consistent with the intermittency of the energy source and the reduced capacity commitment and payments. In lieu of Edison's overly strict output requirement, CalWEA proposes that generators be required to generate no less than 60% of the estimated output in each time of delivery period measured biennially beginning on January 1st. Failure to meet or exceed this threshold would subject the developer to damages for replacement costs but would not be grounds for PPA termination.

RFP Problem 3: Edison fails to provide as-available capacity payments based on metered output as required by the Commission and instead employs a significantly more onerous methodology.

The August 13, 2003 Assigned Commissioner Ruling Specifying Criteria for Interim Renewable Energy Solicitations ("ACR") requires the RFP to "abide by the terms of our [the Commission's] first RPS implementation decision (D.03-06-071)." In the section describing the first bid ranking at page 31, this decision requires that "Capacity payments for as-available products are to be made in accordance with current Commission policy. . . ." The Commission's current policy on as-available capacity payments, applicable under the existing standard offer contracts, involves converting a dollars per kW-year value into a cents per kWh price (which varies based upon time of delivery) and simply paying such price for each kWh delivered by the generator.

In the RFP, however, Edison expressly ignores the ACR and Decision 03-06-071 mandate to employ the current as-available payment methodology. Instead, the RFP contains a multi-step formula that employs a performance factor that is the ratio between the number of hours in a monthly time of delivery period that the generator meets or exceeds the expected period output and the total number of period hours in the month. By completely excluding from the payment, pursuant to this performance factor, all hours during which the generator delivers less then the expected amount, no matter how slightly, the RFP as-available payment formula could yield dramatically lower as-available capacity payments than under the Commission's current payment methodology. For example, if a generator produced 99% of its expected output in every hour in a given time of delivery period, it would receive 99% of its potential maximum capacity payment under the Commission's current methodology. Under Edison's methodology, however, the generator would receive no capacity payment at all.[12]

Solution to RFP Problem 3: As required in the ACR and Decision 03-06-071, Edison should be required to use in its RFP the Commission's current as-available capacity payment

---

[12] Similarly, if the generator delivered 50% of expectation in half the hours and 100% of its expectation in the other half, it would receive 75% of its maximum capacity payment under the Commission's current methodology but only 50% under Edison's RFP proposal.

methodology. In particular, as provided under Edison's standard offer contracts, Edison should convert the applicable dollars per kW-year value into a cents per kWh price and simply pay such price for each kWh delivered by the generator.

RFP Problem 4: Edison creates its own integration cost adder for wind projects, and for no other technology, in violation of the ACR.

On page 21 of the Procurement Protocol, Edison states that until the CEC's report on renewable technology integration costs is complete, Edison will employ a 3.0 mills/kWh integration cost adder for wind projects. Edison does not propose any integration cost adder for other renewable technologies, including other intermittent generators.

First, the ACR (at page 3) directs Edison, in developing adders for integration costs, to "draw as much as possible on the guidance given in D.03-06-071 and work being done in the CEC's Integration Study." Ignoring completely the work being done in the CEC's study, which is specific to California's system, Edison proposes its own adder for wind generators.[13] Edison proposes to use the results of the CEC Integration Study only when the report is complete. There is no reason why Edison should not employ the findings of the Phase I Analysis of Existing Resources to determine applicable integration cost adders in the RFP. The CEC's preliminary findings, released in a workshop this past Friday, show a regulation cost adder for wind resources that is, at most, 0.2 mills/kWh -- roughly fifteen times lower than Edison's proposed value. In fact, both the regulation and load following costs of all renewable resources were found to be negligible. The study's authors stated at a workshop this past Friday that the Phase I numbers would not change significantly with the addition of several hundred megawatts of additional wind capacity.

Second, it is clear evidence of Edison's bias against wind generation that Edison proposes an integration cost adder for wind bidders and no adder for any other technology or proposed project. Even other intermittent technologies or as-available generators receive no adder under

---

[13] Edison's value appears to be flawed because of its simplistic methodology of merely averaging the results of other studies presented at the June 2003 European Wind Energy Conference, and because those studies involve both hypothetical wind resources and resources outside of California where conditions may not correspond to conditions in California.

the RFP. This discriminatory proposal will unduly disadvantage wind bidders in the bid evaluation process.

