

**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)

**OPENING BRIEF OF THE CALIFORNIA WIND ENERGY ASSOCIATION,
CALIFORNIA BIOMASS ENERGY ALLIANCE, L.L.C., AND VULCAN POWER
COMPANY ON RPS STANDARD CONTRACT TERMS AND CONDITIONS**

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I. INTRODUCTION

Pursuant to the October 22, 2003 Administrative Law Judge's Ruling Establishing Procedure for Adoption of Standard Contract Terms and Conditions ("ALJ Ruling") the California Wind Energy Association, California Biomass Energy Alliance, L.L.C., and Vulcan Power Company ("Joint Parties") submit this opening brief on Renewables Portfolio Standard ("RPS") standard contract terms and conditions. The Joint Parties represent a variety of renewable technologies, including wind, biomass and geothermal generators.

In this opening brief, the Joint Parties set forth a comprehensive proposal for standard contract terms and conditions in the California Public Utilities Commission's ("Commission") RPS program. This proposal consists of the following components: (i) a description of the function and use of standard contract terms and conditions; (ii) a set of contract terms and conditions that should be standardized, along with descriptions of the key purposes and policies associated with such terms; and (iii) a process to be used by the utilities for incorporating standard terms and conditions in, and otherwise conducting, their RPS solicitations.

In accordance with the directive in the ALJ Ruling, the Joint Parties do not, with one exception, propose specific contract language in this brief. Instead, the Joint Parties focus on the purposes and key policy implications of the relevant terms and on their inter-relationships. The Joint Parties seek guidance from the Commission as to such items so that,

when the parties are to propose specific contract language in the next phase of this effort, they will be operating from a common and narrower set of options.

II. BACKGROUND

Public Utilities Code Section (“§”) 399.14(a)(2)(D) requires the Commission to adopt standard contract terms and conditions, including performance requirements, for use by utilities and renewables under the RPS program. In Decision 03-06-071, the Commission declined to adopt a full contract as a number of parties had proposed. D.03-06-071, at 56. Rather, the Commission stated that it would adopt standard terms and conditions, including performance requirements, and directed the parties to negotiate further on the implementation of the requirements of §399.14(a)(2)(D). *Id.* The Commission provided guidance to the parties, however, directing them to use both the Edison Electric Institute (“EEI”) form contract as the starting point for developing standard contract terms and conditions (*id.* at 73, Conclusion of Law 27) and the proposal contained in the joint principles of San Diego Gas & Electric Company and The Utility Reform Network (“SDG&E/TURN Joint Principles”) as the basis for negotiations. *Id.* at 57.

The SDG&E/TURN Joint Principles listed the following nine terms as deserving standardization: product definitions, contract term (ranges of years), Commission approval language, Supplemental Energy Payment (“SEP”) awards and contingencies, ownership of renewable energy credits (“RECs”) and environmental attributes, performance standards, non-performance or termination penalties, scheduling coordination, and responsibility for imbalances. The SDG&E/TURN Joint Principles also described a process for distribution and review of utility proposed contracts in advance of RPS solicitations.

Two workshops were held on standard terms and conditions in September. At these workshops it quickly became apparent that broad consensus was impossible. Pacific Gas and Electric Company (“PG&E”) and Southern California Edison Company (“Edison”) representatives argued that only a very limited number of terms should be standardized, and that the utilities should have maximum flexibility with respect to using standard terms in their RPS contracts. Renewable parties did not all agree amongst themselves, but generally favored more standardization and more structured contracting practices than did PG&E and

Edison. Disagreement among the parties, utilities and renewable parties, extended beyond the general issues of what terms should be standardized and what it means to standardize a term; parties were unable to agree upon the basic function of a term that all agreed should be standardized: “Commission Approval”. In the face of this stalemate, the parties sought direction from the Administrative Law Judge. Such direction was provided in the ALJ Ruling.

The ALJ Ruling directs the parties to submit opening and reply briefs on standardizing contract terms and conditions. The ALJ Ruling provides that “terms and conditions standardized by the Commission must be the same in all RPS contracts. . . .” ALJ Ruling at 2. The Joint Parties understand this to mean, at a minimum, that the utilities must all employ the same standard terms and conditions adopted by the Commission; the Joint Parties strongly support this aspect of the ALJ Ruling.¹ The ALJ Ruling also provides that standard terms may not be modified by negotiation, but that parties may argue that the adopted standard terms should allow for negotiation. *Id.* As discussed more fully below, the Joint Parties believe that allowing for negotiation of standard terms and conditions within a specific structured solicitation process will enhance benefits to ratepayers, utilities and renewable developers. Finally, the ALJ Ruling directs the parties to explain, using a specific list of potential terms and conditions discussed at the workshops, which terms should be standardized and why (or why not), the purpose and key policy implications of each term and the relationship or interaction of each term to other contract terms and conditions. *Id.* at 3-4.

III. DISCUSSION

A. THE ELEMENTS OF THE JOINT PARTIES’ PROPOSAL

In considering the standardization of contract terms and conditions, the Commission must appreciate that the processes involving (i) the utilities soliciting contract proposals, (ii) the parties arriving at mutually acceptable contract terms and (iii) the Commission and the Procurement Review Group (“PRG”) evaluating contracts that are executed (including

¹ Requiring all the utilities to employ the same standard terms and conditions further supports allowing negotiating flexibility after the short-list is finalized, as discussed below, as there may be valid reasons unique to a utility to deviate from the standard term.

with reference to proposals that were not awarded) are inter-related and intricate. If a utility request for proposals (“RFP”), for example, includes a form contract that is unduly onerous and out of step with market realities, potential bidders will be discouraged from submitting proposals, those that do likely will either bid higher prices to accommodate the unreasonable terms and/or will propose numerous deviations from the form. As a result, open-ended negotiations are likely to follow and evaluators will be faced with comparing disparate contract structures (i.e., comparing the proverbial apples to oranges). Worse still, in light of the increased transaction costs and lack of good information resulting from a starting point that is unworkable, higher contract prices than necessary can be expected to result. If, on the other hand, the RFP contains a reasonable form contract, it will encourage participation and provide useful information; the Commission should expect that the awarded contracts will generally comport with the form and be easy to compare, and that contract prices will be minimized.

