BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration, and Consider Further Development of, California Renewables Portfolio Standard Program.	Rulemaking 15-02-020 (Filed February 26, 2015)

COMMENTS OF THE CALIFORNIA WIND ENERGY ASSOCIATION ON REQUESTS FOR WAIVERS OF THE RENEWABLES PORTFOLIO STANDARD PROCUREMENT QUANTITY REQUIREMENT FOR COMPLIANCE PERIOD 1 OF GEXA ENERGY CALIFORNIA, LLC, DIRECT ENERGY BUSINESS, LLC, AND LIBERTY POWER HOLDINGS, LLC

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I. INTRODUCTION

Pursuant to the California Public Utilities Commission's ("Commission") Decision 14-12-023, Rule 11.1(e) of the Commission's Rules of Practice and Procedure, and the February 2, 2018, email ruling of Administrative Law Judge Robert Mason, the California Wind Energy Association ("CalWEA") respectfully submits these comments on the Renewables Portfolio Standard ("RPS") Compliance Period 1 (2011-2013) Waiver Requests of Direct Energy Business, LLC ("Direct Energy"), Gexa Energy California, LLC ("Gexa"), and Liberty Power Holdings, LLC ("Liberty") ("Waiver Requests"). Direct Energy made its filing on January 12, 2018, and Gexa and Liberty filed on January 19, 2018.

This is the first time that the Commission is addressing RPS program enforcement since it established enforcement rules for the RPS program in Decision ("D.") 14-12-023. In so doing, it is very important to the continued success of the RPS program that the Commission hold load-serving entities ("LSEs") fully accountable for any renewable energy delivery shortfalls that cannot reasonably be excused based on the standards set forth in D.14-12-023. Any laxity will serve as a precedent that could encourage LSEs to cut corners and take greater compliance risks in the future that result in noncompliance, which could affect achievement of the state's RPS and greenhouse-gas-reduction goals. Moreover, granting waivers where unwarranted will provide a competitive advantage to non-complying LSEs. (*E.g.,* Liberty states that it did not procure sufficient Product Content Category 1 and 2 products in order to "keep costs as competitive as

possible."[1]) In the first compliance period, nine Electric Service Providers ("ESPs") and four utilities fully complied with their RPS requirements.[2] Granting waivers when not fully justified would be unfair not only to these compliant LSEs, but to the three ESPs who were found to be out of compliance but chose to pay the penalty rather than request a waiver.

CalWEA has reviewed each of the three Waiver Requests. We find that none of these requests have demonstrated that the relevant statutory conditions for waivers have been met. Should the Commission grant Gexa's Petition for Modification of D.12-06-038 to clarify that decision on the topic of long-term contracting requirements in the first year of an ESP's operations, the Commission can then consider whether Energy Division's Final Determination regarding compliance should be revisited.

II. COMMENTS ON WAIVER REQUESTS

A. Liberty

Liberty requests that the Commission waive its entire Compliance Period 1 RPS procurement quantity requirement ("PQR") shortfall. In the alternative, Liberty requests that, in lieu of imposing a penalty, the Commission defer its shortfall until a subsequent compliance period, effectively allowing Liberty Power to make up its procurement shortfall "in-kind" during Compliance Period 3 or a later date.[3] CalWEA addresses these issues in turn.

1. Waiver request

Liberty's Waiver Request is based on its contention that it was unable to secure viable Product Content Category ("PCC") 2 products, and that PCC 1 products were available only "at significantly higher prices than the PCC 2 products."[4] While Liberty may have "sought to maximize the amount of less expensive PCC 2 products," which is allowed under the RPS program rules, there is no provision under the RPS program rules that waives compliance requirements based on the market unavailability of PCC 2 products. This is so notwithstanding

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[1] Liberty Waiver Request at p. 7.

[2] CPUC "RPS Compliance Period 1 Determinations," available at: http://www.cpuc.ca.gov/General.aspx?id=3856.

[3] Liberty Waiver Request at pp. 1-2.

