

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Implement the
California Renewables Portfolio Standard
Program.

Rulemaking 04-04-026
(Filed April 22, 2004)

**COMMENTS OF THE CALIFORNIA WIND ENERGY ASSOCIATION,
CALIFORNIA BIOMASS ENERGY ALLIANCE, L.L.C. AND CALPINE
CORPORATION ON THE PROPOSED DECISION ADDRESSING RPS STANDARD
CONTRACT TERMS AND CONDITIONS**

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I. INTRODUCTION

Pursuant to Rules 77.2 through 77.4 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure, the California Wind Energy Association ("CalWEA"), California Biomass Energy Alliance, L.L.C. ("CBEA"), and Calpine Corporation ("Calpine") submit these comments on the May 17, 2003 proposed decision on Renewables Portfolio Standard ("RPS") standard contract terms and conditions ("Proposed Decision").¹

CalWEA, CBEA and Calpine acknowledge the time constraints facing the Administrative Law Judge in connection with preparing the Proposed Decision. Nevertheless, the Proposed Decision is so devoid of analysis concerning critical issues identified by CalWEA, CBEA and Calpine in briefs and prior pleadings on standard contract terms and conditions that its adoption would fail to meet the minimum standards for Commission action under California law. The Proposed Decision also contains an important factual misstatement, which belies the primary flaw with the Proposed Decision (i.e., its lack of reasoned analysis). Finally, in accepting without change almost all of the contract terms proposed by Pacific Gas & Electric Company, San Diego Gas & Electric Company, The Utility Reform Network, Center for Energy Efficiency and Renewable Technologies and

¹ The CalWEA, CBEA and Calpine represent a variety of renewable technologies, including wind, biomass, geothermal and solar-thermal generators.

Independent Energy Producers (“PG&E et al.”), the Proposed Decision would, in several important respects, contravene the RPS legislation and undermine its goals.

For these reasons, the CalWEA, CBEA and Calpine urge the Commission to reject the Proposed Decision. At a minimum, for the reasons explained in more detail below, the Commission should modify the Proposed Decision to adopt the proposed credit, performance requirements and default and termination provisions put forth in the Joint Parties’² March 26, 2004 Opening Brief in this proceeding. Further, the Proposed Decision should be modified to reflect that, in accordance with the March 8, 2004 Joint Ruling of Assigned Commissioner and Administrative Law Judge Regarding Procedure for Adoption of Standard Contract Terms and Conditions, certain of the adopted standard contract terms are negotiable by contracting parties.

II. DISCUSSION

1. The Proposed Decision Lacks Required Analysis

Under Public Utilities Code Section 1705 and well-settled principles of law, the Commission may not simply issue decisions by fiat. It must support its decisions with reasoned analysis and separately stated findings and conclusions concerning material issues. Failure to do so will render a decision unlawful.

Section 1705 requires that a Commission decision “shall contain, separately stated, findings of fact and conclusions of law by the [C]ommission on all issues material to the order or decision.”³ In interpreting this section, the Supreme Court of California has held that section 1705 requires the Commission to state separately findings and conclusions on the material issues of fact and law that determine the ultimate issue or finding.⁴

² The Joint Parties consisted of CalWEA, CBEA and Vulcan Power Company. Vulcan Power Company is not a sponsor of these comments. For clarity, reference to the prior positions or filings of the “Joint Parties” in these comments are references to the prior positions or filings of CalWEA, CBEA and Vulcan Power Company.

³ *Cal. Pub. Util. Code* §1705.

⁴ *Cal. Motor Transp. Co. v. Pub. Util. Comm’n*, 59 Cal. 2d 270 (1963); *see also*, *Cal. Mfr. Asso’n v. Pub. Util. Comm’n*, 24 Cal. 3d 251, 258-9 (1979); *Assoc. Freight Lines v. Pub. Util. Comm’n*, 59 Cal.