Solution to RFP Problem 4: In lieu of Edison's unilateral and discriminatory integration cost adder, the Commission should direct Edison to employ in its bid evaluation process the CEC's final Phase I Analysis of Integration Costs for Existing Generation, which is due out in October.

RFP Problem 5: Edison provides no information about how it will evaluate the capacity value of wind or other resources, in violation of the ACR.

The RFP violates the requirement in the ACR (at page 3) that Edison "clearly stipulate up front precisely how . . . [Edison] will assign capacity values and payments to as-available resources. While Edison has made clear how it intends to make capacity payments to as-available resources (though, as discussed above, its proposal violates the ACR and Decision 03-06-071, and is unduly burdensome to wind developers), Edison has provided no information about how it intends to value as-available resources in its bid selection process. In Decision 03-06-071, the Commission was clearly concerned with the potential that Edison might discriminate against wind bidders, stating (at page 23): "we remain concerned that the value of capacity for as-available products will not be accurately assessed if the process is not given some guidance by the Commission." Among other things, the Commission required that as-available bidders not be discriminated against if they elect to incorporate Commission approved capacity amounts in their bids. D.03-06-071, at 31 (footnote 32). Unfortunately, Edison provides no information by which as-available bidders can understand how Edison will evaluate their bids and ensure that they are not discriminated against.

Solution to RFP Problem 5: The Commission should direct Edison to employ in its bid evaluation process the final capacity value results for all technologies contained in the CEC's Phase I Analysis of Integration Costs for Existing Generation, which is due out in October. The preliminary analysis was released this past Friday and, although it appears that it may understate the capacity value of wind resources, it would still be preferable than Edison's black box. When the Phase II and Phase II analyses are complete, these updated values should be used.

RFP Problem 6: Edison precludes wind generators seeking to repower from the prime option that Edison says is available in the RFP.

On pages 6 and 7 of the Procurement Protocol, Edison states that facilities with existing power purchase agreements may either (i) bid to supply power upon expiration of the original agreement, (ii) bid to terminate the original agreement and replace it with a new PPA or (iii) bid to keep the historical deliveries under the original agreement and place the incremental deliveries under a new PPA. This third option is likely to be the most attractive option to wind facilities seeking to repower their existing equipment with state of the art technology.[14] CalWEA strongly supports Edison's offering this option.

However, Edison completely undercuts this option by refusing to serve as SC for the bidders and by requiring that all bidders serve as their own SC (as discussed above). As Edison is well aware, the ISO does not allow any facility to have more than one SC. As Edison is the SC for the facility under the existing power purchase agreement, it is therefore impossible for an existing facility to employ Edison's third option because the ISO will not allow the facility to use an SC other than Edison for the incremental generation.

Solution to RFP Problem 6: Simply put, Edison should be required to permit bidders employing its existing facility option to designate Edison to continue to serve as SC for the entire project.

RFP Problem 7: Edison requires repowers to be constructed and completed in one month, an unreasonably short amount of time.

In PPA Section 3.9(c)(ii), Edison requires each developer to achieve Initial Operation by the Startup Deadline. Failure to do so is an Event of Default under Section 5.1(k), entitling Edison to terminate the PPA and to demand potentially significant damages. Initial Operation, under Section 1.91, requires that the Generating Facility be actually operating and Scheduling and Delivering energy to the Delivery Point under the PPA. The Startup Deadline for an existing Generating Facility (which will include repowers) is, under Special Condition A(x)(b), the "first

---

[14] CalWEA does not accept that existing facilities are prohibited from simply increasing their output under existing contracts and reserves all rights in this respect.

day of the second full calendar month following CPUC Approval."[15] As such, the PPA requires developers to begin delivering output from repowered facilities within one month of CPUC Approval.