[4] *Id.* at p. 3.

Liberty's quotation of statute.[5] Moreover, as Liberty clearly stated,[6] it had the opportunity to purchase both PCC 1 and PCC 2 products and thus Liberty did not take "all reasonable actions" under its control to achieve full compliance, as required by P.U. Code Section 399.15(b)(7).

Liberty's argument that sellers increased PCC 2 prices "at the very end of Compliance Period 1" speaks only to Liberty's business failings and is not a valid excuse for noncompliance. Further, Liberty all but admits that it was gambling that its noncompliance would cost less than the RPS penalties that the Commission might impose.[7]

Liberty argues that "enforcement rules were not issued until December 2014, nearly a full 12 months after the end of Compliance Period 1" which kept it from "fully realizing the magnitude of the potential penalties."[8] This preposterous argument ignores the fact that, long before Compliance Period 1, in 2003, the Commission had issued its initial RPS decision that established the penalty amount at $50/MWh, with an annual penalty cap at $25 million/year.[9] While the Commission adopted numerous compliance changes in 2014 in D.14-12-023 pursuant to SB 2 (1X), including modified penalty caps for ESPs, SB 2 (1X) did not direct reconsideration of the level of noncompliance penalties. Thus, there was no reason for Liberty to expect that penalty levels would be reduced, and indeed they remained at $50/REC.

Liberty Power supports its waiver request, in part, by arguing that it met its PCC 1 requirement and sought to procure "an appropriate minimum margin of procurement to achieve its PQR" by procuring PCC 3 RECs in excess of its needs.[10] That Liberty met its PCC 1 requirement, and procured an excess of PCC 3 RECs is irrelevant to whether it met its overall RPS requirement and is not a valid basis for a waiver.

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[5] To support its position, Liberty quotes one of the grounds for granting waivers contained in Pub. Util. Code Section 399.15(b)(5): "an insufficient supply of eligible renewable energy resources available to the retail seller." As is obvious, statute does not refer to an "insufficient supply of PCC 2" resources.

[6] Liberty Waiver Request at pp. 3-4.

[7] *Id.* at p. 3. ("Given the large price disparity between the products, Liberty Power concluded that the PCC 1 products were commercially unviable, particularly as at the time no RPS penalty for Compliance Period 1 had been established." (Emphasis added.)

[8] Liberty Waiver Request at pp. 11-12.

[9] CPUC D.14-12-023 at p. 39.

[10] Liberty Waiver Request at pp. 10-11.

2. Make-up and penalty-reduction request

Liberty requests that, absent a waiver, it should be able to make up its procurement shortfall in a subsequent compliance period in lieu of paying a penalty, setting forth three reasons. If the voluntary in-kind deferral request is not granted, Liberty seeks a lower penalty rate such that the price "better reflects market costs for the shortfall products," to avoid what it argues would otherwise be an excessive financial penalty.[11]

Regarding the make-up request, it is not necessary to respond to Liberty's three reasons because, in 2011, the Legislature, in SB 2 (1X), expressly prohibited the carryover of procurement deficits. As the Commission stated in D.14-12-023, this prohibition "eliminates the uncertainty and complexity that attended the prior statutory requirement that procurement deficits could be carried forward, but must be made up within three years of the year in which they were incurred. This simplification in turn allows the disposition of a waiver of a retail seller's procurement quantity requirement (PQR) pursuant to Section 399.15(b)(5) to establish finality for the relevant compliance period."[12] Enabling a make-up requirement in lieu of paying a monetary penalty would contradict this provision of statute.

