

**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 ON
THE DRAFT DECISION OF ADMINISTRATIVE LAW JUDGE SIMON**

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Introduction and Summary

Pursuant to Rule 77 of the Rules of Practice and Procedure of the California Public Utilities Commission (the “Commission”), the California Wind Energy Association (“CalWEA”) submits these comments on the Draft Decision of Administrative Law Judge Simon (the “Draft Decision”).

CalWEA largely supported the utilities’ renewables procurement plans and draft requests for offers (“RFOs”) and thus limited its comments and reply comments submitted during the course of this proceeding to a small list of suggested refinements to the utilities’ various proposals, which would ensure that all renewable power resources, including intermittent resources such as wind-power generators, are able to participate meaningfully in the utilities’ solicitations for power to meet their RPS-program obligations. Specifically, CalWEA’s suggested refinements to the utilities’ renewables procurement plans and draft RFOs focused on certain key areas: (1) the implications of the utilities’ turnkey proposals; (2) the terms and conditions of the utilities’ draft RFOs, in particular the bid-deposit requirements and whether to continue to use the Edison Electric Institute’s (“EEI”) model as the basis for the RFOs’ terms and conditions; and (3) how to designate delivery points in light of the California Independent System Operator’s (“CAISO”) likely switch to a nodal market.

One aspect of the Draft Decision that CalWEA calls out as meriting adoption by the Commission in its final decision is the permission for bidders to make offers to deliver energy at

points that are outside the utilities' service territories but in the CAISO control area and for proper curtailment mechanisms if necessary to address limited transmission constraints. This aspect of the Draft Decision should be adopted by the Commission because it recognizes that statewide transmission constraints and the large transmission bid adders associated with those constraints are impeding achievement of the state's RPS-program goal and that this goal can be met at lower cost if power can be delivered into the CAISO control area, rather than to a specific service territory.

However, several aspects of the Draft Decision should be revised by the Commission. Specifically, despite the limited and constructive nature of CalWEA's proposals, all of which would operate to ensure fuller participation of renewable resources in the upcoming 2005 RPS solicitations, the Draft Decision declines to adopt any of CalWEA's suggestions delineated above. Below, CalWEA addresses the relevant aspects of the Draft Decision and explains why its suggested refinements should be incorporated into the final decision, particularly in light of the recently issued "Preliminary Stakeholder Evaluation of The California Renewables Portfolio Standard" ("CEC Stakeholder Evaluation"). Alternatively, CalWEA requests, should the Commission decline to adopt CalWEA's proposals, that, at a minimum, it revise the Draft Decision in order to acknowledge the validity of CalWEA's concerns and to strongly encourage the utilities to revise their RFOs in light of such concerns. Accordingly, should the utilities opt to not revise their RFOs in light of the concerns of CalWEA and other parties, the Commission should put the utilities on notice that they will not be able to excuse themselves from the institution of penalties for failing to reach their RPS-program obligations on the basis that such failure occurred due to a lack of bidder participation.

Discussion

I. The Draft Decision's Adoption of Flexible Delivery and Curtailment Terms Is Well Advised.

The Draft Decision takes "proactive steps" that will help reduce the impact of transmission issues on RPS procurement: flexibility of delivery points and curtailability of delivery."¹ Specifically, the Draft Decision finds that "[w]idening the scope of delivery options is one step that can be taken" to increase the likelihood of accomplishing the goals of the RPS

¹ Draft Decision, at 8.

program.² Thus, the Draft Decision orders the utilities to allow bids with delivery at points outside their service territories but in the CAISO control area.³ For the same reasons, the Draft Decision reiterates the Commission’s direction to the utilities in Decision 04-06-013 that “bids proposing curtailability are acceptable in the RPS process, and must be evaluated with all other bids.”⁴

These “proactive steps” should be adopted by the Commission in its final decision. The delivery point and curtailability findings of the Draft Decision correctly recognize that by “[b]y casting a wider net for projects that may not have their ideal delivery points or deliverability attributes, the utilities may be able to bolster their RPS procurement starting this year, rather than waiting for transmission improvements that may not come to fruition for years.”⁵ Moreover, the delivery point and curtailability findings of the Draft Decision recognize that by addressing the cost of transmission constraints and the transmission-bid adders associated with those constraints the RPS-program goal of increasing the amount of renewable power relied upon by California ratepayers will be achieved at a lower cost and in a manner consistent with actual grid operations. For these reasons, the delivery point and curtailability findings of the Draft Decision should be adopted.

