

**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 11-05-005  
Sec. 399.20 program  
(Filed May 5, 2011)

**RESPONSE OF THE WESTERN POWER TRADING FORUM ON THE MOTION  
OF THE CALIFORNIA WIND ENERGY ASSOCIATION REGARDING 2012  
RENEWABLES PORTFOLIO STANDARD PROCUREMENT PLANS**

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WESTERN POWER TRADING FORUM

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**I. Introduction and Summary**

In accordance with Rule 11.1(e) of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), the Western Power Trading Forum (“WPTF”)<sup>1</sup> respectfully submits the following response to the December 8, 2011, Motion of the California Wind Energy Association (“CalWEA”), asking the Commission to direct Southern California Edison Company, Pacific Gas and Electric Company and San Diego Gas & Electric Company (collectively, the “IOUs”) to address in their 2012 Renewables Portfolio Standard (“RPS”) Procurement Plans, among other things, three issues that have arisen in connection with the RPS program (“Motion”). Specifically, CalWEA asks that the following issues be addressed: “(i) the processes that the IOUs and the Commission use to consider amendments to power purchase agreements (“PPAs”) associated with changes to underlying renewable projects; (ii) the IOUs’ current unduly narrow approach to the evaluation of Resource Adequacy (“RA”) benefits associated with renewable projects, and (iii) the current time-of-delivery (“TOD”) factors used to

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<sup>1</sup> WPTF is a California non-profit, mutual benefit corporation. It is a broadly based membership organization dedicated to enhancing competition in Western electric markets in order to reduce the cost of electricity to consumers throughout the region while maintaining the current high level of system reliability. WPTF actions are focused on supporting development of competitive electricity markets throughout the region and developing uniform operating rules to facilitate transactions among market participants.

calculate PPA pricing and evaluate renewable energy projects through the least-cost, best-fit (“LCBF”) analysis performed by the IOUs and the Commission.”<sup>2</sup> In a footnote, CalWEA indicates that, “In its comments filed on November 21, 2011 in R.11-10-023, CalWEA asked the Commission to address the RA issues referred to above in that proceeding. To the extent that the Commission does address these RA issues in that proceeding, CalWEA does not request that they also be considered in this proceeding.”<sup>3</sup>

WPTF has no position on the TOD issue raised by CalWEA, but offers comments below on the issues raised by CalWEA with regard to the evaluation of renewable PPAs and amendments to approved PPAs and the evaluation of RA benefits associated with renewable projects.

## **II. WPTF Comments**

### **A. WPTF Concurs with CalWEA that the Current Commission Approach to PPA Amendments is Problematical. We Also Note the Issue is not Unique to Renewables.**

The primary point made by CalWEA is that the IOUs and the Commission currently employ a permissive approach to entering into and evaluating PPA amendments involving changes to underlying renewable projects. They note that this has led to a secondary market in which executed PPAs are bought and sold, frequently for the purpose of securing authority to proceed with an entirely separate project, which may even employ entirely different technologies.<sup>4</sup> CalWEA expresses a concern that this secondary market encourages speculative bidding by parties responding to IOU requests for offers (“RFOs”), since the signed PPA is a “valuable commodity independent of the underlying project.”

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<sup>2</sup> Motion, at p. 1.

<sup>3</sup> Id, footnote 1 at p. 1.

<sup>4</sup> Id, at p. 2.

While the existence of secondary markets is generally a positive development, WPTF concurs with CalWEA that, in this particular case, the existence of an active secondary market for executed PPAs is at least in part indicative of an underlying problem with the evaluation and selection process associated with the solicitation. Failure to perform on winning bids has become a significant issue for contracts executed by the IOUs, and such failure to perform harms the renewable energy market, harms ratepayers and encourages the “race to the bottom”<sup>5</sup> that CalWEA accurately characterizes where contracts are awarded to projects based on a low bid price, but little likelihood of deliverability.

Furthermore, failures to perform and/or renegotiations not only harm the purchaser and ratepayers, but are unfair to solicitation runners-up, who might have been priced higher solely because they more accurately assessed the risks, costs and operational challenges for which the winner is belatedly trying to secure an adjustment through renegotiation. Fostering a system whereby bidders are encouraged to tender artificially low bids because of the assumption of being able to amend the PPA later or sell the PPA to a third party is inefficient and patently unfair to bidders whose bids in the original solicitation were lower than the renegotiated PPAs, but who are now out of the running for a PPA. Moreover, the net result inevitably is to layer on additional transaction costs that, as CalWEA notes, “ultimately increase costs to ratepayers.”<sup>6</sup> WPTF also notes that this problem of non-performance is not unique to renewables; the same problems exist with regard to contracts executed by the IOUs for conventional generation as well. While it may not be in scope to address RFOs for conventional generation in this docket, any solutions that are arrived at in this docket should be carefully considered for their applicability to conventional generation solicitations, as the decisions may

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<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

well serve as precedent for future considerations of policies and procedures applicable to non-renewable solicitations as well.

