

**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)

**REPLY 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**

Thomas Tanton
T² & Associates
4390 Indian Creek Road
Lincoln, California 95648
Telephone: (916) 645 2854
Facsimile: (603) 807 6555
rtanton@psyber.com

Representative for Vulcan Power Company

W. Phillip Reese
California Biomass Energy Alliance, L.L.C.
915 L Street
Sacramento, CA 95814
Telephone: (916) 386-4343
Facsimile: (916) 386-4388
phil@reesechambers.com

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

December 3, 2003

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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 reply brief on Renewables Portfolio Standard ("RPS") standard contract terms and conditions. The Joint Parties represent a variety of renewable technologies, including wind, biomass, solar-thermal and geothermal generators.¹ In this reply brief, the Joint Parties respond to the positions of other parties on RPS standard contract terms and conditions and explain why the Joint Parties' proposal, as set forth in their opening brief, is superior and should be adopted by the California Public Utilities Commission ("Commission").²

II. OVERVIEW

At the outset, it is important to recognize that there are number of issues on which there is significant consensus among the parties. For example, a number of parties, including

¹ In their opening brief, the Joint Parties inadvertently neglected to mention that their constituents include solar-thermal generators, a number of whom are represented by the California Biomass Energy Alliance.

² Failure of the Joint Parties to respond in this reply brief to a particular position taken by another party should not be construed as agreement by the Joint Parties with any such position.

the Joint Parties, endorse an expedited process to review utility requests for proposals (“RFPs”) that includes an opportunity for protests by interested parties and an Assigned Commissioner Ruling addressing the RFP.³ While there is general consensus on the wisdom of such a process and considerable similarities among the different proposals, there are a number of key differences in the proposals, which are highlighted below. For the reasons discussed below, the Commission should adopt the version proposed by the Joint Parties.

There is also considerable support for a specific definition of the meaning (or use) of standardized contract terms, including (i) requiring the utilities to include standard terms in their RPS RFPs, (ii) a presumption of reasonableness for standard terms, (iii) allowing bidders to request deviations from standard terms in response to the RFPs, (iv) compilation of a short list based only on the standard terms and the deviations proposed by bidders (and not based upon alternate utility preferences), (v) an explanation by the utilities of the proposed deviations to the Procurement Review Group (“PRG”); and (vi) allowing the parties to negotiate after the short list is completed and reviewed with the PRG.⁴ Again, although there is considerable similarity among the different proposals, there are a number of key differences. The Joint Parties’ proposal should be adopted.

The greatest disagreement among the parties concerns which contract terms and conditions should be standardized. The utilities advocate that only a relatively small subset of terms be standardized. Edison, for example, asserts that only seven of the ALJ’s list of 26 potential terms be standardized. PG&E and SDG&E, who are joined by TURN, CEERT and IEP (“PG&E et al.”), assert that only nine of the 26 should be standardized. Absent from the utilities’ lists of terms are many critical contractual terms --including credit support, termination and default provisions, milestones, pricing structures, scheduling coordination and others -- that other parties believe should be standardized. In light of their proposal that

³ See, e.g., Joint Parties’ Opening Brief at 28-29; Joint Brief of CEERT, IEP, PG&E, SDG&E and TURN (“PG&E et al. Opening Brief”), at 5-7; Opening Brief on Standard Terms and Conditions of Ridgewood Olinda, LLC (“Ridgewood Opening Brief”), at 9-10.

⁴ See, e.g., Joint Parties’ Opening Brief at 5-8; PG&E et al. Opening Brief at 10-12. The Joint Parties note that Ridgewood Olinda, LLC (“Ridgewood”) specifically opposes the negotiability of terms that have been standardized. Ridgewood Opening Brief at 8-9.

all terms be negotiable (with which the Joint Parties agree), PG&E et al.'s minimal list of terms meriting standardization is inexplicable.

The Joint Parties, Ridgewood and Solargenix, on the other hand, support standardizing significantly more terms, including all of the key contract terms that have the greatest potential to affect financing or project development. The Joint Parties, for example, recommend that 19 terms be standardized.⁵ Solargenix recommends standardizing 22 terms. Ridgewood recommends that 12 terms be standardized, taking no position on a number of relatively non-controversial terms including Eligibility, Contract Term, Delivery Point, Applicable Law and others.⁶

There is also considerable disagreement on the content of a few of the terms that most parties agree should be standardized, including Commission Approval, Confidentiality, Definition and Ownership of RECs and Performance Requirements. The Joint Parties expect that additional disagreement will be reflected in the reply briefs.

As discussed below, the Joint Parties urge the Commission to reject the easy path of standardizing only those few terms on which there is complete, or near complete, consensus. In light of the monopsony power of utilities and the contentious nature of negotiations between the utilities and renewable generators that has pervaded past experience, the Joint Parties urge the Commission to standardize a far greater number of terms for the reasons set forth herein and in the Joint Parties' Opening Brief. Specific responses to the parties' opening briefs are set forth below.

⁵ In the Joint Parties' Opening Brief, only 18 terms were identified as needing standardization. As discussed below, the Joint Parties now recommend that a 19th term, Contract Modifications, also be standardized.

