

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

Order Instituting Rulemaking to Continue
Implementation and Administration of California
Renewables Portfolio Standard Program.

Rulemaking 08-08-009
(Filed August 21, 2008)

**EMERGENCY MOTION OF THE CALIFORNIA WIND ENERGY
ASSOCIATION AND THE LARGE-SCALE SOLAR ASSOCIATION
FOR AN EXPEDITED ORDER ON CURTAILMENT ISSUES
IN SCE'S 2010 RPS PROCUREMENT PLAN**

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February 16, 2010

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I. INTRODUCTION

Pursuant to the California Public Utilities Commission's ("Commission") Rule of Practice and Procedure 11.1, the California Wind Energy Association ("CalWEA") and the Large-scale Solar Association ("LSA") respectfully submit this motion for an expedited order on curtailment issues in Southern California Edison Company's ("SCE") 2010 Renewables Portfolio Standard Procurement Plan ("Motion"). This motion is necessary to deter an otherwise-insurmountable burden to developing renewable energy resources needed to achieve California's Renewables Portfolio Standard ("RPS") and for California to meet the 2010 deadlines for federal renewable energy stimulus benefits. Absent immediate resolution of this issue, California's opportunity to benefit from the stimulus funds will be lost.

As set forth in the CalWEA/LSA comments filed on January 19, 2010 in this proceeding ("Opening Comments"), SCE's 2010 RPS Procurement Plan includes an interpretation of its prior pro forma power purchase agreements ("PPA") and proposes revised terms for its 2010 pro forma PPA that are inconsistent with the plain language of SCE's prior pro forma PPAs, are patently unreasonable, and will render projects subject to such terms unfinanceable. SCE filed

reply comments on January 26, 2010, in this proceeding ("Reply Comments"), which fail to justify SCE's position on curtailment. Resolution of this issue is of fundamental importance to projects under contract to SCE and subject to these terms; these projects will be unable to obtain financing and proceed with development until this threat to project viability is resolved. The need for expeditious resolution of this issue is magnified further by the terms of the "cash grant" provision in Section 1603 of the American Recovery and Reinvestment Act of 2009 ("ARRA"), which conditions eligibility for the cash grant on the project commencing construction by the end of 2010 and being placed in service by the expiration of the applicable underlying tax credit. CalWEA and LSA understand that there are projects under contract to SCE that also rely upon receipt of the cash grant under ARRA to ensure the project remains viable. A delay in resolution of the curtailment issue risks imposition of further harm by impairing the ability of developers to meet the ARRA deadlines with respect to projects under contract to SCE. Hence, this Motion seeks an expedited order on the curtailment issues in SCE's 2010 RPS Procurement Plan.

CalWEA and LSA respectfully request that the Commission grant the Motion because (1) SCE's position on curtailment is inconsistent with the plain language of prior pro forma PPAs, is patently unreasonable, and will render projects unfinanceable, (2) SCE's Reply Comments fail to justify SCE's position on curtailment, and (3) any delay in resolution of this issue will impair developers' ability to meet the ARRA deadlines for receipt of the cash grant and therefore impair project viability. Each of these points is addressed in greater detail below.

II. ARGUMENT

A. **The Commission Must Reject SCE's Position On Curtailment Because It Is Inconsistent With The Plain Language Of Prior SCE pro forma PPAs, Is Patently Unreasonable, And Will Render Projects Unfinanceable**

The crux of this issue is that SCE's 2010 RPS Procurement Plan sets forth (1) SCE's "interpretation" of its prior pro forma PPAs as providing it with a right to curtail project output, without payment to the seller, anytime a bid related to the project is not accepted in the applicable day-ahead or real-time California Independent System Operator ("CAISO") market, and (2) proposed new terms for the 2010 pro forma PPA that would make such curtailment rights explicit.¹

To summarize the CalWEA/LSA Opening Comments, the Commission should expressly reject SCE's interpretation of its prior pro forma PPAs because the interpretation is inconsistent with: (1) the plain language of those PPAs,² (2) prior RPS Procurement Plans in which SCE proposed a separate category for projects willing to be curtailed at SCE's discretion,³ and (3) prior Commission decisions in which SCE was instructed to consider congestion costs within its bid evaluation process.⁴ Likewise, the Commission should reject SCE's interpretation of past pro forma PPAs and the proposed new terms in the 2010 pro forma PPA because SCE's position on curtailment would effectively provide it with unlimited curtailment rights, exercised at its own sole discretion.⁵

SCE's proposed curtailment provisions would allow it to curtail a project if the bid that SCE submits, in its sole discretion, for the project does not clear the applicable day-ahead or

¹ CalWEA/LSA Opening Comments at 2-3.