Because developers are not likely to be in a position to commit substantial funds towards a project (let alone obtain financing) until they are secure that they have a binding PPA, and because the PPA may expire under Section 11.2 if CPUC Approval is not timely achieved, developers must wait until after CPUC Approval is achieved to make significant project commitments. This gives developers only one month to order major equipment, install such equipment and synchronize such equipment with the grid. As anyone should appreciate, this is simply impossible.

Solution to RFP Problem 7: Edison provides a wholly different Startup Deadline for new facilities in Special Condition A(xi). In part, Edison allows the developer of a new facility to state the date by which it must commence Initial Operation. There is no reason why a repower should be subject to any different requirement. Accordingly, Edison should be required to delete Special Condition A(x) and apply Special Condition A(xi) to all bidders, existing and new. In addition, it should be expressly stated that, if the developer is prevented from meeting the Startup Deadline because of Force Majeure, that the Startup Deadline will be extended accordingly.

RFP Problem 8: Edison will employ its required good faith estimate of annual deliveries to preclude future repowers.

As discussed above, Edison requires each as-available generator to make a good faith estimate of its annual deliveries by monthly time of delivery period. This estimate is used expressly in the PPA to determine the annual and monthly performance requirements. Although it does not appear to be stated expressly in the PPA, this estimate also will serve another significant purpose for Edison: it will allow Edison to prevent wind generators from repowering their facilities in the future as better generating technology becomes available.

---

[15] The PGC Commitment Confirmation term in Special Condition A(ix)(a) is not applicable to the RFP.

Arguing that the existing standard offer contracts are output contracts and that California law prevents sellers under output contracts from delivering more than what the parties could have reasonably expected at the time of contract execution, Edison has long asserted that the "non-binding" estimate of annual deliveries in these contracts limits the amount of energy that can be delivered to Edison under the contracts. Because the repowers would increase the amount of energy generated (without increasing installed capacity), often in excess of the original estimates, Edison has used the estimates in the contracts to prevent the repowers. In addition to the unique California provisions of the federal production tax credit, which are based in part upon this estimate, Edison's reliance on this estimate is one of the primary obstacles to wind project repowers.

Solution to RFP Problem 8: As the Commission recognized in Decision 03-06-071 (at page 57), "the repowering of existing wind facilities in prime locations is a common-sense approach to increasing procurement of renewable energy. . . ." Edison should not be permitted to use a bidder's good faith estimate of output using current technology from forever preventing the developer from optimizing the wind resource by installing more efficient turbines. Accordingly, Edison should be required to include in the PPA a statement that the annual and monthly estimates are based upon current technology and do not preclude the developer from repowering the facility with new or different technology that might increase the output of the facility.

RFP Problem 9: Edison will have unfettered discretion to reduce the wind developer's Net Nameplate Contract Capacity and to confiscate the developer's Project Fee.

In Special Condition A(ii) of the PPA, Edison states that if the developer does not demonstrate to Edison, in Edison's sole discretion, its ability to Schedule and deliver the full Net Nameplate Contract Capacity to Edison prior to Firm Operation, Edison will reduce the Net Nameplate Contract Capacity. The Net Nameplate Contract Capacity is a key term used in determining capacity payments in Section 3.1(e); a reduction in the Net Nameplate Contract Capacity will translate into a reduction in the capacity payments for the balance of the contract term. Special Condition A(ii) allows Edison, upon a reduction in the Net Nameplate Contract Capacity, to confiscate that portion of the Project Fee that corresponds to the capacity reduction.

These onerous provisions should be objectionable to all developers, but they are particularly troublesome for wind projects. The ability of a wind project to demonstrate its capacity is entirely dependent upon prevailing wind conditions and the turbine installation and maintenance schedule employed by the developer. Edison cannot reasonably expect to appear at a wind facility in its sole discretion and demand a demonstration of capacity or penalize the developer if conditions do not happen to be satisfactory.

