

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Concerning
Energy Efficiency Rolling Portfolios,
Policies, Programs, Evaluation and
Related Issues.

Rulemaking 13-11-005
(Filed November 14, 2013)

**OPENING COMMENTS OF
THE CALIFORNIA EFFICIENCY + DEMAND MANAGEMENT COUNCIL
ON PROPOSED DECISION ADDRESSING ENERGY EFFICIENCY THIRD-PARTY
PROCESSES AND OTHER ISSUES**

Dated: January 13, 2023

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I. INTRODUCTION

The California Efficiency + Demand Management Council¹ (“The Council”) respectfully submits these Opening Comments on the Proposed Decision Addressing Energy Efficiency Third-Party Processes and Other Issues (“Proposed Decision” or “PD”), mailed in R.13-11-005 (Energy Efficiency Rolling Portfolio) on December 20, 2022. These Opening Comments are timely filed and served pursuant to Rule 14.3 of the Commission’s Rules of Practice and Procedure and the instructions accompanying the Proposed Decision.

II. BACKGROUND

The Council is a statewide trade association of non-utility businesses and organizations that provide energy efficiency (“EE”), demand response (“DR”), distributed energy resources (“DER”) and data analytics services and products in California. Our member companies and organizations employ many thousands of Californians throughout the state. They include EE, DR, DER, and grid services technology providers, implementation and evaluation experts, energy service companies, engineering and architecture firms, contractors, financing experts, workforce training.

III. SUMMARY

The Council supports the Commission’s guiding principles and the reasoning behind prioritizing issues in the Staff Proposal and appreciates many aspects of the Proposed Decision.

¹ The views expressed by the California Efficiency + Demand Management Council are not necessarily those of its individual members.

Many issues in the Proposed Decision which generally align with the Council’s perspectives. In addition, the Council recommends that the Proposed Decision be modified to:

- Clearly define criteria that qualifies and quantifies Performance Assurance risks to ratepayers;
- Establish consistent analysis criteria for when IOUs require cybersecurity insurance as part of a contract agreement;
- Remove the stated preference for the Total System Benefit (“TSB”) metric in Conclusion of Law (“COL”) #10;
- Require the final annual development report to capture stakeholder feedback and discuss why certain suggestions or perspectives were not incorporated into the final report; and
- Require a more thorough and thoughtful communication process for unsuccessful bids.

IV. THE COUNCIL SUPPORTS THE GUIDING PRINCIPLES IN THE PROPOSED DECISION

The Council understands the Proposed Decision’s determination to prioritize aspects of the July 18, 2022 Third-Party Solicitations Process Improvements Staff Proposal (“Staff Proposal”) which addressed an extensive range of important issues. The Council supports the effort to prioritize high-impact changes that can be made in the near term and the guiding principles established to help prioritize those issues/changes. However, there is one set of key issues that were not addressed in the Proposed Decision which the Council believes to have direct relevance to the guiding principles. The Council addresses these issues in Section VII of these Opening Comments.

V. THE COUNCIL APPRECIATES MANY ASPECTS OF THE PROPOSED DECISION

The Council appreciates that many of the issues in the Proposed Decision generally align with the Council’s perspectives.² To begin with, the Council supports the Proposed Decision’s

² The proposals explicitly addressed below do not represent an exhaustive list of all of the issues the Council supports in the Proposed Decision.

proposal to eliminate the requirement of a two-stage solicitation process to enable greater flexibility and efficiency with the solicitation process.³

The Commission should enable broader participation in the solicitation process by diverse business enterprises (“DBEs”). The Council notes the Commission appears to already have updated what is considered a DBE to include “persons with disabilities.”⁴ Regardless, the Council agrees DBEs should include businesses owned by persons with disabilities as it is an important step towards attracting further DBE engagement and bid submittals.

The Council agrees with the Proposed Decision’s proposal to amend the use of the definition of “financially interested party” such that anyone who is employed by a state academic or educational institution does not have a financial conflict of interest solely by virtue of their employment with the institution.⁵ The Proposed Decision’s proposal strikes a balance of easing an unnecessarily rigid definition while upholding protections against potential conflicts of interest.

The Council supports the Proposed Decision’s finding that “the use of a procurement model such as the [Market Access Program] approach is not inherently in conflict with the requirements of D.18-01-004 and could be competitively solicited for, as other third-party energy efficiency programs are.”⁶ The Council believes the Market Access Program model should proceed without interruption to avoid unnecessary and detrimental stop-start impacts. The Council also believes the current ongoing market access solicitations provide a less administratively burdensome process for small businesses and DBEs.