Similarly, Liberty's request to lower the $50/REC penalty rate to one that is "based on actual market prices for the most expensive RPS product, PCC 1 RECs" is wholly at odds with the Commission's reasoning in establishing and maintaining the $50/REC penalty, which included creating "clear consequences" for inaction and to provide incentives to meet RPS requirements.[13] Were the Commission to reduce the penalty level, it would have the opposite effect, encouraging LSEs to relax in their efforts to ensure compliance and to gamble that noncompliance may cost no more than "the price Liberty Power could have paid to meet" its RPS requirement.[14]

B. Direct Energy

Direct Energy requests a waiver of enforcement of its failure to meet its RPS procurement requirement and, if a waiver is not granted, that it be allowed to make up its requirement in lieu of paying a monetary penalty

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[11] *Id.* at p. 2.

[12] D.14-12-023 at p. 9 (footnote omitted).

[13] D.03-06-071 at p. 52.

[14] Liberty Waiver Request at p. 15.

1. Waiver request

Direct Energy requests a waiver of enforcement of its failure to meet its RPS procurement requirement based on P.U. Code Section 399.15(b)(5)(B), which provides that the Commission shall waive enforcement in the event of "[p]ermitting, interconnection, or other circumstances that delay procured eligible renewable energy resource projects, or there is an insufficient supply of eligible renewable energy resources available to the retail seller."[15] Direct Energy points to the fact that two of its unit-contingent renewable contracts failed to deliver the contracted quantity of energy, but it does not contend that this failure to deliver was due to "permitting, interconnection, or other circumstances that delay[ed] the projects." In fact, these renewable energy projects apparently began delivering on time, but simply under-performed and under-delivered.[16] Such under-performance is not covered by the referenced statutory provision. Direct Energy also claims that a delay in the COD date for a separate contract, along with under-performance, contributed to its noncompliance, but does not describe the nature of the delay.

Direct Energy addresses the other factors to be considered in determining whether to waive a retail seller's RPS requirement, essentially arguing that it made its best estimates for its customer demand and renewable energy procurement requirements. Direct Energy contends that its relatively small compliance deficit demonstrates that it prudently managed its renewable procurement. And yet, it also states that "Direct Energy did not learn of the performance issues related to its procurement contracts until the compliance period was almost over, leaving Direct Energy with very little time to make up the shortfall that resulted from the underperformance of multiple facilities."[17] Prudent management would have detected performance issues in time to correct them. Similarly, Direct Energy states that "only two contracts out of its 38 contracts" failed to deliver as expected.[18] Prudent management might have planned for a compliance margin large enough to cover more than two under-performers. Moreover, Direct Energy should have (and may have) included remedies for non-performance in its power purchase agreements, as is typical in such agreements. To the extent that Direct Energy executed any non-performance remedies, these remedies may cover its RPS noncompliance penalties.

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[15] Direct Energy Waiver Request at p. 5.

[16] *Ibid.*

[17] *Id. at* p. 7.

[18] *Id.* at p. 10.

Direct Energy states that it "should not be punished for seeking to reduce overall procurement costs by aiming to meet its procurement targets and avoid stranded procurement and unbankable RECs."[19] Yet, this statement indicates that it made a calculated gamble in minimizing its procurement margin. The result is that it fell short, and it should be prepared to accept the consequences. Otherwise, Direct Energy will reap a reward over ESPs that did not cut RPS compliance so close.

Finally, Direct Energy's possession of excess PCC 3 RECs does not "demonstrate[] its good faith intention to meet its RPS procurement obligations"[20] because PCC 3 RECs do not satisfy its obligations to procure PCC 1 and/or PCC 2 RECs.

2. Make-up and penalty-reduction request

As with Liberty, Direct Energy argues that "there is nothing preventing the Commission from allowing Direct Energy to make up its compliance period 1 PQR shortfall instead of assessing a penalty."[21] As discussed above with regard to Liberty, enabling a make-up requirement in lieu of paying a monetary penalty would directly contradict statute.