⁶ Ridgewood Opening Brief, Appendix A. The Green Power Institute ("GPI") and Office of Ratepayer Advocates ("ORA") also filed opening briefs but did not take positions on many issues.

III. DISCUSSION

A. RESPONSE TO RIDGEWOOD

1. *Pricing Structures*

The Joint Parties believe that Ridgewood has identified an RPS pricing issue that further supports the need for standardizing the Pricing Structures contract term. In particular, Ridgewood points out that a generator may bid (or receive payment of) a fixed dollars/kW-year capacity payment and a cents/kWh energy payment. Ridgewood Opening Brief at 3. A decision will have to be made concerning whether SEP awards are components of, and reduce, the capacity payment and/or the energy payment that the utility would otherwise make. *Id.* The California Energy Commission (“CEC”) has recently ruled that it will make cents/kWh payments of SEP awards, making it more suitable to come out of the generators’ energy payments.⁷ This model, however, may not work for peaking or dispatchable facilities that may have low energy payments or that may not run enough to recover their expected SEP awards. A standard contract term ensuring that the generator recovers its all-in bid price (including any SEP awards), whether by requiring the utility to dispatch the facility a certain minimum number of hours or otherwise, should be developed, akin to the mechanism proposed by the Joint Parties to ensure that facilities do not obtain payments in excess of their all-in bid price through erroneous operating assumptions in the evaluation stage.⁸

2. *Negotiating Standard Terms*

Ridgewood is the only party that advocates, in its opening brief, that standard contract terms be non-negotiable.⁹ While the Joint Parties believe that it may be, in limited circumstances, acceptable to lock in a few standard terms such as Eligibility, which is governed by statute, it does not make sense in the long-run to try to lock in all standard terms. The Joint Parties agree with PG&E et al. that it is impossible to predict every possible

⁷ California Energy Commission, “Renewables Portfolio Standard: Decision on Phase 2 Implementation Issues,” October 2003, at 19.

⁸ See Joint Parties’ Opening Brief at 19-20.

⁹ Ridgewood Opening Brief at 8-9.

contracting situation in advance and adopt standard terms that will work well in the real world. Either there will be great pressure not to standardize a number of the key terms for fear of unduly limiting party flexibility, or the standard terms will be so generic that significant potential value is lost.

Ridgewood's arguments in support of non-negotiability of standardized terms are not compelling. For example, Ridgewood argues that to allow negotiation of standard terms would "represent a significant departure from the Commission's historic practice."¹⁰ To the contrary, the Commission's original standard offer contracts were deemed per se reasonable and parties have always been free to negotiate deviations to the standard offer contracts.

Ridgewood also states that allowing negotiation would undermine the RPS program and result in a waste of time and resources.¹¹ This also is not true. Under the mechanism proposed by the Joint Parties for the meaning of standardization, a base set of reasonable terms and conditions would be established by the Commission against which generators can bid, bids may be evaluated, and utility and bidder conduct may be measured. This will be tremendously beneficial for all parties. Additionally, utilities and generators may, if they mutually agree, extract additional value through their negotiations.

Finally, Ridgewood argues that a party with undue market power could force the other party to modify the standard terms to its detriment. While the Joint Parties are sympathetic to this concern, the Joint Parties believe that restricting the utilities' negotiating flexibility to the post-shortlist phase of the solicitation, coupled with PRG oversight, mitigates the utilities' ability to foist unreasonable risks onto the developers. Similarly, the competitive nature of the solicitation process and the monopsony power of the utilities should minimize any potential for developer market power.

As such, rather than ruling that all RPS standard contract terms are non-negotiable, the Commission should adopt the meaning for standardization proposed by the Joint Parties and allow parties to negotiate within the confines of the Joint Parties' proposed mechanism.

¹⁰ Id at 8.

¹¹ Id.

3. *RFP Process*

Ridgewood has proposed, essentially, the same process for reviewing utility RFPs as the mechanism proposed by the Joint Parties (although the Joint Parties' proposal is slightly more developed). The Commission should adopt the Joint Parties' proposal in this respect.

B. RESPONSE TO ORA

1. *A Level Playing Field for Intermittents*

ORA devotes a significant portion of its opening brief to ensuring that RPS requirements do not unfairly discriminate against intermittent generators. For example, ORA objects to standardizing performance requirements out of concern that capacity values for intermittents have not yet been established by the CEC.¹² ORA also objects to standardizing the Scheduling Coordination term until the utilities present evidence to refute the CEC's determination that renewable generators impose negligible costs associated with deviations.¹³ Finally, ORA argues generally that the Commission "should not set standard terms and conditions that are inconsistent with the behavior of intermittent energy resources"¹⁴

As a group that includes many different generation resource types, including intermittent generators, the Joint Parties appreciate and endorse ORA's objective. No particular technology type should be disadvantaged because of ill-conceived RPS rules or contract provisions. Stated another way, the Joint Parties agree with ORA that all renewable technologies should participate in the RPS program on a level playing field; only the real differences in the products that they offer and the values of such products as determined in the least cost / best fit analysis should affect their competitive positions in the RPS procurement process.