The Council supports the Proposed Decision’s suggested consistency in the accounting methodology as addressed in COL #17.⁷ In addition, the Council agrees with the proposed expansion of the use of strategic energy management approaches beyond the industrial sector.⁸ The Council supports the proposed adoption of data sharing requirements for Commission-authorized energy efficiency programs; clarifying in Ordering Paragraph (“OP”) #14 that

³ Proposed Decision, at pp. 20-21.

⁴ See, the CPUC’s Supplier Diversity Program Website which can be found here: <https://www.cpuc.ca.gov/supplierdiversity/>

⁵ Proposed Decision, at pp. 30-31.

⁶ *Id.*, at p. 22.

⁷ *Id.*, at p. 68 (COL #17).

⁸ *Id.*, at p. 2.

"alternative pathways" are to optimize data transfer.⁹ Lastly, the Council supports the Proposed Decision's proposals regarding the California Analysis Tool for Locational Energy Assessment ("CATALENA").¹⁰

VI. A FEW KEY ISSUES SHOULD BE REVISED TO ALIGN PROPOSALS WITH GUIDING PRINCIPLES AND RESULT IN BENEFICIAL OUTCOMES

Though the Proposed Decision has outlined several beneficial recommendations, there are a few key issues that the Council suggests be revisited. The Council notes that its concerns and recommendations are accompanied by proposed amendments in Appendix A of our Reply Comments where appropriate.

COL #2 and OP #2: Performance Assurances (Securities)

The Council appreciates the spirit of the proposals regarding Third-Party Performance Assurances such as financial performance bonds or cash collateral.¹¹ However, in the Council's Opening Comments on the Staff Proposal, the Council raised concerns regarding the experience that Performance Assurances can be overly broad, burdensome, and inequitably prohibitive for small businesses and DBEs and suggested the elimination of Performance Assurance requirements.¹² If the Performance Assurance requirements from pay-for-performance contracts are not eliminated, the Council suggests the Proposed Decision be revised to clearly define criteria that qualifies and quantifies risks to ratepayers, including assessing the financial impacts that warrant the increased cost of pricing in Performance Assurances into EE contracts.

The Council acknowledges that the Proposed Decision has set forth modifiable contract terms rather than standard contract terms in relation to Performance Assurances as well as required analysis by the Procurement Review Group ("PRG") and Independent Evaluators ("IEs").¹³ Specifically, the Proposed Decision's proposal establishes procedural checkpoints, requiring investor-owned utilities ("IOUs"):

"...to provide to the PRG and IE for review and comment its analysis of the risk the contract presents to ratepayers, and explain how the performance security is

⁹ *Id.*, at p. 73 (OP #14).

¹⁰ *Id.*, at pp. 57-58.

¹¹ Proposed Decision, at p. 66 (COL #2) and p. 70 (OP #2).

¹² Council Opening Comments on Ruling Seeking Comments on Third Party and Other Issues, submitted in this proceeding on August 9, 2022, at p. 3.

¹³ Proposed Decision, at p. 66 (COL #1).

appropriate to the contract size, scope, and associated risks reasserts our recommendation to eliminate Performance Assurances.”¹⁴

However, the proposal as it stands does not assign criteria to the PRG’s or IE’s analyses, potentially inadvertently providing little to no effective changes to Performance Assurances. The Council further suggests the Commission track or enable tracking of the number of contracts which require Performance Assurances compared to the total number of relevant contracts as well as how many impacted contracts were entered into by DBEs. If nearly all relevant contracts continue to require Performance Assurances, the Council recommends the Commission revisit this issue.

COL #6 and OP #3: Cybersecurity Insurance Requirements

The Council appreciates the Proposed Decision’s efforts to address challenges regarding cybersecurity insurance requirements as discussed in COL #6 and OP #3 which appear to address cybersecurity insurance challenges by IOUs to disclose and discuss the proposed cybersecurity insurance requirements with the PRG.¹⁵ Though this disclosure and discussion process would provide an opportunity to review the necessity of cybersecurity insurance (or the level of coverage) relative to that bid, there are no criteria associated with that review or its outcomes, leaving cybersecurity insurance requirements vulnerable to the same or similar unnecessary costs and challenges that are currently experienced. The Council’s recommendation is thus similar to the previous recommendation: if the Proposed Decision is not be revised to replace cybersecurity insurance requirements with consistent, statewide, industry standard security certifications requirements then the Council suggests establishing consistent analysis criteria for when IOUs require cybersecurity insurance as part of a contract agreement.