II. The Draft Decision’s Adoption of The Utilities’ Proposals To Consider Turnkey Bids Is Premature.

CalWEA explained in its comments and reply comments that it would be premature for the Commission to allow the utilities to acquire turnkey projects through the 2005 solicitations because certain concerns had not yet been adequately addressed. These concerns include how to: (i) ensure that renewable suppliers are not discouraged from bidding non-utility ownership bids out of concern that the utility will unduly favor ownership options; (ii) apply the least-cost best-fit evaluation criteria to comparisons of turnkey bids with non-utility ownership bids; (iii) ensure that utilities do not unduly favor ownership options over third-party sales during contract negotiations; (iv) evaluate the added ratepayer costs associated with project ownership (e.g., O&M costs, administrative and general costs, and the fuel costs associated with certain technologies); (v) evaluate the added ratepayer risks associated with project ownership (e.g.,

² *Id.* at 10.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

operating risk, force majeure risk and the fuel-price risk of certain technologies); (vi) ensure that the utilities do not discriminate against third party projects to favor their own resources in plant-operations matters; (vii) address supplemental energy payment (“SEP”) issues in the context of utility ownership (e.g., whether the utility-owned plans are eligible for the SEPs that the non-utility developer would have been entitled to receive); (viii) apply the compliance rules that permit shortfalls in excess of 25 percent if it is a utility-owned plant that is not generating sufficient energy to enable compliance; and (ix) determine whether there should be any limits on the kinds or amounts of renewable capacity that the utilities are permitted to require.⁶ Despite these numerous important questions, the Draft Decision allows the utilities to consider turnkey proposals “[b]ecause the RPS statute allows utilities to own generation that can be used to satisfy RPS requirements, [and therefore] bids with some form of utility ownership must be considered, if relevant, in the bid evaluation process.”⁷ The Draft Decision also finds that turnkey bids are acceptable because safeguards and procedures, which the Commission originally adopted in Decision 04-12-048, sufficiently address the concerns of CalWEA and other parties that “without more guidance on criteria to use in least-cost best-fit rankings of [turnkey proposals], utilities will favor bids that result in their eventual ownership of the renewable resource.”⁸ The Draft Decision lists the following safeguards and procedures instituted in Decision 04-12-048 as applying in the RPS context: (a) requiring the use of an independent evaluator to evaluate turnkey and buyout bids; (b) requiring all bids, including turnkey and buyout bids, to be evaluated using the least-cost best-fit criteria; and (c) requiring the utilities to submit their methodology for evaluating turnkey or buyout bids to their Procurement Review Groups (“PRGs”) and Energy Division staff for review and approval prior to developing their RFO short-lists.⁹ As is explained below, both of the Draft Decision’s rationales for allowing turnkey bids in the 2005 solicitation season are misguided and overlook the recommendations made in the recently released CEC Stakeholder Evaluation.

First, the Draft Decision’s understanding of the RPS Statute is incorrect. California Public Utilities Code section 399.14(g) does not require the Commission to consider bids with some form of utility ownership in 2005. Rather, Section 399.14(g) simply provides that the RPS

⁶ See, e.g. “Reply Comments of the California Wind Energy Association on SCE and PG&E Renewable Procurement Plans,” at 2-3 (May 6, 2005).

⁷ Draft Decision at 14-15 (relying upon Cal. Pub. Utils. Code § 399.14(g)).

⁸ *Id.* at 15.

⁹ *Id.* at 15-16.

Program is not meant to establish a preference for purchasing electricity from third parties.¹⁰ Given the numerous unanswered questions raised by CalWEA and other parties about the solicitation of turnkey bids, the Commission's decision not to entertain such turnkey bids until after such questions are answered would not constitute the establishment of a preference for purchasing electricity from third parties. Rather, the Commission would simply be finding that its expert review of the policy and factual issues of the RPS proceeding requires that it delay the solicitation of turnkey bids until after certain implementation issues have been resolved in a separate proceeding.