The Joint Parties do not agree, however, that the way to achieve the desired level playing field is to refrain from standardizing key terms like Performance Requirements and Scheduling Coordination. On the contrary, only by establishing a base set of key contract

¹² ORA Opening Brief at 3.

¹³ *Id.* at 4.

terms that ensure that all generators are treated fairly can the Commission be confident that it has secured as level a playing field as is possible. Specific comments on ORA's concerns are set forth below.

2. *Performance Requirements*

As discussed above, ORA objects to standardizing performance requirements out of concern that capacity values for intermittents have not yet been established by the CEC. ORA's concern is misplaced. The capacity values to be established by the studies being conducted under the CEC's management should be incorporated into the least cost / best fit process for evaluating bids, but should not affect the contract terms under which generators operate. In effect, ORA puts the proverbial cart before the horse. The capacity value studies will not determine or affect the contract terms; to the contrary, capacity values reflect the generation profile of the underlying technology and the contract terms under which they are expected to operate. The CEC studies, for example, are expected to determine the value of different technologies under the assumption that they run whenever they are able, without regard to potential dispatch rights or other contract terms. In addition, as discussed in the Joint Parties' Opening Brief (at page 13), performance requirements are also required by statute to be standardized. As such, ORA's objection to standardizing performance requirements should be rejected.

3. *Scheduling Coordination*

ORA's objection to standardizing the Scheduling Coordination term until the utilities refute the CEC's determination that renewable generators impose negligible deviation costs also is misplaced. In reality, one party or the other must assume the obligation to schedule the generating facility and there will be a contractual allocation of the risks and rewards of so doing. This will be true under any set of protocols to be adopted by the ISO, or other transmission provider, whether the costs associated with deviations are expected to be great or small. As discussed in detail in the Joint Parties' Opening Brief (at pages 25-27), the Scheduling Coordination and related Imbalances terms are critical terms that should be standardized.

¹⁴ Id.

C. RESPONSE TO SOLARGENIX

1. Contract Modifications

The Joint Parties indicated in their Opening Brief (at page 22) that, at that time, they did not believe that the Contract Modifications term needed to be standardized. In its opening brief, Solargenix points out that deviations from standard contract terms require Commission approval and should be highlighted.¹⁵ The Joint Parties agree.

In fact, the Commission should adopt a standard contract term specifying that the Commission must approve, in advance, any material contract modifications made after contract execution. This is important because, among other things, SEP awards will be made and the least cost / best fit analysis will be conducted based upon the original contract terms. The Commission should take this reasonable precaution to prevent an “end run” around the Commission’s adopted RPS requirements. Because contract terms are bilateral obligations between only the contracting parties and can be waived by mutual agreement, the Commission should also specify by rule that the utilities are not to agree or otherwise make material modifications to RPS contracts without prior Commission approval.

D. RESPONSE TO GPI

1. Definition and Ownership of RECs

The Joint Parties endorse the approach for the ownership of environmental attributes offered by GPI in its opening brief (at pages 2-3).

¹⁵ Solargenix Opening Brief at 6-7.

E. RESPONSE TO EDISON

1. Governing Principle

Edison asserts that the Commission should only standardize those terms that are necessary to the implementation of the RPS program.¹⁶ Edison further identifies what they believe these terms to be. Edison's proposal should be rejected.

First, Edison's proposed principle offers little actual guidance, as deciding what is "necessary" is completely open to dispute. In its own brief, for example, Edison argues that the Commission should standardize the Confidentiality term, yet provides no explanation as to why this term is any more "necessary" for implementation of the RPS Program than terms like Product Definitions, Milestones or Pricing Structures. In addition, given the obvious linkage between performance requirements and non-performance penalties (among other related terms),¹⁷ it is no less necessary to standardize the penalties for non-performance than it is to standardize the performance requirements.

Second, although not offering any substantive basis on which to determine which terms should be standardized, Edison's proposed principle implies that only a small subset of terms should be standardized. The Joint Parties urge the Commission to reject this premise. The Joint Parties discussed the many benefits of standardizing contract terms in their opening brief (at pages 4-5), which benefits increase as the number of standardized terms increase. Adopting unnecessary limits on the number of terms to be standardized will unduly limit the potential benefits of standardization.

In addition, Edison's own logic supporting a limited number of standardized terms fails in light of the Joint Parties' proposal that parties be permitted to negotiate the standardized terms after the short list is developed. In particular, Edison argues: "Unnecessary standardization will limit the parties' ability to account for the individual needs

¹⁶ Edison Opening Brief at 1.

¹⁷ See Joint Parties' Opening Brief at 12-14.

of renewable developers and their lenders and equity investors.”¹⁸ By allowing renewable bidders to propose deviations to standard terms and both parties to negotiate after the short list is developed, the Joint Parties’ proposal fully allows the parties to account for the individual needs of renewable developers and their lenders and equity investors.