Cybersecurity insurance requirements are of significant concern as they tend to be incorporated into contracts as a blanket requirement. Cybersecurity insurance is a particularly challenging coverage to both obtain and value. This is, in part, due to the need for extensive cybersecurity insurer surveys to better understand the work to be performed and the potential risk involved with that work. For that and other reasons, the required cybersecurity insurance often defaults to the most expensive coverage for an implementer. Oftentimes these cybersecurity

¹⁴ *Id.*, at p. 66 (COL #2).

¹⁵ Proposed Decision, at p. 66 (COL #6) and p. 70 (OP #3).

insurance premium costs exceed all other types of insurance. That result unnecessarily burdens implementers and ultimately ratepayers.

COL #10: Update to Terms and Conditions to Reflect TSB Requirements

The Council appreciates the Proposed Decision’s attention towards eventually shifting to a TSB metric as well as not putting forward a requirement to use the TSB metric at this point.¹⁶ However, the Council continues to recommend clarifying there is not a preference for the TSB metric before 2024 and ahead of the availability of measurement and verification infrastructure.

The Council’s concern remains: it is unclear if the measurement and verification infrastructure required for assessing the load shapes of non-Database of Energy Efficiency Resources (“DEER”) measures exist or will exist by 2024. Though the Proposed Decision does not put forward a requirement for contracting parties to use the TSB, the Proposed Decision does establish a preference for the TSB metric by stating “...The TSB metric adopted in D.21-05-031 should be included in the standard and modifiable terms and conditions for third-party contracts.”¹⁷ The Council cautions against both requirements and preferences to use the TSB metric before the appropriate measurement and verification infrastructure is accessible. However, with the Proposed Decision’s current proposal, third-parties may be faced with using the TSB metric in contract negotiations before appropriate resources are available.

Proposed Decision Sec. 4.2.2. and COL # 25: Funding and Representation from Non-IOU Administrators

The Council appreciates the Proposed Decision’s attention to the issue of transparency, particularly as it relates to recommendations previously made in this proceeding by the Council.¹⁸ However, as discussed in the Proposed Decision, the Council recommended that third-party implementers be eligible for Reporting Project Coordination Group (“PCG”) membership, largely due to interest in improving transparency but also to ensure implementer input is received and considered.¹⁹ Though the Proposed Decision’s proposal regarding this issue explicitly discusses the opportunity for implementers to participate in the process regarding the annual development report, the Council is concerned implementer perspectives may not be substantially considered.

¹⁶ *Id.*, at pp. 24-25.

¹⁷ Proposed Decision, at p. 10 (COL #10).

¹⁸ *Id.*, at p. 45.

¹⁹ *Id.*, at p. 50.

To resolve that concern, the Council suggests the Proposed Decision be modified incorporate a stakeholder comment analysis structure in the annual development report that is similar to what is compiled in this Proposed Decision. The Council ultimately suggests the final annual development report must capture stakeholder (including implementer) feedback and discuss why certain suggestions or perspectives were not incorporated into the final report.

VII. THOROUGH AND THOUGHTFUL COMMUNICATION PROCESSES FOR FAILED BIDS MEET THE COMMISSION’S GUIDING PRINCIPLES AND SHOULD BE ADDRESSED

There are several key issues that were outlined in the Staff Proposal but were not addressed in the Proposed Decision. The Council understands the need to prioritize issues that should and need to be addressed during this rulemaking process considering the extensive number of issues addressed in the Staff Proposal. The issue addressed in this section is directly relevant to the Proposed Decision’s first two guiding principles:

- “Reducing unnecessary burdens to bidders, IOUs, Commission staff, and ratepayers;
- Managing risks to the IOUs and bidders and mitigating risks to ratepayers for contracts that fail to realize forecasted cost-effectiveness and/or energy savings benefits[.]”²⁰

One key issue that was not addressed by the Proposed Decision is the list of the Council’s previous recommendations regarding question 56 (“Is a PRG guideline to IOUs on the timing of feedback to bidders sufficient to ensure bidders receive feedback or should the CPUC require more granular feedback requirements in a decision?”).²¹ The Council understands the following recommendations to be widely desired by third-party entities and believes they are directly relevant to the Commission’s first two guiding principles. The Council restates the following recommendations as offered in our Opening Comments:

- Hold meaningful feedback sessions with unsuccessful bidders within 30 days of the due date of the submission of the original proposal.
- Develop standardized scoring criteria by working with Independent Evaluators. The scoring results should be shared with each bidder during the feedback session. Included

²⁰ Proposed Decision, at p. 12.