Standardizing contract terms and conditions serves a number of valuable purposes. As discussed above, it will reduce transaction costs for the utilities and bidders (and regulators). Because standardized terms should be reasonable and will enhance certainty for bidders, standardization will increase participation and, as result, competition in utility solicitations. For these same reasons, standardization also should promote reduced bid prices and successful project development. Standardization will also promote fairness and consistency in the solicitation process, as the Commission will be better able to oversee utility actions and intervene as necessary to curb abuses. It will also provide much needed transparency for the RPS program, at a time when utility procurement activities are shrouded in an unprecedented amount of secrecy. Last, but not least, standardization will reduce litigation concerning utility solicitations, as interested parties know in advance what to expect. These benefits associated with standardization of contract terms and conditions are all gained in direct proportion to the amount of standardization (e.g., the more that is standardized the greater will be the reduction in transaction costs, the increase in transparency, etc.).

Notwithstanding these important benefits of standardization, the Commission should appreciate that it will be impossible to adopt standard contract language that will suit every project attribute and market circumstance. Parties must have sufficient flexibility to deviate

from the standard terms to tailor contract provisions to actual project and market characteristics and to enhance value where possible. In addition, it is necessary to recognize that circumstances change over time and that contract terms will evolve accordingly.

In light of these realities, and based upon the discussion at the workshops held this past September, the Joint Parties expect that some parties will suggest that the Commission should not attempt to standardize a lot of terms, including some of the terms most in need of standardization. *The Joint Parties urge the Commission to reject this position.* Instead, the Joint Parties have developed a three-pronged proposal to standardizing terms and conditions that will provide the benefits of standardization, while allowing for necessary flexibility. The Joint Parties' proposal involves (i) a definition of what it means to standardize a term that recognizes the inter-relationship and intricacies of contract solicitation, formation and evaluation (as discussed above); (ii) standardization of those key terms and conditions (other than those that will be bid, such as contract price) that could materially affect financing and project success; and (iii) a process by which the utilities will conduct RPS solicitations that will allow fair bid comparisons, meaningful participation and regulatory oversight, and that will minimize controversy. The Joint Parties urge the Commission to adopt each of these components as a comprehensive approach to standardizing contract terms and conditions for the RPS Program.²

B. WHAT DOES IT MEAN TO STANDARDIZE A TERM?

The ALJ Ruling indicated that standard terms adopted by the Commission may not be modified by negotiation. ALJ Ruling at 2. The ALJ Ruling goes on to state, however, that parties may argue that the adopted standard terms should allow for negotiation. *Id.* As discussed above, the Joint Parties believe that there are tremendous benefits associated with standardization, which benefits increase with the number of terms standardized. The Joint Parties also believe that flexibility to tailor contract terms to address specific project circumstances or market realities is an essential component of an efficient RFP process. Accordingly, if the Commission were to adopt a rigid requirement that standard terms may

² The Joint Parties caution that the foregoing is an integrated proposal and that individual elements may not work in isolation of the others.

not be negotiated, there will be a perverse incentive to standardize only a few terms (i.e., those that comfortably may be locked in stone for all potential bidders). This will result in a tremendous loss of potential benefits associated with adopting standard terms and conditions.

As such, the Joint Parties believe that by providing a specific role for standardized terms and conditions in the utility solicitation process, and by allowing most of the standard terms to be negotiable within this specified process, the benefits of standardization will ensue without the loss of needed flexibility. The Joint Parties propose the following ten-point role for standard contract terms and conditions adopted by the Commission.

1. **Standard terms approved by the CPUC should be per se reasonable for use by utilities.** This will provide the parties with an incentive to utilize the standard terms, while not unduly discouraging them from deviating from the standard terms if such deviations are warranted, and can be justified, under the circumstances.
2. **Standard terms must be included in a form contract that is attached to the utility RFP.** This will ensure that the RFP progresses from a base contract form that contains reasonable terms and conditions that already have been approved by the Commission. This will promote transparency and fairness, minimize transaction costs and provide other benefits associated with standardization.
3. **In the contract that is attached to the RFP, the standard terms pre-empt the field on the relevant subject matter (i.e., if performance requirements are standardized, the utility cannot propose alternative performance requirements or impose additional performance requirements.)** This will, again, ensure that the RFP progresses from a base contract that contains reasonable terms and conditions that already have been approved by the Commission. If the utilities are free to add new conditions to a term already approved as standard by the Commission, or to employ terms other than the standard terms, then the benefits of standardizing the terms will be lost.³
4. **Developers can, without restriction, respond to the RFP with terms that deviate from the standard terms, and the utilities must consider the**

³ The Joint Parties considered allowing the utilities to propose both the standard term and an alternate term that the utility might prefer. The Joint Parties rejected this approach, as it would undermine the benefits of standardization without providing material benefits. As discussed below, bidders that are unable or do not desire to use the standard terms are free to propose deviations (i.e., are not restricted by the required use of the standard terms in the initial RFP contract) and the utilities are free to propose alternate terms after the short-list is finalized (i.e., also are not restricted by the required use of the standard terms in the initial RFP contract).

deviations. This will allow, for example, a developer that can provide additional benefits to the utility to enhance its bid, while at the same time allowing a developer that cannot accept a given standard term for any reason to nevertheless participate in the RFP. This will for provide needed flexibility, encourage greater participation, lower costs and enhance value.