Rather than protecting renewable developers and their investors, Edison’s proposal would increase Edison’s ability to exert leverage over renewable developers through its monopsony power and confidentiality restrictions. The Joint Parties strongly prefer the standardization of more terms, coupled with the flexibility to negotiate as discussed herein and in the Joint Parties’ Opening Brief.

2. *Commission Approval*

Edison’s position that Commission Approval include approval of the utility’s RFP process, as opposed to just approving the contract at issue, should be rejected.¹⁹ This issue is discussed at length in the Joint Parties’ Opening Brief (at pages 9-10), which discussion will not be repeated here.

3. *Definition and Ownership of RECs*

Edison argues for a standard term for the definition of a REC that conveys all environmental attributes as part of the product being delivered. The Joint Parties agree with Edison on the need to standardize a contract term for the Definition and Ownership of RECs, though we may differ on the definition of “all environmental attributes.” The term should be defined carefully to include only those attributes that should, in fact, be included in the REC. As discussed above, the Joint Parties endorse the position of GPI on the appropriate definition of the environmental attributes that are transferred with a REC.

4. *SEP Awards and Contingencies*

¹⁸ Edison Opening Brief at 2.

¹⁹ Edison Opening Brief at 2.

Edison proposes that the renewable developer and the utility should have the option to terminate their contract if an SEP award is not issued within a specified time period.²⁰ There is, however, no reason why the utility should have a termination right if the developer does not get an SEP award. As a function of RPS program design, the utility is indifferent as to whether the developer obtains the SEP award and develops its project or fails to obtain the SEP award and elects to proceed with project development without the benefit of SEP payments. In either case, the utility pays the identical contract price (capped at the market price referent). Any possible concern about the creditworthiness of the developer in the absence of an anticipated SEP award will be addressed through contractual milestone requirements. If the project is not viable without the SEP award, the developer will almost certainly fail to obtain financing and be unable to commence construction. In the end, as proposed by the Joint Parties, only the developer should have a termination right if the SEP award is not forthcoming on a timely basis.

5. *Confidentiality*

Edison proposes that all information about RPS contracts should be kept confidential, except for the counterparty name, resource type, facility location, size of project and duration of the agreement.²¹ This proposal should be rejected. Shrouding in secrecy all of the terms employed by the utilities in contracting for renewable power, except for the foregoing nearly non-substantive information, effectively strips away the ability of renewables advocates to ensure that renewables are being treated fairly and ensures that the utilities are able to employ their monopsony buying power to the fullest. As discussed in the Joint Parties' Opening Brief (at page 11), the Commission can best ensure the success of the RPS program by shedding light on the relevant contract terms. Developers' secrets can be protected by ensuring that information that would disclose the identity of a given project owner be kept confidential. As well, the more standardization of the contract terms that is employed, the less of a need there will be for confidentiality requirements.

6. *Performance Requirements*

²⁰ Id. at 3.

The Joint Parties disagree with a number of the performance requirement proposals made by Edison at pages 5 and 6 of its opening brief. First, the Commission should recognize that performance requirements must be product specific and that there should be different requirements for different products. Edison's proposed 80 percent delivery requirement during the peak periods, for example, may not be applicable to all firm products. If a developer can offer to meet performance requirements during only a subset of these periods, or during additional periods, and the utility would obtain value for such a commitment, the requirements should be able to accommodate such product offerings.

Second, as discussed in the Joint Parties' Opening Brief (at page 14), absent a failure to meet the applicable delivery requirements (for firm and as-available resources) and an unusual event calling into question the facilities' ability to meet such requirements, there is no need for a routine annual test of the facilities' ability to meet the delivery requirements.

Third, Edison's proposal that a facility deliver 100 percent of its firm capacity during emergencies is unreasonably strict. Projects that are undergoing scheduled maintenance at the time of an emergency, or that might be experiencing a physical limitation that would make it unsafe to operate at full capacity during the emergency, should not be penalized for operating prudently. As proposed in the Joint Parties' Opening Brief (at page 14), firm contracts should impose a requirement to use commercially reasonable efforts to operate at full capacity during an emergency condition.

Fourth, as discussed in the Joint Parties' Opening Brief (at page 14), intermittents should not be subject to annual delivery requirements as Edison proposes; rather they should be allowed to average deliveries over two years. This is essential as resource conditions may vary considerably from year to year. It is less likely, but not impossible, that extreme variations will persist over two years.

Finally, contrary to Edison's proposal, damages and collateral requirements should be standardized (and, as Edison also proposes, subject to negotiation). This is discussed at length in the Joint Parties' Opening Brief at pages 15-17.

²¹ Edison Opening Brief at 4.

F. RESPONSE TO PG&E ET AL.

1. In General

Generally speaking, the Joint Parties are pleased at the various similarities between their proposals and those of PG&E et al. Both groups, for example, propose a meaning or use of standardized terms that includes (i) requiring the utilities to include standard terms in their RFPs, (ii) a presumption of reasonableness for standard terms, (iii) allowing bidders to request deviations from standard terms in response to the RFPs, (iv) compilation of a short list based only on the standard terms and the deviations proposed by bidders (and not based upon alternate utility preferences), (v) an explanation by the utilities of the proposed deviations to the PRG; and (vi) allowing the parties to negotiate after the short list is completed and reviewed with the PRG.²² Both groups also propose an expedited process to review utility RFPs that includes an opportunity for protests by interested parties and an Assigned Commissioner Ruling addressing the RFP.²³

Apart from these general similarities in approach, there are a number of very significant differences between the proposals of the Joint Parties and those of PG&E et al. These differences, and the reasons why the Commission should adopt the Joint Parties' proposals, are explained below.