Solution to RFP Problem 9: Given the severe consequences associated with failing to demonstrate one's ability to provide the Net Nameplate Contract Capacity, a detailed protocol is warranted. Rather than attempting to develop such a detailed protocol at this time, however, CalWEA proposes simply that the Commission require Edison to delete the phrase in Special Condition A(ii) that would entitle Edison to employ its sole discretion and, instead, require Edison to insert language that calls for a mutually agreeable protocol to determine whether the Generating Facility is capable of providing the Net Nameplate Contract Capacity.

III. The RFP Contains Unduly Onerous Terms for all Renewable Generators

In addition to provisions that have a disproportionate impact on wind developers, the RFP contains a myriad of unreasonable provisions that will affect all potential bidders, wind and non-wind alike. The following is a listing of some of the more egregious terms, and proposed solutions that could be adopted by the Commission in lieu thereof.

RFP Problem 10: Edison subjects developers to unreasonable credit requirements, which will discourage participation and increase costs.

Edison requires, in PPA Section 8.4, bidders to provide credit support in an amount equal to the forecasted difference between the prevailing market price for renewable power and the contract price. Depending upon how market prices change over time, this could be an extremely large amount. Failure to provide the required credit support is grounds for PPA termination.

This kind of credit requirement was developed to apply in transactions between trading entities that are not relying on hard assets to perform transactions. It is inappropriate to apply such a requirement to a developer that is committing to supply energy and capacity from a single

power plant. The large capital investment inherent in developing a project will adequately assure performance during the contract term. In California, it is much more difficult to develop, finance and construct a project than it is to operate one. It is important to keep in mind that thousands of MW of independent generators, including renewables, have been developed, financed, constructed and operated in California under the standard offer contracts, without any credit support mechanism aside from an earnest money deposit. Imposing requirements beyond earnest money would create unnecessary barriers and deter small developers. It also likely will increase bid costs as bidders pass through the costs of compliance. Ironically, this kind of credit requirement is actually progressively more onerous on bidders as they reduce their bid prices (as the difference between the market price and the bid price grows).

Solution to RFP Problem 10: Edison should be comfortable (i) that the earnest money deposit will weed out weak or non-serious bidders, (ii) that project development milestones will further ensure that utilities are not saddled with non-viable projects, and (iii) that, once the project achieves Firm Operation (and the earnest money deposit is refunded), the developer has sufficient wherewithal and incentive to deliver product output over the contract term. The Commission should require Edison to delete the onerous credit terms from the PPA.

RFP Problem 11: Edison requires bidders to post an unduly high Project Fee.

Edison requires all bidders to provide a $20/kW Project Fee in cash or by letter of credit. This translates to a large $200,000 Project Fee for a relatively small 10 MW project. The Project Fee will be forfeited in the event that a milestone is missed, possibly even if as a result of Force Majeure.

CalWEA fully supports requiring a reasonable Project Fee that is forfeitable upon missing milestones (for reasons other than Force Majeure) so as to discourage projects that have little chance of success from diverting scarce resources. However, the RFP's $20 Project Fee is unduly burdensome, particularly on small developers.

Solution to RFP Problem 11: The Commission should require Edison to employ the following graduated Project Fee:

> [For Projects below 25 MW] No Project Fee or other credit support will be required of Seller.
>
> [For Projects above 25 MW and below 100 MW] A refundable Project Fee in the amount of $ __ [deposit should increase from $0 for Projects with an estimated capacity of 25 MW to $300,000 for Projects with an estimated capacity of 100 MW on a linear scale] will be provided by Seller to Buyer upon execution of this Agreement. Such deposit will be refunded to Seller within five Business Days after the date of Firm Operation.
>
> [For Projects above 100 MW] A refundable deposit in the amount of $ __ [deposit will be $3 multiplied by the Net Nameplate Contract Capacity] will be provided by Seller to Buyer upon execution of this Agreement. Such deposit will be refunded to Seller within five Business Days of the date of Firm Operation.

In addition, it should be made clear that failure to miss a milestone due to Force Majeure shall not result in forfeiture of the Project Fee.

RFP Problem 12: Edison imposes a disguised unilateral termination right if final CPUC Approval does not occur in four months.