² *Id.* at 4-6.

³ *Id.* at 6-7.

⁴ *Id.* at 7-8.

⁵ *Id.* at 8-9.

real-time CAISO market. Whether a given bid clears the market is a function of the bid price relative to the clearing price applicable to the point at which the generator is modeled by the CAISO.⁶ Thus, under SCE's new interpretation of the PPAs, it would control whether the project runs or is curtailed, simply by adjusting the bid it submits to the CAISO market for the project. This unfettered discretion would present a substantial risk that SCE could engage in scheduling and bidding practices that fail to promote the State's, and the Commission's, support for renewable generation resources.

SCE's position is unreasonable because the seller is only paid for energy actually produced. Thus, the unlimited curtailment rights SCE would have under its new interpretation of the PPAs would provide SCE with unfettered discretion to decide if, when, and how much a seller will be paid.⁷ Under this interpretation, counterparties with pro forma PPA terms will simply be unable to obtain project financing because SCE's interpretation of the contract, if accepted, would give SCE unfettered control over the project's revenue stream, leaving the lender without any meaningful assurance that the project's revenue stream will be sufficient to repay the debt.⁸ Without project financing, projects will not be built, with the relatively rare exception of projects that are self-financed. In short, it will preclude attainment of California's RPS goals.

To avoid such a result, the Commission should reject SCE's interpretation of its prior pro forma contracts, clarify that the Commission never intended that SCE's pro forma would be construed in the manner that SCE now suggests, and order SCE to revise its proposed 2010 pro forma PPA accordingly.

⁶ See e.g., CAISO Tariff § 31.3.1.1.

⁷ CalWEA/LSA Opening Comments at 8-9.

⁸ *Id.* at 9-11.

B. SCE's Reply Comments Fail To Justify SCE's Position On Curtailment

SCE's Reply Comments offer two cursory arguments in response to the CalWEA/LSA Opening Comments: (1) PPA terms should not be "negotiated" or interpreted in the RPS Procurement Plan proceeding, and (2) SCE's customers should not bear the burden of take-or-pay contracts.⁹ Neither of these arguments justifies SCE's position on curtailment or negates the overwhelming considerations counseling rejection of SCE's position. Thus, the Commission should reject SCE's interpretation of its prior pro forma contracts, clarify that the Commission never intended that SCE's pro forma would be construed in the manner that SCE now suggests, and order SCE to revise its proposed 2010 pro forma PPA accordingly.

1. SCE's Objection To Commission Review Of Curtailment Provisions Ignores The Commission's Statutory Authority To Administer The RPS Program

SCE's suggestion that the curtailment issue should not be addressed in the RPS Procurement Plan proceeding ignores the Commission's statutory mandate to administer the RPS program.¹⁰ As part of that mandate, the Commission is required to "review and accept, reject, or modify" SCE's RPS Procurement Plan.¹¹ Thus, the Commission is not only authorized, but required, by statute to "review" SCE's RPS Procurement Plan, including its position on curtailment, and "modify," if necessary, that plan. While the Commission may occasionally "rely on the business judgment of the parties"¹² with respect to a given issue, it is certainly not required to do so.¹³ Indeed, the Commission has expressly "encourage[d] the parties to inform

⁹ SCE Reply Comments at 3-5.

¹⁰ Pub. Util. Code § 399.11(a).

¹¹ Pub. Util. Code § 399.14(c).

¹² D. 05-10-014 at 17.