It is clear that CalWEA has raised an important issue that should be added to the scope of this ongoing docket. WPTF very much endorses the principle that winners of solicitations should be required to perform under the terms of their contracts. At the same time, WPTF does not suggest that any renegotiation of an existing PPA is untenable. Events beyond the control of the developer can change during the long lead time between solicitation and ultimate delivery. Therefore, a thoughtful balance must be achieved. An urgently needed first step to achieving this balance would be for the Commission to accelerate the process that leads to approval of winning bids and their associated PPAs, as this would significantly address issues raised by the CalWEA Motion. Moreover, the Commission should work with the other energy agencies to streamline and improve the licensing process associated with project development to further minimize the risks associated with long lead times.

#### **B. Steps could be Undertaken to Address this Issue.**

CalWEA recommends certain steps to “curb the speculative frenzy,” including having the Commission adopt clear principles for the review of proposed PPAs and PPA amendments, clarify the methodology for evaluating pricing in proposed PPAs and encourage the IOUs to enforce the milestone provisions of PPAs. WPTF offers its comments on each of the CalWEA suggestions as follows:

- “Signed PPAs proposed to the Commission should be evaluated and acted upon in a more expedited fashion to ensure that developers can fulfill the PPAs they have executed. The current lag between PPA execution and Commission approval has led to developers being exposed for expenditures on projects that may not be approved, or being unable to meet the terms that were agreed upon in a different market environment.”<sup>7</sup> *WPTF agrees with this suggestion.*

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<sup>7</sup> Motion, at p. 3.

- “Proposed PPAs should be compared only to other executed PPAs, not bids simply submitted into the RFO process, because executed PPAs provide pricing associated with binding commitments and at-risk credit support. In contrast, bids lack any assurance that the bidder will deliver on the proposed price or timing.”<sup>8</sup> *WPTF would not agree with the CalWEA suggestion that bids in an RFO should be compared only to executed contracts. First, those executed contracts may very well end up being the ones that come in for renegotiation. Second, the market may well change such that the pricing in executed contracts is no longer reflective of current market conditions.*
- “PPA amendments that do not materially alter the original Least-Cost Best-Fit (“LCBF”) analysis of the project should not require re-evaluation of price relative to current market pricing for executed PPAs or other issues. These types of amendments would include, for example, clarifying contractual language, adding updated Commission-required nonmodifiable terms, revisions to the site that do not change the point of interconnection, change in technology vendor or model (but not technology type), or extensions of milestones for reasons outside of the developer’s reasonable control”<sup>9</sup> *In the abstract, WPTF agrees that some modifications along these lines may, under some circumstances, be reasonable. However, as a practical matter, determining whether or not a proposed contract modification will materially affect the LCBF analysis may be difficult and yield ambiguous results. Therefore, approval of such contract modifications should be predicated upon a strong showing that such modifications are relatively minor in nature and do not affect the underlying pricing of the original contract. Any ambiguities or close decisions should be resolved via a presumption that changes do indeed add costs.*
- “PPA amendments that materially alter the original LCBF analysis of the project (e.g., price increases, changes in technology type, or extensions of milestones for reasons within the developer’s reasonable control such as failure to post collateral as required by the CAISO in accordance with the interconnection process, or failure to submit a permit application) should be evaluated closely with a disposition towards rejection by the Commission. Under these circumstances, the developer would be free to compete against the remainder of the renewable energy market through the RPS program’s solicitation process for a replacement PPA, which would be reviewed by the Commission on a fresh basis and in relation to then-current market conditions.” *WPTF agrees with this suggestion, except to note that there should be a very strong disposition toward rejection of such amendments, and that in nearly all, if not all, instances of amendments requiring re-pricing, there should be a new competitive solicitation. Moreover, so long as there has been no significant delay in approval of the underlying contract, any project development that fails to perform on its winning bid should be prohibited. Our statements below suggest our position is that the non-performing bidder should be required to perform on any liquidated damages provisions of the original contract and prohibited from participation in the replacement RFO.*

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<sup>8</sup>Id at p. 3.

<sup>9</sup> Id at pp. 3-4.