In Section 11.2 of the PPA, Edison provides that the PPA will automatically terminate if CPUC Approval, which includes the running of all appeal periods, has not occurred within 120 days of the date on which Edison submits the PPA for approval. Seemingly mutual in application, Edison converts this to a unilateral termination right by providing itself (and not the generator) with the opportunity to waive this condition. As such, if CPUC approval has not occurred within the requisite 120 days, Edison can, in its sole discretion, either let the PPA expire or waive the condition and force the developer to perform under an unapproved PPA. In light of the potential for changed circumstances during the intervening period, either both parties should be able to waive the condition or neither should have a unilateral right.

In addition to the objectionable unilateral nature of the termination provision, 120 days is inadequate. Assuming that the Commission timely issues a decision on the relevant utility filing, any party that wishes to disrupt a PPA can do so by filing an application for rehearing and then a

challenge in court on a writ of review. This process almost certainly will not be fully resolved in four months.

Solution to RFP Problem 12: The Commission should require Edison to revise this section to provide that the PPA will terminate if (i) the Commission has not issued a decision approving the PPA within 120 days of the Edison filing, (ii) the Commission has not issued a decision rejecting all applications for rehearing within 90 days of their being filed and (iii) any applications for writs of review are not dismissed within 120 days of their being filed. In addition, Edison should not have the unilateral right to waive this condition.

RFP Problem 13: Edison subjects potential bidders to overreaching waivers of rights and indemnity obligations.

In Section XII of the Procurement Protocol, Edison requires bidders to waive all claims against Edison in connection with the RFP and any right to challenge the RFP. If a bidder brings a claim notwithstanding this waiver, no matter how legitimate the claim, the bidder is required to indemnify Edison for claims of other parties against Edison as a result.

While CalWEA can appreciate Edison's desire to avoid litigation, there is no reason why a bidder that believes that it has been treated unfairly should be prevented from pursuing its legitimate claims. And, if a bidder brings a good faith (or at least a meritorious) claim, there is no reason why it should indemnify Edison for the claims of other participants.

Solution to RFP Problem 13: The Commission should simply require Edison to eliminate these onerous provisions.

RFP Problem 14: Edison requires bidders to keep their bids open, and seeks to preclude bidders from offering their output to others, indefinitely.

On page 9 of the Procurement Protocol (in Section V.B.G), Edison requires bidders to commit that their bid will be binding and remain open for acceptance or rejection by Edison until Edison decides to terminate the RFP. Edison also requires bidders (in Section V.B.F) to commit not to offer their output to any other party until Edison terminates the RFP. There does not

appear to be any time limit on how long Edison may permit the RFP to last before terminating it. These requirements are unduly restrictive.

Solution to RFP Problem 14: The Commission should require Edison to revise its Procurement Protocol to provide that bids must remain open for consideration by Edison for 60 days. This is consistent with the schedule proposed by Edison for the RFP. In addition, the Procurement Protocol should provide that bidders are free to offer their output to third parties unless and until Edison accepts the bid. To the extent that a bidder commits to provide output to a third party prior to acceptance by Edison in a manner inconsistent with its bid, and notifies Edison accordingly, the bid should be deemed revoked.

RFP Problem 15: Edison seeks to hold individual contracts hostage to a Commission decision absolving Edison of any responsibility for its conduct.

As discussed above, the PPA provides that if CPUC Approval does not occur within a certain time frame, the PPA automatically expires. CPUC Approval is defined in Section 1.72 of the PPA to include approval of all aspects of the RFP, including Edison's conduct in administering it. As such, Edison is requiring that, before any single PPA goes into effect, Edison must be absolved by the Commission of any liability for improper conduct, no matter how egregious. In other words, Edison is seeking to hold its PPAs hostage for a ruling from the Commission preempting any claims against Edison for improper conduct, no matter how egregious.

Solution to RFP Problem 15: The Commission should require Edison to revise its definition of CPUC Approval to delete the offensive provisions.

RFP Problem 16: Edison has improperly given itself a unilateral termination right if the contract price exceeds the to-be-developed Market Price Referent.