¹³ SCE submits that its ability to execute more than 30 PPAs in 2009 is evidence that the parties can resolve the curtailment issue bilaterally. SCE Reply Comments at 3. This empirical offering fails to reflect, however, that the PPAs were signed before SCE announced its extreme interpretation of the curtailment provisions in its 2010 RPS Procurement Plan. That SCE was able to sign so many contracts in 2009 suggests not that the parties were able to

[the Commission] of any specific contracting issues that appear to be creating impediments to the attainment of RPS goals."¹⁴ And when such impediments have appeared in the past, the Commission has stepped in to order modification of specific RPS Procurement Plan provisions.¹⁵

As noted at length in the CalWEA/LSA Opening Comments, SCE's position on curtailment presents an impediment to the attainment of the State's RPS goals. Therefore, the Commission's consideration and rejection of SCE's proposed curtailment terms for the 2010 pro forma PPA is both well within the Commission's authority and consistent with the Commission's past exercise of its discretion.

Moreover, the Commission should consider SCE's position on curtailment issues when it evaluates SCE's overall performance under the RPS program as part of the application of flexible compliance criteria. While the Commission may "start from the presumption that utilities are able to use their business judgment in running their solicitations unless their plans threaten to impair the effectiveness of the RPS program,"¹⁶ the Commission has been equally adamant that "[u]tilities ultimately remain responsible for program implementation, administration and success."¹⁷ Here, SCE is proposing unreasonable curtailment terms that, until addressed, will present an untenable barrier to project development, fundamentally undermining project viability.¹⁸ When the time comes for the Commission to consider the extent to which SCE has "demonstrate[d] creativity and vigor in program administration and execution," the

work this out, but rather that SCE's counterparties interpreted the curtailment provisions much differently than SCE and were unaware of SCE's extreme interpretation.

¹⁴ D. 05-10-014 at n. 15; *see also* D. 06-05-039 at 14 (noting that the Commission has "employed the presumption that utilities are able to use their business judgment in running their solicitations, unless their plans threaten to impair the effectiveness of the RPS program").

¹⁵ *See e.g.*, D. 06-05-039 (requiring SCE to revise its plan to address CAISO market redesign); D. 05-07-039 (requiring utilities to revise permitted delivery points).

¹⁶ D. 05-07-039 at 15.

¹⁷ D. 09-06-018 at 4.

¹⁸ *See* CalWEA/LSA Opening Comments at 9-11.

Commission should consider the extent to which SCE's extreme interpretation of its curtailment rights has impaired project viability and impeded the State's achievement of its renewable energy goals.

SCE's argument that interpretation of the 2009 SCE pro forma PPA is outside the scope of this proceeding also ignores the Commission's statutory authority.¹⁹ In addition to its review of the RPS Procurement Plans, the Commission is required to review the results of each solicitation for consistency with the approved RPS Procurement Plans.²⁰ In order to conduct this review, there must be a baseline against which the solicitation results will be evaluated. SCE failed to inform the Commission, or the market, of its extreme interpretation of the curtailment provisions in its 2009 pro forma PPA when it submitted its 2009 RPS Procurement Plan in this proceeding. Furthermore, the plain language of SCE's 2009 pro forma PPA itself does not support SCE's position. Thus, the Commission's approval of SCE's 2009 RPS Procurement Plan could not have included anything approaching even tacit endorsement of SCE's curtailment position.

Now that SCE's 2010 RPS Procurement Plan has provided the Commission with notice of SCE's interpretation of its 2009 pro forma PPA, the Commission's statutory authority to determine consistency with the 2009 RPS Procurement Plan necessarily includes authority to issue a statement that SCE's new interpretation of its 2009 pro forma PPA is inconsistent with the Commission's understanding of that agreement. While it is true that an individual, executed agreement has its own terms for dispute resolution and may contain terms and conditions that differ from those in SCE's pro forma PPA,²¹ the Commission nevertheless has plenary authority

¹⁹ SCE Reply Comments at 4.

²⁰ Pub. Util. Code § 399.14(d).

²¹ SCE Reply Comments at 4.

to clearly state its understanding of, and intent for, the terms of the pro forma PPAs it has previously reviewed pursuant to its statutory authority. Accordingly, the Commission should clarify that the Commission never intended SCE's pro forma PPA to be construed in the manner that SCE now suggests.