For example, in *Cal. Motor*, the court held that a mere statement of the ultimate finding by the Commission does not satisfy the requirement of Section 1705.⁵ Instead, the court stated that “every issue that must be resolved to reach that ultimate finding is ‘material to the order or decision.’”⁶ Specific findings on each of the issues will “afford a rational basis for judicial review” and “enable the reviewing court to determine whether the [C]ommission has acted arbitrarily.”⁷ In addition, the court also noted that findings on material issues (i) “indicate the basis for the decision [so] the parties can prepare accordingly for rehearing or review,” and (ii) “serve to help the [C]ommission avoid careless or arbitrary action.”⁸ “There is no assurance that an administrative agency has made a reasoned analysis if it need state only the ultimate finding.”⁹

Similarly, in *Greyhound Lines*, the court also found that a mere statement of the ultimate finding does not meet the requirement of Section 1705.¹⁰ Quoting *Cal. Motor*, the court further stated that “findings are required of the basic facts upon which the ultimate finding is based.”¹¹

The Proposed Decision, if adopted, would run afoul of the foregoing requirements. The Proposed Decision would adopt standard contract terms and conditions covering critical areas such as credit requirements, performance requirements, default and termination provisions, the definition and ownership of renewable energy credits (“RECs”) and other issues. Each of these terms reflects a critical contract provision; absent a reasonable approach to these issues, bidders will be discouraged from participating in utility

2d 583 (1963) (citing *Cal. Motor* and annulling a Commission decision for failure to make necessary findings supporting the ultimate findings of public convenience and necessity).

⁵ *Cal. Motor Transp.*, 59 Cal. 2d, at 274.

⁶ *Id.* at 273.

⁷ *Id.* at 274.

⁸ *Id.* at 275.

⁹ *Id.*

¹⁰ *Greyhound Lines v. Pub. Util. Comm’n*, 65 Cal. 2d, 811, 813.

¹¹ *Id.*

solicitations, contracts will not be signed and contracts that are signed will not be financeable.

Nevertheless, the Proposed Decision would adopt the terms proposed by PG&E et al. (which the Proposed Decision refers to as the CEERT Parties) without any discussion whatsoever as to why the specific proposals adopted are acceptable or preferable to the proposals that are being rejected. The only text in the Proposed Decision offered in support of its adoption of these terms involve (i) recognition that that proposed terms have broad-based support, which the Proposed Decision itself acknowledges provides insufficient basis for adoption, and (ii) generic and conclusory statements that the Commission examined each and every term and condition proposed and found the PG&E et al. proposals to be an integrated whole and superior to those proposed by the other parties. These statements do not meet the minimum requirements cited above.

For example, the Joint Parties pointed out in their April 14, 2004 reply brief (at page 8) that the PG&E et al. performance requirements for as-available products fail to meet the basic requirements of the RPS legislation.¹² Public Utilities Code Section 399.14(a)(2)(D), specifically requires the Commission to adopt standard performance requirements. Yet the PG&E et al. proposed term merely provides a place in which the parties are expected to agree upon the performance requirement; it does not contain a standard performance requirement. In contrast, the Joint Parties propose that as-available bidders must meet an 80% annual mechanical availability test and a 60% annual average, measured over two years, energy delivery test.¹³ The Proposed Decision contains no discussion of why the Joint Parties' proposal should be rejected or how the PG&E et al. proposed term can be reconciled with applicable legal requirements.

Another glaring example of the Proposed Decision's failing is in connection with the credit terms proposed by PG&E et al. These terms were criticized extensively by the Joint Parties and Calpine, and by other parties. Among other things, the proposed credit terms were shown to be unnecessary and unduly strict, they will limit participation in the RPS

¹² References to the Joint Parties in connection with positions taken prior to today's pleading do not, unless otherwise noted, include Calpine Corporation.