5. **The utility must establish a short list of bidders based only on the bids submitted in response to the RFP. The utility must identify to the PRG (or to the Energy Division if the PRG no longer exists), among other things, all bids received, and an assessment of how the utility evaluated bid deviations. The assessment of deviations shall include a price adder or subtractor, stated in dollars per MWh or dollars per MW (as applicable) associated with each material deviation.** This will, among other things, promote fairness and ensure that bids are being compared and evaluated, as much as possible, on an “apples to apples” basis.
6. **The utility is free to negotiate individually with bidders on the short list, and the bidder could agree or not agree to change standard terms in those negotiations.** This will for provide additional flexibility and could result in enhanced utility and ratepayer value.⁴
7. **The utility must present its proposed contracts to the PRG (or to the Energy Division if the PRG no longer exists), again assessing any deviations from the standard contract terms in the same manner as described above.**
8. **The utility must file its executed contracts for Commission approval by advice letter. Subject to potential confidentiality constraints, the advice letter must identify those terms that deviate from the standard terms and conditions and the value placed on those terms by the utility.** This will promote transparency and fairness and permit interested parties to participate effectively in the RPS process.⁵
9. **All utilities must use the same standard contract terms.** Among other things, this will ensure that renewable developers are not be benefited or disadvantaged simply because of their project location, and that contract terms

⁴ The Joint Parties considered attempting to restrict the utility’s ability to propose deviations from the standard terms. In light of the potential for enhanced ratepayer value, the difficulty in policing any such restriction and the fact that the benefits of standardization will be provided for even if the utilities are free to negotiate after the short list is finalized under the Joint Parties’ proposal, the Joint Parties rejected such a restriction.

⁵ As discussed below, the Joint Parties believe that confidentiality constraints should be minimal, and apply only to the identity of the counterparty, information from which the identity could be determined and contract price.

and conditions will not be a basis for renewable suppliers to seek or avoid one utility purchaser over another.

- 10. Periodically (at least every two years), the contract terms actually used in RPS contracts would be evaluated by the Commission, the standard terms and the RFP process would, if necessary, be reevaluated by the Commission.** This will ensure that standardized terms continue to meet real and changing market needs.

With the foregoing meaning and use established for standard terms and conditions, the Commission can both standardize all of the key contractual terms (realizing the benefits from having done so), while at the same time not stifle the flexibility that will yield additional benefits. The Joint Parties strongly prefer such a mechanism to a restrictive rule that all standard terms are non-negotiable.

C. WHICH TERMS AND CONDITIONS SHOULD BE STANDARDIZED, HOW DO THEY RELATE TO OTHER TERMS AND WHAT IS THEIR KEY PURPOSE?

1. Commission Approval

There was consensus at the workshops that “Commission Approval” was a term that merited standardization. Generally speaking, Commission Approval is a condition precedent to the performance of most of the obligations of the parties. Prior to Commission Approval, for example, the developer is not obligated to develop the project and sell electricity to the utility and the utility is not obligated to purchase electricity from the developer under the contract. Commission Approval usually is not a condition precedent to such obligations as the requirements to seek Commission approval, to maintain confidentiality and to cooperate reasonably in furtherance of the contract, which commence upon contract execution. The Commission Approval term usually includes a definition of what it means to have “Commission Approval,” a statement of the parties’ obligations to obtain such approval and a statement of the obligations that do and do not commence before Commission Approval is obtained.

Commission Approval is almost always linked to two other important contract terms, project development milestones and a termination provision. Regarding milestones, Commission Approval is usually one of the triggers for the commencement of the deadlines

by which milestones must be met. For example, a contract might provide that project construction must begin within a certain number of months following Commission Approval. Regarding termination, contracts for which pre-approval are sought (like the RPS contracts) will usually provide that if Commission Approval does not occur within a certain designated time frame, the parties may terminate the contract.

Given the important function of the Commission Approval term, and the controversy that arose at the workshops and in prior renewables RFPs concerning this term, the Joint Parties recommend that this term be standardized.

Two fundamental policy issues are implicated by this term and should be resolved by the Commission before the parties are tasked with negotiating the relevant contract language. First, must a Commission decision approving a given contract be final and no longer subject to appeal to constitute Commission Approval or should a Commission decision approving the contract in and of itself constitute Commission Approval? Second, must the Commission decision approving the contract also approve of all of the utility's conduct relating to the RFP, or is approval of the contract and a finding that payments under the contract are reasonable and will be passed through in rates (assuming prudent contract administration by the utility) sufficient to constitute Commission Approval?

On the first issue, a Commission decision should be final and no longer subject to appeal in order to constitute Commission Approval. Although this choice could delay the formal commencement of, and some activities under, the contract, until all appeals have run on the approval of the contract the ultimate sanctity of the contract will be uncertain. It suits no party's purposes to commence obligations to develop a project, for example, until that uncertainty is resolved. Consider the problems that would result if a contract is approved in one decision, and that decision is later vacated by a subsequent Commission or court order. In reality, any prudent lender will refrain from committing, or condition its commitment, to fund a project upon the termination of all possible appeals. As such, little is really lost in waiting for the expiration of all appeal periods or rejection of all appeals.

On the second issue, a Commission decision should not have to approve of all of the utility's conduct to constitute Commission Approval; approval of the contract at issue and a finding that the payments under such contract are reasonable and will be passed through in

rates should be sufficient. This very issue was raised in both of Edison's recent renewables RFPs.⁶ In essence, by linking approval of the contract to approval of all of the utility's conduct, the utility is holding its contracts hostage for a ruling from the Commission preempting any claims against the utility for improper conduct, no matter how egregious. If the Commission believes that a given contract is reasonable and should be implemented, there is no reason why the Commission must also find that all other parties are without rights to complain about utility conduct (which complaint might have no bearing at all on the adopted contract) in order for the contract to be accepted. If a third party were to seek to overturn the approved contract based upon the utility conduct, such action would need to be in the form of an application for rehearing of the initial Commission decision, and related relief, and would constitute an appeal requiring resolution before the Commission approval constitutes final Commission Approval. It is very possible, however, that a third party might seek relief other than disturbing the approved contracts and such contracts should not be held in limbo pending resolution of such third party's claims. Certainly, such third party's claims should not be rejected due to the desire to implement executed contracts, but should be evaluated based upon their own merits.