2. Proposed Contract Language

At the outset, the Joint Parties note their surprise that PG&E et al. have proposed specific contract language for all of the terms that they recommend be standardized.²⁴ PG&E and others in their group were among the most ardent advocates at the second workshop for the position that specific contract language should not be presented at this stage of the process. In reliance on the ALJ Ruling, which held that specific contract language would be considered in a subsequent phase of this proceeding and need not be set forth at this time, the

²² See, e.g., Joint Parties' Opening Brief at 5-8; PG&E et al. Opening Brief at 10-12.

²³ See, e.g., Joint Parties' Opening Brief at 28-29; PG&E et al. Opening Brief at 5-7.

²⁴ The Joint Parties did include in their Opening Brief (at pages 26-27) specific contract language on one extremely technical point involving Scheduling Coordination. This was done primarily because the language, which was previously distributed in the CalWEA Motion, explained the concepts better than would any narrative explanation.

Joint Parties will not comment on the specific language proposed by PG&E et al., other than to note that in at least two contexts (Assignment and Funding Termination Deadline), the proposed language fails even to accomplish PG&E et al.'s stated objectives. In order not to prejudice parties that relied on the ALJ Ruling, the Joint Parties request that no action (whether endorsement or otherwise) be taken at this time on the specific language proposed by PG&E et al.

3. *Governing Principles*

PG&E et al. propose that the Commission employ two governing principles in determining which terms to standardize. In particular, PG&E et al. argue that the Commission should only standardize terms (a) that are important to financing and (b) typically are not subject to change or negotiation based upon the product selected or the characteristics of the project.²⁵ While the Joint Parties do not necessarily object to the first proposed criterion, the second clearly should be rejected.

At the outset, PG&E et al.'s proposed second criterion is remarkable in light of their other proposal (which the Joint Parties' support) that standard terms be fully negotiable. If only terms that are not typically subject to change or negotiation are standardized, there would be no real need to allow for negotiation of the standard terms. Rather than adopting a governing principle that would limit unduly the terms that can be standardized and the benefits that flow from such standardization, the Joint Parties endorse the ability of parties to tailor terms to fit individual needs as they may change over time through negotiation.

Second, PG&E et al.'s proposed second criterion is plainly contrary to legislative intent. As Edison argued, performance requirements may be project specific and in need of negotiation.²⁶ Nevertheless, performance requirements was the one term singled out by the Legislature as needing to be standardized. If the Legislature had intended that project-specific terms that both parties may benefit from negotiating not be standardized, it would not have required that performance requirements be standardized.

²⁵ PG&E et al. Opening Brief at 2-3.

²⁶ Edison Opening Brief at 5.

4. *RFO Review Process*

As discussed above, PG&E et al.'s proposed process for reviewing utility RFO's is, in concept, a good idea and not totally unlike the Joint Parties' proposed process. However, the following key flaws with the PG&E et al. proposal should be corrected.

a. *Limitations on Protests*

Although PG&E et al. propose that intervenors be allowed to protest, in advance, a utility RFP, PG&E et al. unduly restrict the content of any such protest. In particular, PG&E et al. would limit intervenor protests to asserting that a proposed contract term is inconsistent with (i) an express requirement in a Commission decision on RPS implementation, (ii) applicable state law governing renewable procurement or (iii) a standard contract term.²⁷ According to PG&E et al. themselves, the purpose of this restriction is to prevent parties from raising new issues in protests.²⁸ As discussed below, this restriction should be rejected.

Stated simply, it is impossible for the Commission to promulgate, in advance, a set of requirements that will adequately address what may be perfectly legitimate grounds for protests. RPS procurement is a complicated process that will change with changing market and regulatory conditions. To limit protests to requirements already adopted by the Commission or the Legislature would place an insurmountable burden on the Commission to predict every form of potentially objectionable conduct, or on the parties, who will have no remedy for their legitimate grievances if the Commission fails to predict in advance the grounds for their protest.

Further, in the name of avoiding unproductive litigation, PG&E et al. would create a tremendous safe harbor that will eliminate the most productive litigation. As PG&E et al. must be aware, many disputes that come before the Commission do not involve instances in which a party has violated an express Commission requirement. It is where the utility employs its discretion or takes advantage of a loophole that Commission action is most needed. PG&E et al. envision "a growing body of Commission rulings" to guide the

²⁷ PG&E et al. Opening Brief at 6.

²⁸ *Id.* at 7.

parties.²⁹ If protests are limited to already promulgated rules, the body of precedent will be self-limiting. In order to achieve its vision, parties must be able to protest that, in light of the existing law and sound policy, the utility has acted unreasonably.