Second, the safeguards and procedures adopted in Decision 04-12-048 and applied by the Draft Decision to the RPS Program provide, at best, minimal protection to third-party renewables against the concerns raised by CalWEA and other parties. For example, the use of an independent evaluator and requiring the utilities to submit their methodology to their PRGs and Energy Division Staff do not provide the utilities' independent evaluators or PRGs with any guidance or standards for applying the least-cost best-fit methodology to turnkey bids versus third-party bids. Nor do the safeguards and procedures adopted in the Draft Decision address the larger RPS-implementation issues of how to apply SEPs (if at all) to turnkey projects; how to apply the compliance rules that permit shortfalls in excess of 25% if it is a utility-owned plant that is not generating sufficient attributes to enable compliance; and whether there should be any limits on the kinds or amounts of renewable capacity that the utilities are permitted to acquire through the purchase of turnkey projects. Without more guidance from the Commission and the institution of additional safeguards and procedures that at least address the potential for discrimination in the bidding, negotiation and operations phases of renewables contracts, the issues raised by CalWEA could undermine the RPS program's goal of each utility possessing a portfolio of mixed renewable resources that provides cheaper, cleaner power to California ratepayers. As a practical matter, it is preferable for the Commission to delay the solicitation of turnkey bids in favor of adopting CalWEA's proposal to accept opening and reply comments from interested parties regarding the various issues raised by turnkey bids and to resolve such issues in a timely fashion for future utility solicitations (ideally, beginning in 2006).

¹⁰ Cal. Pub. Utils. Code § 399.14(g).

Finally, it is noteworthy that the CEC Stakeholder Evaluation finds that whether and how to allow utility ownership of renewable energy projects is “[a]n additional issue worth of [Commission] consideration.”¹¹ This recommendation is the result of a survey of all RPS-market participants, including the utilities and project developers. Accordingly, the Commission should heed the considered recommendation of the CEC Stakeholder Evaluation and fully consider all of the implications of utility ownership of renewable energy projects before allowing the utilities to solicit such bids. In light of the foregoing, the Commission should not rush to judgment and allow turnkey bids without first further considering the implications raised by such bids.

III. The Draft Decision’s Adoption of Non-Standardized Bid Deposits Ignores The Outcome of Prior Solicitations and The Recommendations of the CEC Stakeholder Evaluation.

The Draft Decision reviews the bid-deposit proposals of the utilities, including PG&E’s proposed deposit requirement of \$3.00/kW for all short-listed bids (which is supported by CalWEA) and SCE’s proposed deposit requirement of \$25,000 or \$5.00/kW for all bids.¹² The Draft Decision concludes that it does “not have a way to choose between the hypotheses,” respectively, of CalWEA and SCE that either larger bid deposits will discourage bidding at all and unduly favor larger generators that are financially able to make such larger deposits or larger bid deposits will deter only those bidders that are not serious or do not have a viable proposal.¹³ The Draft Decision thus decides to not interfere with the utilities’ judgment regarding bid deposits for 2005 and instead urges parties to bring problems with bid deposits that emerge from the 2005 solicitations to the Commission’s attention so that the Commission “may reevaluate this issue for 2006 solicitations.”¹⁴

The Draft Decision’s finding regarding bid deposits overlooks the fact that CalWEA and other parties’ concerns about the bid-deposit requirement proposed by SCE were based on the experience of market participants in prior solicitations. Specifically, CalWEA noted that in its 2004 solicitation, PG&E required bidders to post \$5.00/kW of project nameplate capacity when they first submitted their bids; this requirement is virtually identical to the proposal of SCE in

¹¹ CEC Stakeholder Evaluation, at 54.

¹² *Id.* at 16.

¹³ *Id.*

¹⁴ *Id.*

this proceeding.¹⁵ PG&E, as CalWEA explained, apparently was dissatisfied with its bid-deposit requirement and thus proposes in this proceeding a significantly less cost-prohibitive bid deposit of \$3.00/kW, which is to be posted only upon the bidder being short-listed by the utility.¹⁶ Thus, the parties have already brought their problems with bid deposits to the Commission's attention and PG&E's 2004 solicitation has already demonstrated that a \$5.00/kW bid-deposit requirement is not necessary to protect the utilities from non-viable or non-serious bids. Postponing the implementation of a standardized and reasonable bid-deposit requirement of \$3.00/kW, upon shortlisting, until after the conclusion of the 2005 solicitation season is ill-advised when the experience of the parties and the utilities in the 2004 solicitation already provides sufficient guidance and insight that would enable the Commission to make a reasoned decision now.

The Draft Decision's finding regarding bid deposits also does not align with the findings and recommendations made in the CEC Stakeholder Evaluation, which notes that "it is useful to recognize that unduly onerous contract terms may yield higher ratepayer costs and higher SEP payments than necessary."¹⁷ The report also notes that the contentious issues related to the utilities 2003/2004 RFOs, in particular the size and nature of the bid-deposit requirements "apparently had an impact on the amount and type of bid response received under the RFOs."¹⁸ Accordingly, the report urges the Commission not to postpone making an affirmative decision regarding bid deposits and other terms and conditions of the draft RFOs.¹⁹ In light of the findings of the CEC Stakeholder Evaluation, the Commission should revise the Draft Decision in order to institute a reasonable bid-deposit requirement of \$3.00/kW, to be posted upon shortlisting, so that the overall quality of bids in the 2005 solicitation season will be improved. At a minimum, the Commission should strongly encourage the utilities to consider revising their RFOs in light of the concerns raised by CalWEA and other parties regarding the chilling effect of an onerous bid-deposit requirement and admonish the utilities that their failure to achieve sufficient bidder participation will not excuse the utilities from the incurrence of penalties for failing to meet their RPS Program obligations.