2. SCE's Concern About "Take-Or-Pay" Contracts Misses The Mark Because No Party Has Proposed Such A Contract

SCE's statement that its customers should not have to bear the burden of "take-or-pay" contracts fails to recognize that none of the parties to this proceeding have suggested that SCE must enter into a take-or-pay contract. As discussed in the CalWEA/LSA Opening Comments, SCE's 2009 pro forma PPA includes an *explicit* provision that requires the project to curtail output, without payment to the seller by SCE, if the CAISO orders curtailments in response to physical reliability concerns such as a condition that jeopardizes the integrity of the grid or requires immediate action to prevent or limit the loss of load or generation.²² None of the conceptual alternatives proposed in the CalWEA/LSA Opening Comments propose to modify this obligation.²³ Therefore, SCE's customers would not be subject to a true take-or-pay contract.

SCE's argument that developers can mitigate the risk of curtailment through its project location, interconnection type, and generator technology also misses the mark.²⁴ SCE, through its bid review, PPA negotiation and acceptance process, has a deep involvement in these aspects of the projects; takes the transmission system, congestion and other factors into consideration; and is a full partner in those risks. For example, the Commission has already allocated congestion risk to SCE, and instructed SCE to incorporate this into its least-cost, best-fit analysis

²² CalWEA/LSA Opening Comments at 5-6.

²³ *See id.* at 11-14.

²⁴ SCE Reply Comments at 4.

of bids.²⁵ Furthermore, the CAISO interconnection process requires an interconnection customer to provide up-front funding or pay directly for the transmission and interconnection facilities necessary to mitigate thermal overloads and voltage violations, and address short circuit, stability, and reliability issues associated with the requested interconnection.²⁶ This analysis takes into consideration location and generator technology.²⁷ Thus, the physical, reliability-based curtailments to which the project is exposed are equalized through the CAISO interconnection process. SCE, in its role of planning and developing transmission, has far more control over how congestion is relieved on the grid.

Likewise, SCE's comment "that guaranteeing generator profits is not the responsibility of [SCE] customers" conveniently ignores the patently inequitable result of SCE's position on curtailment and grossly overstates the result of the conceptual alternatives in the CalWEA/LSA Opening Comments.²⁸ As discussed in the CalWEA/LSA Opening Comments, obtaining project financing does not require the elimination of risk or a "guaranteed" revenue stream.²⁹ Indeed, the payment structure of the RPS program, which provides revenue only when the project is delivering energy to the grid, effectively precludes such a guarantee. Rather, a project finance structure requires that a developer be able to demonstrate some level of assurance that the revenue stream under the PPA will be sufficient to repay the debt. The conceptual alternatives in the CalWEA/LSA Opening Comments describe a few mechanisms for providing increased assurance of the PPA revenue stream. None of these proposals is risk-free, as SCE suggests, but each would avoid the asymmetric allocation of risk requested by SCE.

²⁵ D. 05-07-039 at 9-10.

²⁶ See CAISO Tariff Appendix Y.

²⁷ *Id.*

²⁸ SCE Reply Comments at 5.

²⁹ CalWEA/LSA Opening Comments at 10-11.

None of SCE's arguments justify its position on curtailment. Thus, the Commission should reject SCE's interpretation of its prior pro forma contracts, clarify that the Commission never intended that SCE's pro forma would be construed in the manner that SCE now suggests, and order SCE to revise its proposed 2010 pro forma PPA accordingly.

C. Delayed Resolution Of This Issue Will Impair Developers' Ability To Meet The ARRA Deadlines For Receipt Of The Cash Grant And Therefore Impair Project Viability

Failure to resolve the curtailment issues in SCE's 2010 RPS Procurement Plan on an expedited basis will have an unprecedented chilling effect on California's RPS program. Many projects under contract to SCE are currently attempting to commence construction by December 31, 2010 in order to qualify for the cash grant in lieu of investment tax credit made available by section 1603 of ARRA.³⁰ Commencing construction will require construction financing, and closing construction financing will require certainty of project revenues under the project offtake agreement. The mere assertion that SCE has discretionary curtailment rights under its PPAs is sufficient to destabilize the RPS program by jeopardizing, if not thwarting altogether, access to construction financing at a time when every day counts. More fundamentally, SCE's position with respect to discretionary economic curtailment rights calls into question the level of SCE's long-term commitment to California's RPS program, a message that certainly will not be lost on Wall Street. Immediate action is required in order to avoid derailing the RPS program at this critical juncture.