2. Definition and Ownership of RECs

There was consensus at the workshops that the definition of what constitutes a REC and who owns the REC should be standardized. The Joint Parties agree but take no further position on this issue at this time.

3. SEP Awards, Contingencies

There was consensus at the workshops that provisions regarding SEP awards and contingencies in the event that an anticipated award is not forthcoming should be standardized. Essentially, if SEP payments are required to enable a bidder to be paid its bid price (i.e., its bid price exceed the applicable market price referent), then an SEP award must constitute a condition precedent to the developer's obligations to begin to develop the project, meet milestones and sell electricity (and related obligations). As with the

⁶ See, e.g., Emergency Motion of the California Wind Energy Association for an Ex Parte Order Requiring Changes to Edison's August 2003 Renewable Resource RFP, September 16, 2003 ("CalWEA Motion"), at 18.

Commission Approval condition precedent, a necessary SEP award will be linked to milestone deadlines and a termination option.

The real difficulty with SEP awards is not in connection with how it works as a condition precedent; the Joint Parties do not expect that the foregoing will be particularly controversial. On the contrary, the real issue will relate to what happens if there is insufficient funding in the future to permit payment of necessary SEP awards. The Joint Parties understand that the budget for SEP payments is not necessarily guaranteed for the life of an award and may be diminished by a subsequent act of the Legislature. This may prove to have significant negative consequences to a project requiring financing, as lenders are unlikely to take significant risks with payment streams necessary to fund debt service. At a minimum, it must be clear that if SEP awards are not paid in the future, the developer may, at its option, terminate the contract without any liability whatsoever. This does not solve the key problem of the potential for a lack of necessary project income, but it will mitigate one of the potential concerns that lenders will have with this issue.

4. Confidentiality

There was consensus at the workshops that confidentiality provisions should be standardized, and it was noted that a Commission decision is expected on confidentiality that would set key parameters for the contract provisions. The Joint Parties believe that, in order to ensure that the RPS program has maximum fairness, credibility and verifiability, confidentiality protections with respect to contract terms and conditions should be kept to a minimum. With the development of standard terms and conditions, there should be less need for confidentiality. In particular, the Commission should only allow the contract price and those terms that can be used to identify a given renewable project owner (e.g., its name, address, delivery point) be kept confidential. All other terms and conditions, including any negotiated terms and summary pricing (without attribution to a particular project), should be open for public review. Providing transparency and credibility in the renewable bidding process is essential to the success of the RPS program.

5. Contract Term

There was consensus at the workshops that the contract term provision should be standardized. The Joint Parties agree but take no further position on this issue at this time.

6. Eligibility

There was consensus at the workshops that the RPS eligibility provisions should be standardized. The Joint Parties agree but take no further position on this issue at this time.

7. Performance Standards / Requirements

Performance requirements, along with the related provisions on non-performance penalties, default, pricing structure and credit, are among the most important contract provisions, and for which standardization is most critical. If these terms are not established properly, then either project developers will be unable to obtain financing and/or survive for the life of the contract (if the terms are unduly onerous) or the utilities will not get full value for their money (if they are unduly lax). As evidenced by the controversy surrounding the performance requirements in the recent Edison renewables RFP, Commission action on performance requirements is essential.⁷

Standardizing the performance requirements is also necessary to ensure that developers are competing, and their bids are being evaluated, on an even basis. Similarly, standardizing performance requirements is necessary to ensure that the market price referents are reflective of products against which they are being compared. For example, if two bidders offer a firm baseload product at the same price, but one (Bidder A) is held to a much higher performance requirement than the other (Bidder B), then Bidder A is offering a more valuable product than Bidder B and should win the bid. Similarly, if the market price referent assumes a very low performance requirement relative to the requirements applicable to bidders, then the assumptions in the referent formula for operations and maintenance expenses, financing costs, insurance and other items that vary depending upon risk of non-performance penalties may be skewed.

⁷ See, e.g., CalWEA Motion at 5-7.

The importance of standardizing performance requirements was recognized by the California Legislature, which expressly required the Commission to standardize the performance requirements in § 399.14(a)(2)(D).

Generally speaking, performance requirements are those provisions that set the minimum requirements applicable to project performance in order for the developer to qualify for contract payments and to avoid certain non-performance remedies (including, potentially, reduced capacity payments, replacement cost obligations and contract termination as discussed below). Performance requirements most often take the form of energy delivery requirements, capacity factor requirements, mechanical availability requirements, or tests concerning responsiveness to dispatch requests. There may be more than one type of performance requirement in a given contract.

As mentioned above, performance requirements are inextricably linked to a number of other key contract terms, including non-performance penalties, default, pricing structure and credit. For example, the most onerous performance requirement would be virtually meaningless if the remedy for non-performance (or the developer's credit) were not meaningful; conversely, an otherwise reasonable performance requirement would become intolerable if the remedy for non-performance was too draconian. Stated another way, the risks and benefits associated with a given performance requirement are linked to the remedy and credit provisions in the contract. In addition, it is not uncommon to embed performance incentives (or even requirements) within the pricing provisions. At times these embedded incentives or requirements can make separately stated requirements duplicative, unnecessary or overly burdensome.

The key policy issues associated with the performance requirements involve the form that the requirement should take, and how strict the requirements should be, in light of the underlying product. Given the controversy that likely will surround negotiating performance requirements, the Commission should establish the key parameters before sending the parties off to negotiate. Fortunately, the Standard Offer QF contracts have been relatively successful with respect to their performance requirements and, along with contracts from other jurisdictions, can offer guidance to the Commission.