In addition, WPTF would add the following suggestions for consideration by the Commission: The formats of solicitations could simply require the delivery of power that meets appropriate criteria at appropriate times and places, and does not tie contracts to specific facilities. This would both enable and require bid winners to find alternate ways to fulfill their obligations if and when development of a specific facility is unable to proceed, for whatever reason. For example, if a specific contract required delivery of a volume of power in SP15 that meets the criteria for “Product 1” under the RPS legislation over a given period of time, the winner would be obligated to meet its obligation even when the project it had in mind cannot be developed. It could do so by developing a different project that otherwise meets the contractual criteria, or by buying eligible power on the open market from other suppliers, for re-delivery to the contracted recipient.

Second, the Commission should independently vet the financial capability of successful bidders actually to perform on their contracts, even under adverse market or financing conditions. This vetting would likely take the broad form of either ensuring that the winner has a sufficiently strong balance sheet or the posting of some form of financial security.

Third, all prospective bidders should be exposed to liquidated damages liability in the event of non-performance after selection. Specifically, and at a minimum, failure to perform would cause the bidder to incur liability for (1) the difference in price between the contract price and the replacement price, if any; (2) the administrative cost of a new solicitation, should the IOU elect to pursue one; and (3) any other costs that the purchaser or ratepayers incur due to failure to perform and the need to re-solicit. The Commission needs to make it perfectly clear that simply walking away from a contract if it no longer looks like a good deal is not a cost-free option. Instead, doing so should require the “walker” to keep the other parties in interest whole.



### **C. WPTF Supports CalWEA's Alternative to Mandating the Provision of Resource Adequacy Capacity Value through Expensive Network Upgrades**

CalWEA proposes that renewable resource projects be permitted to provide RA capacity by contracting with third parties to furnish RA capacity value rather than having to construct expensive network upgrades that would provide projects with the full deliverability needed to provide RA capacity.<sup>10</sup> In addition, in instances where RA is a component of the renewable PPA, this approach would increase the ability of developers to hedge against transmission delays by supplying RA from the market until the upgrades are completed.

WPTF supports this proposal, and respectfully urges the Commission to consider CalWEA's request to allow third-party suppliers to provide RA capacity either in lieu of building expensive network upgrades or in the interim period between the renewable resource's commencement of deliveries and the completion of transmission upgrades. The provision of RA is an economic question whereby the costs of providing that product (market obligations, transmission deliverability, etc.) should be balanced against the market value of RA.

In some instances, the economic outcome may be to supply a contractual RA obligation from the market from resources whose RA deliverability has already been established. RA capacity payments to these resources would also help ensure the continued operation of the kind of flexible resources that will also provide integration services.

### **III. Conclusion**

WPTF supports CalWEA and recommends that the Commission grant its motion asking the Commission to direct the IOUs to address in their 2012 RPS Procurement Plans the processes that the IOUs and the Commission use to consider amendments to PPAs associated with changes to underlying renewable projects. The current system encourages speculative bidding by parties

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<sup>10</sup> Id at pp. 4-6.

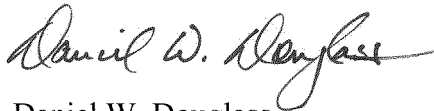
who do not have the requisite financial or operational expertise to complete their projects. The subsequent failure to perform has in turn led to uncertainty by buyers with regard to how much renewable power they have actually acquired, and in increased costs to consumers due to renegotiation above the contract prices that were expected, based on the original solicitation.

Moreover, since the same issue exists with regard to conventional generation RFOs, it is important that the Commission recognize that its action taken on the CalWEA motion may well have broad precedent that should be applied to all generation RFOs and not simply renewable solicitations. WPTF also asks that the Commission consider its proposed solutions for addressing and ameliorating this troubling situation.

Finally, WPTF asks the Commission allow for the provision of third-party RA capacity as cost-effective way of meeting RA requirements.

WPTF thanks the Commission for its consideration of these comments and urges that the Commission act expeditiously to consider and implement the recommendations discussed herein.

Respectfully submitted,



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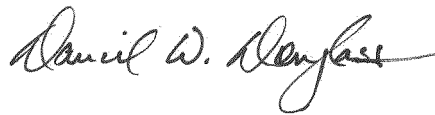
Counsel for  
**WESTERN POWER TRADING FORUM**

December 23, 2011

**VERIFICATION**

I, Daniel Douglass, am counsel for the Western Power Trading Forum and am authorized to make this Verification on its behalf. I declare under penalty of perjury that the statements in the foregoing copy of the *Response of the Western Power Trading Forum on the Motion of the California Wind Energy Association Regarding 2012 Renewables Portfolio Standard Procurement Plans*, filed in R.11-05-005, are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

Executed on December 23, 2011, at Woodland Hills, California.



Daniel W. Douglass  
DOUGLASS & LIDDELL