C. Gexa

CalWEA is not privy to all of the communications leading up to, and details underlying, Energy Division's December 20, 2017, Final Determination of Compliance regarding Gexa's RPS compliance in period 1. However, Energy Division apparently concluded that Gexa's short-term "full requirements" contract does not satisfy the RPS long-term contracting requirement and that, therefore, all of GEXA's RPS procurement under short-term contracts is disallowed. Despite this determination, Gexa continues to argue with Energy Division's conclusion on this point,[22] which is procedurally inappropriate. No waiver should be granted on this basis. The Legislature and the Commission have long recognized the important role that long-term contracting plays in fostering new renewable resources and achieving California's RPS goals.[23]

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[19] *Id.* at p. 12.

[20] *Id.* at p. 13.

[21] *Ibid.*

[22] Gexa Waiver Request at p. 9.

[23] *See, e.g.,* CPUC D.07-05-028 (May 2007), Findings of Fact 1 and 2: "New sources of RPS-eligible generation will be necessary to meet the goal of 20% of retail sales from eligible renewable energy resources by December 31, 2010" and "Long-term contracts are an important tool in developing new RPS-eligible generation." See also CPUC D.06-10-019 (October 2006), Finding of Fact 16:

Absent the long-term contracts that have been executed as part of the RPS program, it is highly unlikely that any new renewable energy facilities would have been built.

Gexa also argues that the long-term contracting requirement should not apply to Gexa in 2013, its first year of operation, due to a lack of clarity in the Commission's 2012 D.12-06-038 regarding the obligations of retail sellers in their first year of operations.[24] Gexa argues that Energy Division interpreted the language in D.12-06-038 contrary to clear language contained in the discussion section of that decision which suggests an exemption. However, D.12-06-038 contains no finding of fact, conclusion of law, or ordering paragraph on the subject as relates to Energy Service Providers and, moreover, Ordering Paragraph 20 of that decision clearly states that there is no exemption. Therefore, a complete reading of the decision does not support a long-term contracting exemption. Gexa states that it "worked diligently with Energy Division seeking to understand the nature of any issues with its renewable procurement."[25] CalWEA is not privy to the timing or content of these communications, however Gexa itself notes that it did not commence communications with Energy Division until mid-2016 – four years after D.12-06-038 was issued.[26] To the extent that D.12-06-038 may have been unclear, Gexa should have sought clarity much sooner.

We note that, on January 19, 2018, Gexa filed a Petition for Modification ("PFM") in R.11-05-005 to clarify the decision on the first-year long-term contracting exemption issue. Absent favorable Commission action on that Petition, a penalty waiver should not be granted on the basis of a first-year operations exemption. Should the Commission grant Gexa's PFM, the Commission can then consider whether Energy Division's Final Determination regarding compliance should be revisited.

If the Commission does not grant Gexa's PFM, the penalty should not be based only on the long-term contracting shortfall, as Gexa requests in the alternative,[27] which would contravene the clear language in Ordering Paragraph 20 of D.12-06-038.[28] Finally, to the extent that Gexa's

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"Substantially all new RPS-eligible generation in California has been built after the developer has secured a contract of at least 10 years in duration for the entire output of the project."

[24] Gexa Waiver Request at p. 12.

[25] *Id.* at p. 23.

[26] *Ibid.*

[27] *Id*. at p. 26.

[28] Ordering paragraph 20 in D.12-06-038 states: "In order to count procurement from short term contracts signed after June 1, 2010 for compliance with the California renewables portfolio standard in a

penalty waiver is not granted, as discussed with regard to Liberty, above, the penalty should not be based on the avoided cost of compliance as Gexa requests.[29]

Respectfully submitted,

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compliance period, a retail seller newly commencing operations in California must sign in the first compliance period of its operation in which any short term contract is signed, long term contracts with expected generation equal to at least 0.25% of its retail sales in the first year of its retail operations in California."

[29] Gexa Waiver Request at p. 26.

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 *Comments of the California Wind Energy Association on Requests for Waivers of the Renewables Portfolio Standard Procurement Quantity Requirement for Compliance Period 1 of Gexa Energy California, LLC, Direct Energy Business, LLC, and Liberty Power Holdings, LLC* 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 26, 2018, at Berkeley, California.

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Nancy Rader
Executive Director, California Wind Energy Association