For firm baseload and firm peaking products, there should be relatively strict energy delivery and capacity availability requirements during the applicable delivery periods. The delivery period for a baseload product is expected to cover most, if not all of the year, while the delivery period for a peaking product is expected to cover peak periods only. An appropriate threshold is an 80% monthly capacity factor, subject to allowances for force majeure (including utility/ISO curtailment) and scheduled maintenance. Firm products also should have a commercially reasonable efforts requirement to deliver at full output during emergencies. These correspond generally to the requirements for firm capacity under the Commission's Standard Offer QF contracts.

For as-available baseload and as-available peaking products, there should be relatively strict mechanical availability requirements during the applicable delivery period. An appropriate threshold is an 80% annual availability requirement (subject to allowances for force majeure). In addition, as-available products should contain relatively modest energy delivery and capacity availability requirements. An appropriate threshold is 60% of expected deliveries measured over a two-year period. This reflects that as-available projects are not (and likely cannot) guarantee that energy will be produced at any given time, for example because of an intermittent fuel source, but nevertheless should be able to keep their equipment in good repair and meet some minimum level of delivery requirement.

As long as the facility meets the above requirements, and there is no unusual event or circumstance reasonably calling into question the facility's ability to continue to meet the requirements, there should be no other performance requirements. For example, there should be no requirement that the facility separately demonstrate to the utility that it is able to meet the performance requirements if indeed it has met and is meeting these requirements. Such a demonstration test, which was a feature in Edison's recent RFP, is unnecessary and rife with issues (e.g., when should the test be taken? over how long a period?).

8. Product Definitions

Depending upon what is meant by "Product Definitions," this term is either akin to (or even synonymous with) performance requirements and critical for standardization, or it could be fairly benign and only merit standardization for linguistic consistency. For

example, the EEI contract incorporates the performance requirements applicable to a given product right in the product definitions set forth in Schedule P. This results primarily from the nature of the EEI form as a trading contract that contemplates numerous transactions between the same buyer and seller. Most contracts between a given power plant owner and a buyer, on the other hand, will have separately stated performance requirements that, in reality, define the underlying product, and contain a product definition that is hortatory (e.g., “on a firm basis”). In either case, the Joint Parties suggest that the product definitions be standardized, if nothing else, to ensure that the given products are called the same things for semantic efficiency purposes. More importantly, if performance requirements are to be included within the product definitions, then it is critical (and required by statute) that they be standardized as discussed above.

9. Non-Performance or Termination Penalties and Default Provisions

As stated above, non-performance, termination and default provisions, which are commonly referred to in contracts as default, remedies and termination provisions, are related to performance requirements (although there are default, remedy and termination provisions that are not related to performance requirements) and are critical terms deserving of standardization. Again, if these terms are not properly balanced then either the developer will be unable to finance its project (or survive), or the utility will receive inadequate value. Accordingly, the Commission should require that these terms be standardized and provide guidance to the parties on the key policies to be contained within these terms. Fortunately, the EEI contracts, adopted by the Commission as the basis for standard contract terms and conditions, provides a good starting point.

The EEI Master Agreement contains in Section 5.1 appropriate provisions defining those events that constitute defaults, including nonpayment (5.1(a)), breach of a representation (5.1(b)), failure to perform a material covenant (5.1(c)), and bankruptcy or other credit-related event (5.1(d)-(h)), except for the following. The cure period for failing to meet a material covenant in Section 5.1(c) should allow for 30 days (rather than 3 days), plus a reasonable amount of time if the default cannot be remedied within 30 days and the non-defaulting party is kept whole in the interim. In addition, a repeated or prolonged failure to

deliver or receive energy (e.g., energy output is delivered/scheduled to a third party by the generator or energy delivered is not accepted/scheduled by the utility) should be an additional Event of Default. Further, the failure to meet performance requirements should not generally constitute an Event of Default, as the remedy for such a failure will be separately stated (as discussed below) and falls short of the remedies for an Event of Default;⁸ provided that failure to meet the performance requirements for three consecutive periods (assuming that reasonable performance requirements are adopted) should be an Event of Default. Finally, failure to meet a milestone should be handled separately, as discussed below, and should not be an Event of Default.

Remedies for Events of Default are set forth in the remainder of Section 5 of the EEI Master Agreement, and include an option for the non-defaulting party to terminate the contract and to receive a Termination Payment based on the remaining value of the contract relative to prevailing market prices. The EEI Master Agreement, however, currently allows for a defaulting party to receive a payment from the non-defaulting party in the event that the contract is less valuable to the non-defaulting party than expected replacement contracts. While this may be appropriate in a trading context, in which parties that do not necessarily have assets other than their contracts engage in numerous back-to-back transactions and rely on performance by each and every party to remain solvent, it is not appropriate in a basic contract between a buyer and seller such as the RPS contracts. Accordingly the Termination Payment provision should be changed such that a non-defaulting party that terminates the agreement does not (even if the contract is less valuable to the non-defaulting party than expected market conditions) make a Termination Payment to the defaulting party.

Remedies for missing a milestone should be limited to contract termination and forfeiture of the Project Fee (which will be discussed below). If the failure to meet a milestone resulted from a force majeure event or an act or omission of the utility, the developer should have the option to terminate the contract (and receive back its Project Fee) or extend the milestone appropriately.

⁸ It is necessary to expressly provide as such so that the failure is not caught within the general “any other material failure” Event of Default in Section 5.1(c).

Remedies for failure to meet performance requirements (other than in three consecutive periods) should be limited to liquidated damages (based on the replacement costs of the energy or capacity not provided in the relevant period) and reduced capacity payments. Firm projects that miss performance requirements should have their capacity payments reduced pro rata based upon the capacity that they actually provided. As-available projects that miss performance requirements automatically have their capacity payments reduced because they are paid based upon performance (as discussed below); no other capacity payment reduction method should be provided for as-available products.