The importance of allowing parties to raise issues that have not already been addressed by the Commission is heightened by PG&E et al.'s proposal that the contract contained in the RFP will be presumptively reasonable after the ACR approves the contract.³⁰ Unless parties are able to assert that the contract is not reasonable (without having to show that an already adopted requirement has been violated), there is no basis for attaching a presumption of reasonableness to the contract. In essence, to adopt the PG&E et al. proposal would require the Commission to pretend that all possible grounds for protesting other than what has already been addressed do not exist. This fantasyland proposal should be rejected.

b. Protests not ruled on are Deemed Denied.

PG&E et al. also propose that a protest not ruled on within 10 business days of the filing of replies to the protest be deemed denied.³¹ While the Joint Parties can appreciate PG&E et al.'s desire for speed and certainty, this proposed requirement is patently unreasonable and at odds with existing Commission policies.

Regarding the inherent unreasonableness of this proposal, if the issues raised in a given protest are complicated, it may take more than 10 business days for the presiding officer to resolve them. This does not mean, however, that the protest should be denied. In fact, the longer it takes to address an issue, it may be assumed that in most cases it is because the issue is more worthy of being addressed. To rule that delayed action results in a deemed denial would provide the utility with an incentive to obfuscate and complicate issues in its reply and seek to delay issuance of a decision. This kind of gamesmanship should not be encouraged.

²⁹ PG&E et al. Opening Brief at 7.

³⁰ *Id.* at 6.

³¹ *Id.*

Regarding conflict with Commission policy, the Commission generally disfavors deadlines being imposed on Commission action.³² In addition, in all but routine compliance filings, affirmative Commission action on a utility advice letter is required.

Rather than imposing an arbitrary rule that would unduly limit the opportunity of interested parties to have a say on potentially critical issues affecting RPS procurement, the Joint Parties would support Commission adoption of a timetable calling for a decision on any protests within 10 business days of the filing of replies. If the presiding officer fails to meet that timetable, the utility would be authorized to proceed at its own risk or wait for a resolution. In no case should silence on a protest constitute a deemed denial.

c. Protests to RFP Protocols

Finally, PG&E et al. propose that protests only be allowed on the contract terms included in an RFP. An RFP, however, contains both a contract and a set of bidding instructions or protocols. The protocols have the potential to influence bids as much as (or more than) proposed contract terms. As such, it is essential that interested parties have the opportunity to object not only to proposed contract terms, but also to the RFP protocols.

5. *Use of Standard Terms*

Although there is high degree of similarity between PG&E et al.'s proposal for the use of standard terms and the Joint Parties' proposed meaning of standardizing terms, there are two key problems with the PG&E et al. vision. First, PG&E et al. propose that the utility provide to the Commission only a brief explanation of a modified standard term.³³ This simply will not give the Commission enough information to compare contracts with negotiated terms against contracts with standard terms (or other negotiated terms) so that an "apples to apples" comparison between competing proposals and the market price referents

³² See, e.g., Rule 51.1(d) of the Commission's Rules of Practice and Procedure. See also, D.02-06-068, 2002 WL 1901643 (Cal.P.U.C) at 6.

³³ *Id.* at 10.

can be made. In contrast, the Joint Parties recommend that specific dollar values be placed on material terms that deviate from standard terms so that such a comparison can be made.³⁴

Second, PG&E et al. propose that contracts with non-standard terms should be subject to no greater scrutiny than contracts with standard terms, and that the contracts should be looked at as a whole, not just based upon individual deviations from standard terms.³⁵ Although the Joint Parties agree that contracts should be looked at as a whole, and not just based upon individual deviations, it cannot be that nonstandard contracts receive no greater scrutiny than standard contracts. As PG&E et al. propose, standard terms should be per se reasonable and need not be scrutinized.³⁶ Giving the PG&E et al. proposal effect would mean that non-standard terms also are per se reasonable and need not be scrutinized. Of course this cannot be. Contracts with non-standard terms must receive greater scrutiny because the deviations need to be considered. It is as simple as that.

6. *Specific Contract Terms*

The Joint Parties offer the following comments on PG&E et al.'s proposals on specific standard contract terms.³⁷

a. Delivery Term

The Joint Parties have no objection to the PG&E et al. proposal.

b. CPUC Approval

As with Edison's proposed standard term for CPUC Approval, discussed above, the PG&E et al. proposal should be rejected insofar as it would require approval of the RFP process generally.

In addition, PG&E et al. propose a mechanism under which the utility may make additional contract payments (referred to as the "Lost PGC Funds") to the developer prior to

³⁴ Joint Parties' Opening Brief at 7.

³⁵ PG&E et al. Opening Brief at 11.

³⁶ *Id.* at 10.