¹⁵ "Comments of the California Wind Energy Association on Draft Renewable Requests for Proposals," at 2 (May 6, 2005).

¹⁶ *Id.*

¹⁷ CEC Stakeholder Evaluation, at 54.

¹⁸ *Id.*

¹⁹ *Id.*

IV. The Draft Decision’s Choice To Not Institute A Deadline by which Utilities Must Notify Losing Bidders Is Not Necessary To Protect The Utilities’ Interests and Will Discourage Bidders.

The Draft Decision “leave[s] notification of rejected bidders to the business practices of the utilities” but “expect[s] those practices to be consistent with the general requirements of transparency in RPS procurement.”²⁰ The Draft Decision makes this finding despite its acknowledgment that “CalWEA has identified a potential area of unfairness to bidders,” i.e. that a binding bid without a notification deadline restricts the developer from key project development activities such as pursuing other potential purchasers.²¹

The Draft Decision’s choice not to impose a firm bid-rejection deadline of any sort, whether it be seven days as both SCE and CalWEA propose, or some other fixed amount of time, is not necessary to protect the utilities’ interest in not prematurely closing off bids capable of being improved and short-listed.²² For example, SCE’s proposal to impose a seven-day deadline demonstrates that at least some of the utilities believe that a bid-rejection deadline can be instituted while protecting the utilities’ interests. Moreover, if a fixed bid-rejection deadline were adopted, the utilities could still communicate with certain bidders prior to publishing a final short list.

In contrast, the negative consequences to project developers of not implementing a bid-rejection deadline cannot be easily ameliorated. Many renewable generators, in particular new generators or smaller generators, will not be able to bear the financial risk engendered by an indefinite bidding period and therefore will not participate in RFOs that do not impose a firm and reasonable bid-rejection deadline. Accordingly, the Commission should revise the Draft Decision in order to institute a firm bid-rejection deadline. Alternatively, as discussed above, the Commission at least should strongly encourage the utilities to revise their RFOs in light of the valid concerns of CalWEA and other parties or risk the imposition of penalties for the failure to meet their RPS program targets (from which a lack of bidder participation will not serve as an excuse).

²⁰ Draft Decision at 18.

²¹ *Id.* (referring to Comments of the California Wind Energy Association on Draft Renewable Requests for Proposals, at 3).

²² *Id.*

V. The Draft Decision’s Refusal To Require The Utilities To Implement Market Redesign Contingencies Is Illogical and Ignores The Recommendations of the Recent CEC Stakeholder Evaluation.

The Draft Decision declines to require the utilities to allow renewable generators to deliver their power either to the SP-15 CAISO congestion boundary, CAISO trading hub or the generators’ busbars in the event that the CAISO changes the current zonal market to a nodal market.²³ Nevertheless, the Draft Decision states that it “approve[s] of PG&E’s response to its experience in 2004, and think[s] that SCE and San Diego Gas & Electric Company (“SDG&E”) should consider it carefully. . . .”²⁴ This finding is illogical and ignores the recommendations of the recent CEC Stakeholder Evaluation.

The finding is illogical because the Draft Decision approves of PG&E’s delivery-point proposal and even urges the other utilities to carefully consider it. Meanwhile, the Draft Decision does not provide any explanation for why it is not requiring the utilities to adopt the approach that it clearly prefers. Moreover, the Draft Decision acknowledges that PG&E modified its provisions regarding delivery contingencies as a result of difficulties it experienced in its 2004 negotiations with project developers.²⁵ Such experiences demonstrate that the concern of CalWEA and other parties that SCE’s restrictive delivery-point requirement will be unacceptable to project developers and financiers is legitimate and should be addressed immediately in the final decision.