²¹ Council Opening Comments on Ruling Seeking Comments on Third Party and Other Issues, submitted in this proceeding on August 9, 2022, at pp. 18-19.

in the results would be the unsuccessful bidder's score for each criteria, a side-by-side comparison to the successful bidder(s), and the range of scores across all bidders.

- Offer a written description that provides the rationale behind each given score, including an explanation for why the unsuccessful bidder's score was higher or lower than the successful bidder's score.
- Document these feedback sessions (anonymizing the unsuccessful bidders and noting where unsuccessful bidders declined invitation for feedback) inclusive of date and time. Such documentation could be captured as an attachment in the initial program Advice Letter.
- All scoring criteria should be provided in the RFP process and should be clear and understandable to bidders.²²

These recommendations establish another channel for constructive feedback between third-party bidders and IOUs that could result in incremental improvements towards bid quality and diversity. This improvement would be a result of granting third-party bidders the opportunity to better understand areas of improvement in their unsuccessful bids. Third-party bidders could then apply those lessons learned towards future and likely more competitive, if not successful, bids. This reduces unnecessary burdens and manages risk to bidders and IOUs by clarifying uncertainties in what led to the third-party's unsuccessful bid, generally resulting in improved quality and diversity of future bids.

VIII. CONCLUSION

The Council appreciates the opportunity to provide Opening Comments on the Proposed Decision. In addition, the Council requests that the Proposed Decision be modified for the reasons stated above. Those needed modifications to the Proposed Decision are included in Appendix A (Proposed Modifications to Findings of Fact, Conclusion of Law, and Ordering Paragraph) attached and incorporated by reference hereto.

²² Council Opening Comments on Ruling Seeking Comments on Third Party and Other Issues, submitted in this proceeding on August 9, 2022, at pp. 18-19.

Dated: January 13, 2023

Respectfully submitted,

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APPENDIX A

THE CALIFORNIA EFFICIENCY + DEMAND MANAGEMENT COUNCIL PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERING PARAGRAPHS FOR THE PROPOSED DECISION ADDRESSING ENERGY EFFICIENCY THIRD-PARTY PROCESSES AND OTHER ISSUES

The California Efficiency + Demand Management Council (“the Council”) proposes the following modifications to the Findings of Fact, Conclusions of Law, and Ordering Paragraphs of the Proposed Decision Addressing Energy Efficiency Third-Party Processes and Other Issues, mailed in R.13-11-005 (Energy Efficiency) on December 20, 2022 (“Proposed Decision”).

Please note the following:

- A page citation to the Revised Proposed Decision is provided in brackets for each Finding of Fact, Conclusion of Law, or Ordering Paragraphs for which a modification is proposed.
- Added language is indicated by **bold type**; removed language is indicated by **bold strike-through**.
- A new or added Finding of Fact, Conclusion of Law, or Ordering Paragraph is labeled as “**NEW**” in **bold, underscored** capital letters.

CONCLUSIONS OF LAW:

2. [66] If an IOU seeks performance assurances in third-party contracts, it should be required to provide to the PRG and IE for review and comment its analysis of the risk the contract presents to ratepayers, **including assessing the financial impacts of those performance assurances**, and explain how the performance security is appropriate to the contract size, scope, and associated risks. **The IOU must include in its analysis clearly defined criteria to be established by the Commission.**

6. [66] If an IOU proposes to require cybersecurity insurance as part of a solicitation, that requirement should be disclosed, along with the justification for it **including addressing consistent analysis criteria to be established by the Commission**, and discussed with the PRG and IE prior to the solicitation.

10. [67] The TSB metric adopted in D.21-05-031 ~~should~~ **can** be included in the standard and modifiable terms and conditions for third-party contracts. Other metrics may also be used.

25. [69] The Reporting PCG should continue to serve as the managing body for CEDARS, CET, and associated calculators and databases and should develop a scope of work for one of the portfolio administrators to solicit a project coordinator responsible for developing a governance document and an annual development plan. **The annual development plan shall summarize input received from each stakeholder and how the plan did not incorporate each failed recommendation.**

ORDERING PARAGRAPHS:

2. [70] Pacific Gas and Electric Company, San Diego Gas & Electric Company, Southern California Edison Company, and Southern California Gas Company shall not require performance assurances from third-party contractors unless they first present to their procurement review group and independent evaluator an analysis of the risk the contract presents to ratepayers, **including financial impacts**, and an explanation of how a proposed performance security is appropriate to the contract size, scope, and associated risks. **The investor-owned utility must use clearly defined criteria in their risk analysis, to be established by the Commission.** Thereafter the investor-owned utility may negotiate with the third-party to include performance assurances. Performance assurance requirements shall not be added after a contract has been executed.