³⁰ See e.g., U.S. Treasury Department, "Payments for Specified Energy Property in Lieu of Tax Credits under the American Recovery and Reinvestment Act of 2009" available at <http://www.treasury.gov/recovery/docs/guidance.pdf> (last visited February 11, 2010). For many, if not most, projects in development, accessing this cash grant is a critical element of project success because of the limited availability of tax equity participants to monetize the tax credit, and the incremental cost associated with obtaining tax equity participation, assuming that it becomes available.

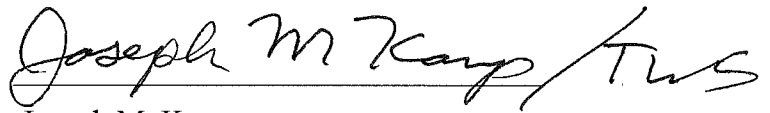
Under its current schedule, the Commission will not issue an order on SCE's 2010 RPS Procurement Plan until sometime during the second quarter of 2010 *at the earliest*.³¹ A Commission order issued late in the second quarter will leave parties with only a few months in which to incorporate the Commission's decision in their PPAs, place orders for long lead time equipment, arrange and close construction financing, and commence construction in time to qualify for the cash grant under ARRA. Thus, it is critical that the Commission grant this Motion and resolve the curtailment issues raised in SCE's 2010 RPS Procurement Plan as soon as possible.

³¹ *Amended Scoping Memo and Ruling Assigned Commissioner Regarding 2010 RPS Procurement Plans* (November 2, 2009), R. 08-08-009.

III. CONCLUSION

For the foregoing reasons, CalWEA and LSA respectfully request that the Commission grant the Motion and immediately resolve this issue. If California is to receive the benefit of the substantial federal stimulus that would accompany commencement of construction this year, and avoid unwarranted delay to achieving its RPS goals, the Commission must take clear, resolute and prompt action.

Respectfully submitted,



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*Attorneys for the California Wind Energy Association
and the Large-scale Solar Association*

February 16, 2010

VERIFICATION

I, Nancy Rader, am the Executive Director of the California Wind Energy Association. I am authorized to make this Verification on its behalf. I declare under penalty of perjury that the statements in the foregoing copy of *Emergency Motion of the California Wind Energy Association and the Large-scale Solar Association For An Expedited Order On Curtailment Issues In SCE's 2010 RPS Procurement Plan* are true of my own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 16, 2010 at Berkeley, California.



Nancy Rader

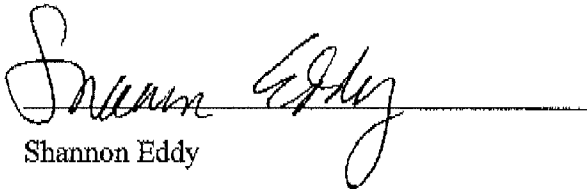
Executive Director, California Wind Energy Association

VERIFICATION

I, Shannon Eddy, am the Executive Director of the Large-scale Solar Association. I am authorized to make this Verification on its behalf. I declare under penalty of perjury that the statements in the foregoing copy of *Emergency Motion of the California Wind Energy Association and the Large-scale Solar Association For An Expedited Order On Curtailment Issues In SCE's 2010 RPS Procurement Plan* are true of my own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 16, 2010 at Sacramento, California.

A handwritten signature in cursive script, reading "Shannon Eddy", is written over a horizontal line.

Shannon Eddy

Executive Director, Large-scale Solar Association

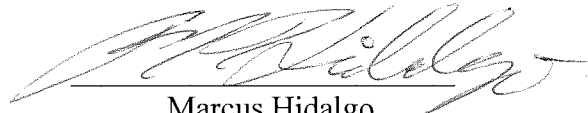
Certificate of Service

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

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on all known parties to R.08-08-009 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 February 16, 2010, at San Francisco, California.



Marcus Hidalgo