³⁷ As discussed above, the Joint Parties do not comment on the specific contract language proposed by PG&E et al. at this time and reserve the right to do so in the future.

express Commission approval in the event that an SEP Award is not forthcoming.³⁸ While the Joint Parties do not oppose this proposal, one clarification related to CPUC Approval is necessary. If the Commission rejects the utilities' proposal to pay the Lost PGC Funds prior to express approval, but otherwise approves a proposed contract, Commission Approval should nevertheless have occurred and the utility would either not exercise the option to pay the Lost PGC Fund or take the risk of so doing.

c. SEP Awards

The PG&E et al. proposal, in concept, is acceptable, with the clarification to CPUC Approval identified above.

d. Definition of RECs

PG&E et al. argue that a standard term is needed for the definition of a REC. Like Edison, they favor the conveyance of all environmental attributes with the REC. However, unlike Edison, they offer a proposed definition of environmental attributes. Their proposed definition correctly recognizes that certain attributes should be excluded from the definition, which attributes are delineated in exclusions (i) – (iv). The problem with this approach is that attributes that are not to be included in the REC have to be identified individually. At least two examples of environmental attributes that have already been identified in this proceeding, waste water injection by geothermal generators and environmental easements on wind generating properties, are not identified in exclusions (i) – (iv), and thus these attributes would be unfairly taken from the generators unless the definition were amended. As discussed above, the Joint Parties favor the approach of GPI, which identifies the attributes to be excluded from the REC as a coherent class. With the approach advocated by PG&E et al., the definition will have to be modified constantly as new attributes of the co-product variety are identified and deemed to be rightly excluded.

e. Confidentiality

The PG&E et al. proposal suffers from the same defects as Edison's proposal, discussed above.

³⁸ Id. at 17.

d. Eligibility

The Joint Parties have no objection to the PG&E et al. proposal.

e. Assignment

The Joint Parties agree that the assignment term should be standardized, but find the PG&E et al. proposal to be inadequate. A more appropriate configuration is contained in the Joint Parties' Opening Brief at pages 22-23.

f. Governing Law

The Joint Parties have no objection to the PG&E et al. proposal.

g. Performance Requirements

Regarding one of the most significant contract terms for the long-term viability of renewable resources, Performance Requirements, PG&E et al. propose simply to rely upon existing EEI Schedule P provisions.³⁹ Contrary to their claim, the EEI requirements are woefully inadequate.

First, there is no set of requirements in Schedule P that would be applicable to an intermittent product. Essentially, the EEI defines three basic products: Firm, which requires deliveries at all times (subject potentially to force majeure excuses and transmission events); Unit Firm, which requires deliveries at all times except during forced outages and force majeure events; and Non-Firm, which requires neither the buyer nor the seller to perform at any given time. None of these products apply to the as-available product typically offered by intermittent generators and addressed by the Commission in Decision 03- 06-071 (e.g., at 31). The as-available product typically involves an obligation on the seller to deliver and on the buyer to purchase whenever the resource is available.

Second, the EEI requirements do not correspond to the baseload, peaking and as-available products for which market price referents are to be established under Decision 03-06-071. This will unnecessarily complicate bid evaluation and SEP awards.

³⁹ PG&E et al. Opening Brief at 20.

Third, the EEI Firm product typically relies on system power and has no allowance for scheduled maintenance or forced outages. While this may be appropriate for transactions among traders and non-RPS requirements, this is not consistent with the kind of products to be offered by individual renewable power plant owners under the RPS program.

For each of these reasons, the Commission should reject PG&E et al.'s proposal to simply rely on the EEI Schedule P for standard performance requirements.

h. Product Definitions

Contrary to the PG&E et al. position, Product Definitions should be standardized. As discussed in the Joint Parties' Opening Brief (at pages 14-15), key provisions including performance requirements can be included in product definitions. In addition, standardization of this term is needed to ensure consistency between RPS contracts, market price referents against which the contracts will be compared and the least cost / best fit process under which the contracts will be evaluated. A consistent set of product definitions is necessary for a rational RPS process.

In response to PG&E et al.'s concern about needed flexibility, parties will (under PG&E et al.'s own proposal) have flexibility to tailor previously defined products through negotiations. Utilities and developers will also have ability to seek new standard product definitions, as their needs and market circumstances change.

i. Non-Performance or Termination Penalties, Default Provision

As discussed in the Joint Parties' Opening Brief (at pages 15-17), penalties for non-performance, and termination and default provisions should be standardized. These terms are critical contract terms that could prevent financing or cause a project to fail to survive. They are inextricably linked to performance requirements and will not be particularly difficult to standardize. Any necessary tailoring that results from a unique set of facts can be done through negotiations. If, as PG&E et al. speculate, acceptable penalties change over time as experience is gained, the standard terms can be changed, as PG&E et al. themselves propose in their use of standard terms proposal.⁴⁰

⁴⁰ Id. at 11.

j. Milestones

Contrary to PG&E et al.'s argument, Milestone provisions will not differ significantly depending upon project and product circumstances.⁴¹ As discussed in the Joint Parties' Opening Brief (at 17-18), there are a basic set of milestones that are applicable to all project types. While the particular critical path permit may be different for one type of project than for another, for example, the contract provision for both facilities will be the same: obtain the critical path permit within a specified period of time. If the project already exists or already has its critical permit, it will have satisfied the milestone. This process is not nearly as complicated as PG&E et al. make it out to be.

k. Pricing Structure

As discussed in the Joint Parties' Opening Brief (at pages 18-20), standardizing the RPS pricing structure is critical. Pricing structures should not, as PG&E et al. state, be different for each project and product. If the utilities produce an infinite number of contracts each with its own pricing structure, the RPS process will collapse under its own administrative weight. As identified by Ridgewood (discussed above) and in the Joint Parties' Opening Brief, the pricing for RPS contracts present a number of challenges, particularly in light of the SEP component of the RPS program. These challenges warrant standardization.