¹³ Joint Parties March 26, 2004 Opening Brief at 4.

program and they will raise bidder costs.¹⁴ At the recent workshop on least cost/best fit issues, a PG&E representative even acknowledged that at least one of the proposed terms, the mark-to-market collateral threshold, was not financeable in connection with the RPS program. Nevertheless, the Proposed Decision would adopt the PG&E et al. terms without any articulation as to why they are appropriate, let alone preferred to the proposals of other parties.

There are a number of other instances where the Proposal Decision would adopt contract terms yet fail to address material issues that were raised.¹⁵ It is simply not enough for the Commission to state that it has considered all the issues; it must articulate its rationale. Accordingly, the Proposed Decision should be rejected.

2. The Proposed Decision Contains A Significant Factual Misstatement

The Proposed Decision asserts that the proposals of every other party besides PG&E et al. “clearly favored one contracting party” over another. Proposed Decision at 4. This statement is not supported by any discussion in the Proposed Decision, nor by any citation to the record in this proceeding. Worse still, it is not correct. The Joint Parties and Calpine, although they admittedly do not include any utility or ratepayer representatives, carefully developed their proposals to reasonably balance the interests of all affected parties.

For example, while the Joint Parties’ proposed credit term, which consists exclusively of a project fee (supported by reasonable milestones) to ensure that the developer has made a commitment towards successfully developing its project, is far less stringent than the terms proposed by PG&E et al., the Joint Parties and Calpine took great pains to explain why this should be acceptable to the utilities and, perhaps more significantly, why it should be preferable to ratepayers. In brief, once a project is constructed and enters commercial operation, the utility should take comfort that the developer has the wherewithal to perform; thousands of megawatts of QF projects were developed and successfully operated on just this basis. For the ratepayers, imposing unnecessary and onerous credit terms will limit

¹⁴ See, e.g., Joint Parties’ April 14, 2004 Reply Brief at 10-11; Joint Parties’ March 26, 2004 Opening Brief at 19-22; Calpine April 14, 2004 Reply Brief, at 3-7.

¹⁵ The Proposed Decision does modify two proposed terms and addressed these terms individually.

participation in the utility solicitations and raise the price of bids (as developers internalize the cost of providing the gratuitous credit-support). A complete discussion of this issue is included in Calpine's April 14, 2004 reply brief (at pages 3-7).

Similarly, regarding the default and remedies provisions, the PG&E et al. proposals were similar to the Joint Parties' proposals, with two important exceptions, both of which are needlessly strict and one-sided in favor of the utility. First, PG&E et al. proposed that a failure to meet the performance requirements in a single period would constitute an event of default entitling the utility to terminate the contract.¹⁶ This proposal puts the project at undue risk of losing its contract as a result of a single event or dispute, which will seriously inhibit its ability to obtain financing. The Joint Parties proposed that only after three failures would the utility be entitled to terminate. Even Edison did not propose the draconian measure put forth by PG&E et al. Edison's proposal to derate a facility that fails to meet the performance requirements, after a probationary period, is far preferable to the PG&E et al. provision (although Edison's proposed damages calculation is objectionable). Second, PG&E et al. proposed that a generator's failure to develop its project would be a default entitling the utility to full contract damages; the Joint Parties proposed that the remedy would be forfeiture of the project fee. It is simply not realistic to expect developers to take a virtually unlimited damages risk when their success in developing a project depends upon things like obtaining permits and financing, which are largely out of their immediate control. The end result of these items is, again, to limit unnecessarily participation and raise costs.

The same is true regarding performance requirements. Here, the Joint Parties developed actual performance requirements that cannot be said to be any more or less favorable to the developers than the proposals of PG&E et al. or even Edison. As discussed above, PG&E et al. did not propose any performance requirements. Comparing Edison's requirements to the Joint Parties' proposals, one must conclude that Edison's proposals were more stringent in certain ways and less stringent in other ways. In the end, the Joint Parties' proposals were more tailored to the specific kinds of products being offered and, as such, preferable to Edison's proposals.

¹⁶ The PG&E et al. terms also would prohibit a seller from curing a default by providing power from a substitute facility that is otherwise eligible under the RPS program.