In addition to a termination remedy for Events of Default and failure to meet milestones as discussed elsewhere, each Party should have a termination right if CPUC Approval is not obtained within a reasonable amount of time. The amount of time might vary depending upon whether Commission approval requires the expiration of appeal periods. Assuming that it does, as the Joint Parties recommend (as discussed above), then the parties should have a termination option if (i) the Commission has not issued a decision approving the PPA within 120 days of the utility filing seeking approval, (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. Upon any such termination, the Project Fee should be refunded with interest.

In addition, if force majeure prevents substantial performance by either party for 18 months or more, the non-affected party should have a termination right with no other remedies. Finally, the developer should be provided a termination right, with no liability to the utility, in the event that needed SEP payments are not awarded or are discontinued. If the contract is terminated prior to return of the Project Fee, it should be returned with interest. There should be no other termination rights.

10. Milestones

Milestone provisions are another set of terms that could, if not done correctly, cause a project to be non-financeable or unsuccessful. They are designed to chart out a reasonable timeline by which a project must be developed or face contract termination, so as to ensure that utility resources and SEP awards are not tied up with projects that are unlikely to be

developed. As such, all parties have an interest in appropriate milestones. As discussed elsewhere herein, milestone provisions relate to termination rights and credit terms. Accordingly, the Joint Parties urge the Commission to standardize the milestone provisions.

While some might assert that milestones are too project-specific to standardize, the truth is that there is enough commonality in the milestones of all projects to accommodate a standard set of milestones. This is particularly apparent when considering that the time period allowed for achieving nearly all milestones should be one of the elements that developers include within their bids. The following is an exclusive list of milestones that should be adopted by the Commission.

First, the developer should post the Project Fee upon contract execution. Second, after Commission Approval occurs and other conditions precedent are satisfied, the developer should obtain the relevant CEQA, or equivalent primary, governmental permit within the time period specified in its bid. Third, the developer should commence construction of its project within the time period specified in its bid. Finally, the developer should achieve commercial operations within the time period specified in its bid.

As discussed above, the remedy for missing a milestone should be limited to contract termination and forfeiture of the Project Fee; provided that if the failure to meet a milestone resulted from a force majeure event or an act or omission of the utility, the developer should have the option to terminate the contract (and receive back its Project Fee) or extend the milestone appropriately.

11. Pricing Structures, Restrictions

One of the most important contract terms, and one most important to standardize, is the pricing structure (i.e., the formula to be employed to determine contract payments) to be included within the contract. For example, are payments to be “all-in” to correspond to the all-in market price referents, or may there be separate capacity and energy payments? If there can be separate capacity and energy payments, should there be any restrictions to ensure that assumptions used in evaluating bids and awarding SEPs remain correct throughout the life of the contract? As referenced above, the contract pricing structure is

linked to, and indeed may contain, performance requirements and remedies in the form of payment reductions or adders for given levels of performance.

The importance of standardizing the pricing structure of RPS contracts has already been recognized by the Commission in Decision 03-06-071. In that decision, the Commission specified that as-available capacity payments will be made in accordance with existing Commission precedent. D. 03-06-071, at 31. In addition, the importance of standardizing the capacity payment pricing structure is also apparent in light of the controversy associated with the as available payment structure contained in Edison's recent renewables RFP.⁹ It is important to keep in mind that, although the Joint Parties believe that the pricing structures must be standardized, they can be subject to negotiation in accordance with the specified contracting mechanism discussed above.

The Joint Parties believe that it is appropriate to separate capacity and energy payments, so long as reasonable restrictions are imposed (as discussed below). The pricing structure for energy payments should be the same for all products and contracts. Energy payments should be time differentiated cents/kWh payments using current QF (or refined) time of use periods. This will send proper price signals to developers, encouraging maximum generation when power is most needed.

The capacity payment structure for firm products (baseload and peaking) should involve a fixed dollars per MW/year capacity payment assuming that applicable performance requirements are met. As discussed above under non-performance penalties, failure to meet the performance requirements should result in a pro rata reduction of capacity payments.

In evaluating the total costs of a firm contract with separate capacity payments, it will be necessary to assume a certain level of performance so as to evaluate the total costs of the project proposal. It also will be necessary to assume a level of performance to convert the distinct energy and capacity payments to an "all-in" price in order to determine whether SEP awards are warranted. In fact, in Decision 03-06-071, at page 31, the Commission required firm product bidders to bid all-in bid prices. If the utility employs unreasonably high

⁹ See, e.g., CalWEA Motion at 8-9.

performance assumptions in evaluating a given bid, it is almost certain that actual “all-in” cost of the project on a cents per kWh basis will exceed the cost included in the bid evaluation. This will unfairly advantage the given bidder. Accordingly, in order to ensure that bidders are not unfairly advantaged in the bid evaluation process and that SEP payments are not made at unexpected levels during the life of a given contract, the Commission should adopt a contract provision requiring that the average “all-in” price paid to all bidders not exceed the “all-in” price contained in their bids.

The capacity payment structure for as available products should, as required in Decision 03-06-071, match the current ISO4, time differentiated cents/kWh payment formula. In other words, developers get paid as-available capacity payments if and to the extent that they generate electricity. As discussed above, this will provide ample incentive to maximize availability and generation during the peak periods, to the extent possible, and will not penalize as-available bidders for circumstances outside of their control (e.g., lack of wind).

Finally, as many renewable developers may be relying upon federal production tax credits or other incentives that are paid only if and to the extent that the project actually generates electricity, it is important that the pricing structure compensate the developer for lost incentive revenues in the event that electricity is not generated as a result of acts or omissions that are deemed to be within the utility’s control. This would include curtailment of interconnection service by the utility and interruption of transmission service by the ISO (other than if caused by negligence of the developer).