1. Credit Terms

Again, in the context of credit terms, PG&E et al. make overly complex a fairly straightforward concept. The credit terms of a contract, which PG&E et al. acknowledge are important, do not need to differ from party to party depending upon the relative creditworthiness of the parties. Just like a utility tariff contains credit requirements that apply to parties of varying credit quality and corporate status, contractual credit terms also fit many circumstances. In other words, the credit provisions are the credit provisions, how they impact a given party will depend upon that party's creditworthiness. Admittedly, there may be some need for tailoring credit provisions for unique circumstances, but again that can be handled through negotiation. In light of the utilities present adherence to the EEI form

⁴¹ Id. at 21.

contract, which contains credit requirements that are wholly inappropriate for many renewable developers, standardization is critical.

m. Contract Modifications

The Joint Parties set forth their position on this term in response to the Solargenix Opening Brief above.

n. Dispute Resolution

In contrast to PG&E et al., the Joint Parties believe that this term should be standardized as set forth at pages 23 and 24 of the Joint Parties' Opening Brief.

o. Force Majeure

PG&E et al. argue that Force Majeure terms should not be standardized because different projects may need different excuses to performance.⁴² While the Joint Parties do not disagree with the premise that different projects may need different excuses from performance, this does not mean that the Force Majeure term should not be standardized. Force Majeure is a well-established legal, and contractual, mechanism that essentially excuses party non-performance due to events outside of the non-performing party's control. Force Majeure provisions usually include a very general statement of what constitutes a force majeure event, and a list of specific events that would qualify as force majeure events. As discussed in the Joint Parties' Opening Brief (at pages 24-25) there are certain essential characteristics of Force Majeure that warrant standardization for RPS purposes. If a specific project has a need to alter the standard term for its unique circumstances, such a change can always be negotiated. It would not make sense to discard the benefits of locking in the key concepts so as to promote flexibility that will exist anyway.

p. Scheduling Coordination

Contrary to PG&E et al.'s position, the fundamental rights and obligations inherent in a Scheduling Coordination provision will not be affected materially by market redesign. Someone always has to schedule the project and there will always be risks and benefits associated with such scheduling. Scheduling Coordination is a key issue for standardization

⁴² PG&E et al. Opening Brief at 24.

as the utilities have steadfastly refused to serve as the SC for renewable resources, even though they may be in a much better position to perform this service and save ratepayers money as a result.

q. Imbalance Issues

For much the same reasons already discussed, the Commission should reject PG&E et al.'s objection to standardizing the imbalance terms. The standard contract terms do not have to be so myopic as to exclude alternative options that might fit different circumstances. Parties are free to negotiate to accommodate unique requirements. Because imbalance terms are critical and have been the source of considerable controversy already, standardization is warranted.⁴³


r. Project Modifications

The Joint Parties believe that this term should be standardized as set forth at pages 27 and 28 of the Joint Parties' Opening Brief.

IV. CONCLUSION

The Joint Parties urge the Commission to adopt the proposals as discussed above and in the Joint Parties' Opening Brief. Counsel for the California Wind Energy Association is authorized to execute this reply brief on behalf of the Joint Parties.

Respectfully submitted,



Joseph M. Karp
White & Case LLP

Attorneys for the California Wind Energy
Association

December 3, 2003

⁴³ See Joint Parties' Opening Brief at 27.

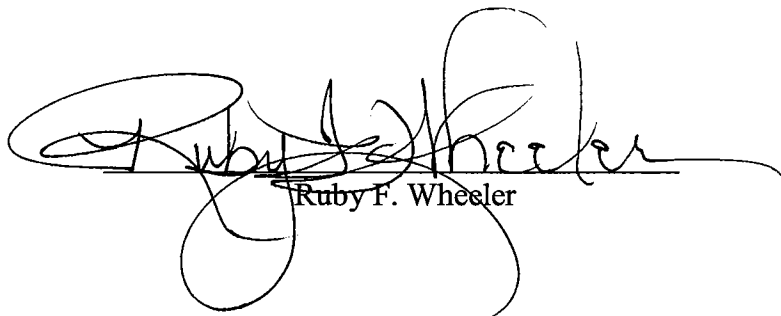
Certificate of Service

I hereby certify that I have this day served a copy of the

REPLY 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

on all known parties in **R.01-10-024** by sending a copy via electronic mail and by mailing a properly addressed copy by first-class mail with postage prepaid to each party named in the official service list without an electronic mail address.

Executed on **December 3, 2003** at San Francisco, California.



Ruby F. Wheeler