The Proposed Decision's erroneous conclusion that the proposals of non-PG&E et al. parties are one-sided reveals the underlying problem with the Proposed Decision. As discussed above, the Proposed Decision fails to reflect sufficient analysis of the parties' positions on the issues. Had it done so, the Joint Parties are confident that many of the terms proposed by PG&E et al. would have been modified or rejected outright in favor of terms proposed by other parties.

3. The Proposed Decision Conflicts with and Will Undermine RPS Goals

As discussed above, there are a number of instances in which the Proposed Decision would adopt, without any justification, contract terms proposed by PG&E et al. that will discourage participation in the RPS program and increase ratepayer costs. Most notable are the proposed credit terms, performance requirements and the default and termination provisions mentioned above. In addition, embracing the PG&E et al. approach to performance requirements (i.e., no performance requirements), the Proposed Decision would fail to adopt performance requirements in direct contravention of State law. While perhaps the most expedient approach at this time, this is not the approach that should be taken by the Commission.

Standard contract terms, including performance requirements, can be a key method of streamlining the contract negotiation and approval process, of limiting the market power of monopsony utility buyers and of ensuring that parties with limited financial resources are able to participate in the RPS program. By adopting unduly strict requirements for sellers, ones that in many cases will render a project unfinanceable, the Proposed Decision would undermine these potential benefits. Negotiations will be more complicated than ever and the utilities will be endowed with even greater bargaining leverage as they are able to insist upon terms that were already approved by the Commission. And, by adopting terms that clearly fail to meet statutory requirements, the Proposed Decision would undermine the credibility of the Commission's RPS program.

4. The Proposed Decision Should be Clarified to Confirm that Certain Standard Contract Terms are Negotiable

In the March 8, 2004 Joint Ruling of Assigned Commissioner and Administrative Law Judge Regarding Procedure for Adoption of Standard Contract Terms and Conditions, a number of terms were earmarked for standardization with the caveat that the terms would be negotiable by the parties. Among these terms are performance requirements, product definitions, non-performance or termination penalties and default provisions, credit terms, and assignment. All of the parties proposing contract language did so under the assumption that these terms would be negotiable. The Commission, therefore, should modify the Proposed Decision to make clear that these terms are, indeed, negotiable by the parties.

III. CONCLUSION

CalWEA, CBEA and Calpine urge the Commission to reject the Proposed Decision. At a minimum, the Commission should modify the Proposed Decision to adopt the Joint Parties' proposed credit, performance requirements and default and termination provisions. The Commission should also clarify that the standard performance requirements, product definitions, non-performance or termination penalties and default provisions, credit terms, and assignment provisions are negotiable.

Respectfully submitted,



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May 28, 2004

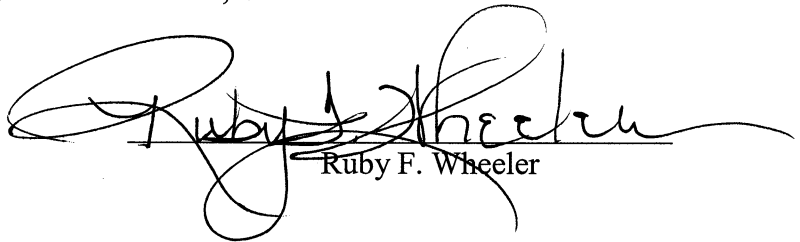
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**COMMENTS OF THE CALIFORNIA WIND ENERGY ASSOCIATION, CALIFORNIA
BIOMASS ENERGY ALLIANCE, L.L.C. AND CALPINE CORPORATION ON THE
PROPOSED DECISION ADDRESSING RPS STANDARD CONTRACT TERMS AND
CONDITIONS**

On all known parties to R. 04-04-026 by mailing a properly addressed copy by first-class mail with postage prepaid to each party named in the official service list.

Executed on May 28, 2004, at San Francisco, California.


Ruby F. Wheeler