12. Credit Terms

Credit terms (generally, what kind of financial assurances of performance may be required and what happens if such assurances are not provided) are another set of key contract terms that can determine whether a bidder is able to finance and perform under the contract. If the credit terms are too strict or allow for strict implementation in the future, compliance may be too costly, or even sometimes impossible. Similarly, if reasonable credit protection is not present in a contract, parties risk having no real remedy in the event of a default (i.e., one cannot squeeze water from a stone). Onerous credit terms will directly

inflate contract prices, as one can usually pay for credit protection. For these reasons, the credit terms should be standardized.

One area in which the EEI documentation is particularly ill suited for RPS purposes is in connection with credit terms. The EEI, as discussed above, was developed as contract for use by energy traders -- parties that do not necessarily have assets other than their contracts that engage in numerous back-to-back transactions, each supporting the other. RPS contracts, on the other hand, will be between two parties that have assets to back up their performance and will have adequate incentives to perform in the form of default provisions.

As such, the only credit provision that should be included in RPS contracts should be a refundable earnest money deposit, payable by a bidder upon contract execution and returnable upon the commencement of commercial operations or in the case of certain contract terminations as discussed above. This deposit or "Project Fee" will discourage fly by night bidders and provide incentives for developers to successfully develop their projects.

Aside from a reasonable and refundable "earnest-money" Project Fee to be paid by a winning renewable bidder upon contract execution, no additional credit support should be required by the utilities or the developers. On the utility side, the financial community is becoming more comfortable with the utilities' current credit situation, which will only improve as the utilities achieve an investment-grade credit rating.

On the developer side, the utility should be comfortable (i) that the Project Fee requirement will weed out weak or non-serious bidders, and (ii) that project development milestones, such as those discussed above, will further ensure that utilities are not saddled with non-viable projects, and (iii) that, once the project achieves commercial operation (and the Project Fee is refunded), the developer has sufficient wherewithal and incentive to deliver product output over the contract term. The large capital investment inherent in developing a project, which often is accompanied by strict debt service coverage ratios and other financial requirements by lenders, combined with the fact that the contract will not allow termination by the developer for economic reasons will adequately ensure 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. Although we have all been affected by the unusual events

of the last three years, 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. There should be no other financial credit requirements once the project is operational and performing under the contract.

13. Power Delivery

The Joint Parties take no position on this term at this time.

14. Delivery Point

The Joint Parties believe, at this time, that the Delivery Point term does not need to be standardized.

15. Contract Modifications

The Joint Parties believe, at this time, that the Contract Modifications term does not need to be standardized.

16. Assignment

Assignment is the transfer of a party's rights or obligations under a contract to a third party. Under California law, the assignment by a party (the assignor) of its obligations to a third party (the assignee) does not release the assignor from its obligations to the counterparty without the express consent of the counterparty. It is a common feature among contracts to provide that parties are not entitled to assign their rights or obligations without the consent of the counterparty, with a few key exceptions.¹⁰ It is important that these exceptions be standardized by the Commission.

First, parties are entitled to make an assignment to an affiliate without counterparty consent. This is important to ensure that if a party reorganizes its business operations among affiliated companies, it may lodge the contract with the appropriate entity without

¹⁰ See, e.g., EEI Master Agreement Section 10.5.

counterparty interference or delay. Consider, for example, the common practice of a bidder to bid in its own name, but then to create a special purpose company to develop the project after it is awarded a contract. Such bidder may avoid the unnecessary expense of establishing a project company if it is not awarded a contract, but should not have any restriction in so doing if it is awarded a contract.

Second, parties are entitled to make an assignment as security to a party providing financing without counterparty consent. The importance of this right is plainly apparent.

Third, parties are entitled to make an assignment to a party that acquires all or substantially all of a given party's assets without counterparty consent. This is necessary to ensure that a counterparty to a single contract is not able to interfere with the sale or disposition of a company's entire business.

It is important to keep in mind that, with an assignment, the assignor is not relieved of its obligations to the counterparty. As such, there is no basis for concern in any of the foregoing scenarios with the creditworthiness of the assignee.

17. Applicable Law

The Joint Parties fully expect that the applicable law under all RPS contracts will be California law, irrespective of conflicts of law principles, and believe, at this time, that the Applicable Law term does not need to be standardized.

18. Dispute Resolution

Disputes can arise under any contract, even if the parties ordinarily enjoy very good relationships. Because of the relative disparity of resources between the utilities, on one hand, and many renewable developers, on the other hand, and because the utilities control the revenue stream for projects, the utilities have a significant advantage over developers in addressing disputes. In particular, the utilities are able to devote more resources and more time to disputes, and can threaten to withhold payment in order to pressure developers. It is important, therefore that a Dispute Resolution term be standardized in order to minimize such undue influence. The Joint Parties are not seeking to gain, and do not propose a mechanism

that will give them, any undue advantage over the utilities; on the contrary, the Joint Parties merely seek to level the playing field.

In particular, disputes under RPS contract should be resolved by expedited binding arbitration. This will mitigate the utilities' ability to engage in protracted, resource intensive litigation. Provisions that require the parties to negotiate for a period of time or engage in non-binding mediation are unnecessary (as the parties can always agree to these steps) and favor the utilities due to their greater resources. In addition, the parties should be required to continue to perform their obligations while a dispute is pending, and the utilities should not be entitled to withhold any disputed amounts. This will ensure that the utilities are not able to bring undue pressure on the developers to accept the utilities' positions. Finally, the contract should provide that the prevailing party in any dispute is reimbursed by the other party for reasonable attorneys' fees and other costs of pursuing the dispute. This will ensure that both parties have incentives to minimize disputes.

19. Representations and Warranties

The Joint Parties believe, at this time, that the Representations and Warranties do not need to be standardized.

20. Indemnity

The Joint Parties believe, at this time, that the Indemnity term does not need to be standardized.

21. Force Majeure

Force Majeure, an event that excuses party non-performance, permeates the entire contract and, as such, should be standardized. If the definition of Force Majeure is unduly restrictive on the developer, the developer will be subject to intolerable performance risks; if it is too lax, the utility may not be getting full value. Conversely, if the Force Majeure definition is too generous to the utility, the developer may have too little assurance of payment.