The Draft Decision’s finding regarding delivery points also ignores the recommendations made in the CEC Stakeholder Evaluation. The report observes that the generation-delivery point in the event of market redesign was one of the most contentious issues in the utilities’ 2003/2004 RFOs and that this issue caused significant contracting delays.²⁶ The CEC’s consultants thus urge the Commission to fully consider this issue now and to make a decision that allocates the risk to the party best able to manage such risk.²⁷ As CalWEA explained in its comments, PG&E’s proposal to allow delivery either to the CAISO congestion boundary, CAISO trading hub or to the generator’s busbar appropriately allocates the congestion risk associated with a change to a nodal market to the utilities, which are best suited to manage such risks, and

²³ *Id.* at 17.

²⁴ *Id.*

²⁵ *Id.* at 17.

²⁶ CEC Stakeholder Evaluation, at 54.

²⁷ *Id.*

therefore reduces project developers' and financiers' concerns that resulted in negotiation delays in 2003/2004. Accordingly, the Draft Decision should be revised in order to require the utilities to allow delivery either to their service territory or the generator's busbar in the event that the CAISO changes the market structure. Again, at a minimum, the Commission should direct the utilities to consider revising their RFOs in light of the valid concerns of CalWEA and other parties or risk facing the imposition of penalties for the failure to achieve RPS Program targets (from which a lack of bidder participation will not serve as an excuse).

VI. Basing The PPA on the EEI Model Overlooks that All Parties, Including The Utilities, Acknowledge that The EEI Model Has Been Problematic in The Renewables Context.

The Draft Decision notes that CalWEA has been critical of the use of a power purchase agreement ("PPA") based on the EEI model but declines to prohibit the use of the EEI model as a base document for PPAs because it has already been used for the development of the Commission's standard terms and conditions, in particular in Decision 04-06-014, and was the result of extensive work by many parties to this proceeding.²⁸ Instead, the Draft Decision directs the parties to bring specific problems with the EEI model to the attention of the parties and Energy Division staff for consideration in any subsequent relevant workshops.²⁹

This aspect of the Draft Decision overlooks that the utilities themselves have largely abandoned the EEI model due to the problems it created in prior solicitations. For example, SCE has abandoned the EEI in its RFO documentation and PG&E has adopted a 46-page addendum to modify and supplement the EEI master agreement. Further, renewable suppliers have long objected to the EEI model as the basis for RPS contracts in large part due to the unnecessarily complicated and frequently inapplicable terms and conditions of the EEI form agreement. Given that the utilities and the renewable suppliers now largely agree that the EEI model is problematic in the RPS context, the Draft Decision's reliance upon the past use of these agreements by the Commission, the utilities and renewable developers, is misplaced. Accordingly, this aspect of the Draft Decision should be revised to require post-2005 solicitations to be structured around a more simplified contract structure in which all of the contract terms are in a single contract that is not based upon the inapplicable EEI model.

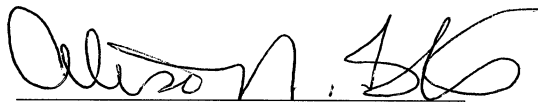
²⁸ Draft Decision, at 17.

²⁹ *Id.*

Conclusion

For these reasons, CalWEA requests that the Commission revise the Draft Decision in order to adopt the refinements suggested above. Alternatively, CalWEA requests that, should the Commission not adopt the refinements suggested above, it strongly encourage the utilities to review and revise their RFOs in light of the concerns discussed above or risk not being permitted to seek an excuse from the imposition of penalties for the failure to meet their RPS program obligations on the basis that an insufficient number of bidders responded to the RFOs.

Respectfully submitted,



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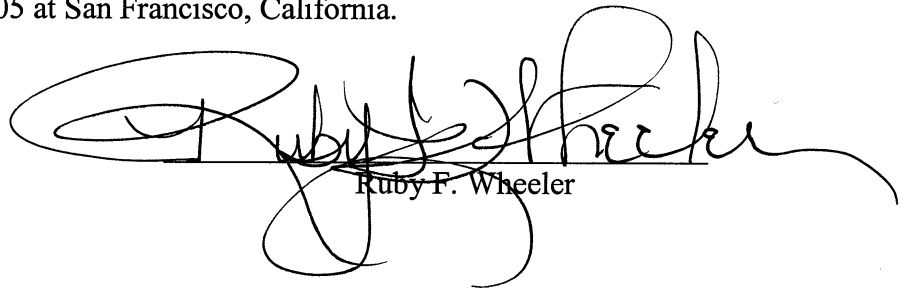
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**COMMENTS OF THE CALIFORNIA WIND ENERGY ASSOCIATION ON THE
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On all known parties to R.04-04-026 by mailing a properly addressed copy by first-class mail with postage prepaid to each party named in the official service list.

Executed on July 11, 2005 at San Francisco, California.



Ruby F. Wheeler