In Special Condition H(i) of the PPA, Edison reserves the right to terminate the PPA unilaterally if the to-be-developed Market Price Referent ("MPR") is higher than the bidder's All-In Bid Price. This both violates the ACR (which requires, at page 2, that the RFP "not anticipate the creation of the Market Price Referent") and is unfinanceable. A bidder simply

cannot take the risk that Edison will terminate the PPA at some future point if the contract price happens to exceed the MPR.

Solution to RFP Problem 16: The Commission should require Edison to delete this termination option from the PPA.

IV. The RFP Violates Commission Requirements

As discussed above, the RFP violates applicable Commission requirements in a number of respects. For example, the RFP fails to incorporate required as-available capacity payment provisions in violation of the ACR and Decision 03-06-071, it ignores the work being done by the CEC-sponsored working group on integration costs and capacity values in violation of the ACR, and it contemplates the development of the MPR in violation of the ACR.

Moreover, the RFP also runs counter to the Commission requirement in Decision 03-06-071 that Edison promptly negotiate with wind developers to facilitate repowers. D.03-06-071, at 57. Rather than negotiate with wind developers, as the Commission envisioned, Edison apparently sees fit to impose unilaterally the terms under which repowers may proceed in the RFP. As discussed above, while some of Edison's terms are encouraging, these positive features are far outweighed by negative aspects of the RFP.

The Commission should require that Edison correct these infirmities before proceeding with the RFP.

V. The RFP Threatens to Undermine the Commission's RPS Program

Finally, CalWEA is concerned that, if Edison is permitted to proceed with the RFP without being required to make the changes discussed above, significant damage may befall the Commission's emerging RPS program. CalWEA and other parties can only speculate about Edison's motivations in conducting the RFP at this time, before many of the essential elements of the Commission's RPS program have been completed. These important elements include the adoption of standard contract terms and conditions, development of updated capacity values for

as-available and other renewable resources[16] and the completion of methodologies for transmission and integration cost adders, market price referents and least cost / best fit bid evaluation. One view has Edison conducting the RFP now so that it may avoid incorporating these terms and evaluation procedures in its RFP.

Edison has indicated on various public occasions that it is already close to meeting the required 20% RPS mandate (although these claims have yet to be verified). Accordingly, renewable developers are presented with a choice of either participating in Edison's flawed RFP or losing an opportunity to sell power to Edison through the RPS program for potentially many years to come. If developers opt to participate in the RFP, CalWEA expects that, unless Edison subsequently changes many of the onerous terms in its PPA, projects will have severe difficulty bringing their projects to completion.[17] Many developers likely will choose not to bid at all.

Although CalWEA does not wish to deter Edison from early compliance with RPS requirements, this clearly is not the situation that the California legislature or the Commission anticipated. Edison should not be permitted to trump important program elements in which parties have invested, and will continue invest, considerable resources. Edison should not be permitted to divert scarce resources away from successful completion of the RPS program in order to further its own agenda. Edison should not be permitted to disadvantage one technology (i.e., wind generation) by imposing overly burdensome bid and contract terms and by evaluating resource capacity values in its own black box. If Edison is permitted to do so, the development of renewable resources under the RPS program will be hampered and the RPS program will lose its credibility with the renewable community.

[16] The $4.93 capacity value for as-available resources used by Edison in the RFP was adopted by the Commission years ago when Edison was generally viewed to have a significant capacity surplus. This clearly understates the capacity value of wind generators in today's market place.

[17] Note that, pursuant to Decision 03-06-071, Edison will be excused from its Annual Procurement Targets to the extent that it failed to meet the targets as a result of Seller nonperformance. D.03-06-071, at 49.

VI. CONCLUSION

For the foregoing reasons, CalWEA requests respectfully that the Commission modify the RFP as described above.

Respectfully submitted,

____

Joseph M. Karp
White & Case LLP
Three Embarcadero Center, Suite 2210
San Francisco, California 94111
Telephone: (415) 544-1100
Facsimile: (415) 544-0202
jkarp@whitecase.com

Attorneys for the California Wind Energy Association

September 16, 2003