Generally speaking, there are ample form contract provisions for an RPS Force Majeure provision. Two key items that should be recognized as force majeure events for developers but not utilities are transmission interruptions and utility curtailment. In short, individual developers should not take the risk that the utility grid is functioning properly.

22. Scheduling Coordination

One feature of the California energy market that imposes a particular challenge in virtually all electricity contracts is that the power scheduled to be delivered and received through the California ISO does not always (and in fact often does not) match actual generation or consumption by the parties on an hourly basis. The differences, referred to as imbalances or deviations, are made up by the ISO in real-time. Financial responsibility for the additional power supplied by the ISO, or financial benefits for the excess power disposed of by the ISO, goes to the Scheduling Coordinator (“SC”) for the party whose actual generation or load failed to match the schedule. The ISO addresses imbalances over an entire SC’s portfolio of resources, although each individual SC is free to address imbalances among its customers on an individual basis. The amount of money involved could be substantial.

The Scheduling Coordination term of the contract will state the parties’ obligations in connection with obtaining SC services and related risks and benefits. The Scheduling Coordination term is linked to the Imbalances term, addressed below. As evidenced by the recent Edison renewables RFP, scheduling coordination issues also impact very basic contract issues such as how much energy is deemed to be delivered by the renewable project to the utility (e.g., is it the amount scheduled or generated by the project?) and the disposition of environmental attributes for power generated but not scheduled (e.g., does the utility get credit for the RECs associated with power that is disposed of in the ISO imbalance market?).¹¹ It can, if mishandled, be an extremely problematic provision. In light of the controversy associated with scheduling under the recent Edison RFP and the potentially significant risks associated with scheduling and imbalance issues, the Joint Parties urge the Commission to adopt a standard Scheduling Coordination term.

¹¹ See, e.g., CalWEA Motion at 4-6.

Essentially, in order to most effectively avoid the knotty problems associated with scheduling coordination, such as those raised in the Edison RFP, the Commission should require the utilities to be the SC for any renewable developer that desires the utility to be its SC. Indeed, because the utilities already are the SCs for many other renewable facilities (under standard offer contracts), and for substantial loads as well, they are in a far better position to manage the scheduling risks and responsibilities than is the average renewable developer. If the utilities do serve as the SC, they should be entitled to reasonable compensation for their services, set at the incremental cost to serve an additional project as SC.

If the renewable developer does not want the utility to serve as the SC, an alternative provision should be included within the standard Scheduling Coordination term. As set forth in the CalWEA Motion, the term would be as follows:

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 and confirmed by the ISO as follows: (a) If the metered output is 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 the utility, as it ensures that the utility never pays more than the contract price and, since the utility may be required to pay some amount for output in excess of scheduled amounts, it entitles the utility to all of the environmental attributes (even for power that is absorbed in the ISO imbalance market). 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 the utility 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.

23. Imbalance Issues

Imbalance issues are, to a large extent, addressed in the context of Scheduling Coordination issues above. To complete the picture, a standard term should be adopted specifying that the Scheduling Coordinator for the facility bears the risks and retains the benefits associated with schedule deviations. As such, if the project's SC over-schedules project output, it is responsible for any ISO deviation charges associated with power provided by the ISO to complete the schedule. Conversely, if the project's SC under-schedules project output, it is entitled to keep any revenues obtained by the ISO for the excess power absorbed in the imbalance market.

24. Prevailing Wage, Minority and Low-Income Issues

The Joint Parties believe, at this time, that no standardization of this term is needed.

25. Project Modifications

One issue that has surfaced as a point of contention under California's Standard Offer contracts involves whether project owners are able to modify their projects during the contract term to increase project output or bolster their ability to deliver the required contract capacity.¹² Often, with technology improvements or process changes that are unforeseeable

¹² See, e.g., CalWEA Motion at 12-13.

at the time of contract execution, project developers are able to boost project output, while not increasing net capacity ratings. This increase in output will benefit all parties, as with increased output comes increased delivery of RECs. In order to avoid the controversies of the past, the Commission should adopt a standard term permitting developers to modify their projects to as to increase project output or bolster their ability to provide contract capacity. It would be reasonable to limit increases in capacity to a material amount without utility consent.

26. Flow Down of Provisions

The Joint Parties take no position on this term at this time.

D. THE PROCESS FOR UTILITY SOLICITATIONS

In addition to determining the use and function of standard contract terms and the terms that should be standardized, it is critical that the Commission also prescribes how the utility will incorporate such terms in, and otherwise conduct, their RFPs. This will help to promote transparency, consistency and fairness and is particularly important with respect to the initial RFPs conducted by the utilities. It will also allow for meaningful participation by interested parties, enhance the credibility of the RPS program, and significantly reduce controversy.

In particular, the following process would be used for the first two RFPs for each utility. At that point, the CPUC would evaluate the process, and the need for it for future RFPs.

1. The utility should send its proposed RFP (including the proposed contract form and all other supporting documentation) to the service list in R.01-10-024) in advance of commencing the RFP.
2. Parties should have a reasonable opportunity to file comments on the RFP, form contract and other documentation with the CPUC.
3. The PRG (if it exists), along with the Energy Division and the ALJ also should provide input to the Assigned Commissioner in respect of the RFP materials.

4. The Assigned Commissioner should issue a ruling on the RFP and form contract, either approving it or ordering changes.
5. The utility must incorporate any Assigned Commissioner directives within the RFP.
6. The utility should then follow the RFP and contract approval process discussed above in connection with the meaning and use of standard contract terms.

IV. CONCLUSION

The Joint Parties urge the Commission to adopt the proposals as discussed above. Counsel for the California Wind Energy Association is authorized to execute this opening brief on behalf of the Joint Parties.

Respectfully submitted,

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