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 (Filed May 5, 2011)

COMMENTS OF NEXTERA ENERGY RESOURCES, LLC ON SECOND ASSIGNED COMMISSIONER'S RULING ISSUING PROCUREMENT REFORM PROPOSALS AND ESTABLISHING A SCHEDULE FOR COMMENTS ON PROPOSALS

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On behalf of NextEra Energy Resources, LLC

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I. INTRODUCTION

NextEra Energy Resources, LLC ("NextEra") submits these comments on the proposals in the October 5, 2012 *Second Assigned Commissioner's Ruling Issuing Procurement Reform Proposals and Establishing a Schedule for Comments on Proposals* ("Second ACR"). These comments are timely based on the extension granted by Administrative Law Judge ("ALJ") Anne E. Simon. In an electronic mail message on November 5, 2012, ALJ Simon confirmed that comments on the Second ACR may be filed and served not later than November 20, 2012, and reply comments may be filed and served not later than December 12, 2012.

The Second ACR offers proposals to refine the Renewables Portfolio Standards ("RPS") procurement process and the Commission's review of that process. As stated in the Second ACR, the proposals are intended "to streamline the RPS contract review process, increase the transparency of the Commission's review of RPS procurement, establish clear standards for this review process, issue Commission determinations on contract reasonableness on a defined timeline, and, generally, to support market certainty in RPS procurement."[1] NextEra supports these goals and the Assigned Commissioner's efforts to effectuate them through the program changes outlined in the Second ACR.

The proposals in the Second ACR generally improve the existing RPS procurement and contract review process by encouraging and expediting approval for highly viable, economic projects using commercially-accepted technologies. Nevertheless, several aspects of the

proposals set forth in Section 4 of the Second ACR require modification to achieve the intended results and avoid unintended consequences, as described below.

In addition, the proposals in the Second ACR focus on new renewable generation projects and problems experienced to date with the RPS program. This is appropriate. But the Commission's approval process must also consider the large number of existing renewable projects with contracts expiring in the next five to seven years. Specifically, the Commission's process for review and evaluation must accommodate repowers, contract renewals and extensions, and the sometimes complicated commercial transactions that are required to bring legacy renewable generation projects into the current California renewable market. NextEra's suggestions for addressing these issues are presented below.

II. COMMENTS ON PROPOSALS

A. Comments on the Proposal to Increase the Level of Review for Investor Owned Utilities' ("IOUs") Shortlists (Section 4.1 of the Second ACR; Question 1)

Section 4.1 of the Second ACR outlines a proposal to increase scrutiny of an IOU's shortlist of bids from its request for offers ("RFO") that may result in executed contracts if the parties agree to terms. Rather than submitting the shortlists for Energy Division approval via a Tier 2 Advice Letter as is current practice, IOUs would be required to submit the shortlists for Commission approval in a Tier 3 Advice Letter. Proposed contracts on the shortlist could not be executed until the Commission approves the shortlist in a resolution.[2]

Increased scrutiny of the shortlist may streamline the contract approval process, but to ensure that this increased scrutiny helps rather than hurts, a discrete timeline must be established. The shortlist review and approval process must be completed expeditiously under a pre-established schedule to avoid delaying the contract negotiation process. If it takes many months to obtain Commission approval of the shortlist, and if IOUs are unwilling to negotiate with shortlisted bidders until approval is obtained, then this added step could lengthen, rather than shorten, the overall RPS contract approval process. The adopted schedule for the 2012 solicitation provides for submittal of the shortlist within 70 days of Commission notification that

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1 Second ACR, p. 2.

2 *Id.*, pp. 9-10.

bidding has closed. However, a firm timeline for Commission approval of the shortlist (*e.g.*, within ninety days after submission) is an essential component if the proposal is to achieve its objective of improved process efficiency.

A streamlined and shortened contract evaluation process will be particularly critical for the upcoming RFO cycle. Only solar projects that can achieve an online date by the end of 2016 can capture the federal investment tax credit and the California solar property tax exemption, both of which expire in 2016. These incentives result in a discount to the project price that consumers pay of approximately thirty percent. However, given a project construction schedule of two years for larger installations, these offers could have a relatively short window of opportunity to obtain the contract approval needed to achieve commercial operation in time to realize the ratepayer benefits associated with existing tax credits. To obtain maximum value for ratepayers, project developers must have final contracting visibility by early 2014 in order to start construction in the summer of 2014. If the Commission utilizes the two-step Commission approval process outlined in the Second ACR, it will be imperative to ensure that step one (*i.e.*, Commission approval of the shortlist) occurs expeditiously and on a timeline that allows contract negotiation to be complete and approval of the final executed contract to occur by early 2014.

B. Comments on the Proposal for Expedited Review of RPS Purchase and Sale Contracts Arising from a Competitive Solicitation (Section 4.3 of the Second ACR; Questions 3-7)

Section 4.3 of the Second ACR outlines a proposal that would expedite review and approval of RPS power purchase agreements ("PPAs") meeting certain criteria. The proposal provides two paths for expedited contract approval: (1) PPAs less than five years in term length could be submitted via a Tier 1 Advice Letter; and (2) PPAs of five years or greater in term length could be submitted via a Tier 2 Advice Letter. PPAs less than five years can receive expedited approval whether from a competitive solicitation or bilateral negotiations if they meet the criteria outlined in Table 1 of the Second ACR. PPAs longer than five years can only receive expedited review if they are selected in a competitive solicitation and meet the criteria outlined in Table 1 of the Second ACR.[3]

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[3] *Id.*, pp. 11-16.

As noted above, one general comment on the Second ACR is that it focuses on new generation facilities. Section 4.3 does not appear to preclude a contract with an existing eligible resource from being presented and considered according to the expedited processes, but existing resources are not explicitly discussed. Expedited review of a contract with an existing resource seems particularly appropriate given that it will have site control, an active interconnection, resource adequacy, and an operating history to demonstrate expected performance. Likewise, an existing renewable facility capable of being repowered or expanded also should be treated as highly viable in light of existing site control, transmission access, resource adequacy, and a performance history that would be improved through repowering. Because these projects will meet the viability metrics, review of contracts with existing resources should focus on price and utility need.

In light of these factors, the expedited approval process should also extend to bilaterally negotiated PPAs with a term length of five years or longer if they are for existing resources or resources that will be repowered, as long as they meet the price competitiveness, utility need, and viability standards in Table 1. This recommendation is explained below, along with suggestions for changes to the criteria in Table 1 to facilitate expedited review of contracts with existing facilities, and to allow viable new projects to qualify for the expedited review process.

1. The expedited review process should be available for bilaterally negotiated PPAs with term lengths of five years or longer if they are for existing or repowered resources that meet the price competitiveness, utility need, and viability criteria in Table 1.

NextEra repowered three legacy wind sites in the past year. Modernizing these facilities and their commercial and interconnection agreements is extraordinarily complicated. For example, there is a separate process for converting an existing interconnection to one that will accommodate the repowered project's output, and that process does not follow the same milestones that are addressed in Table 1. Looking back on the experience, many of the issues that arose in the process were hard to foresee. While NextEra expects that any repowering or recontracting of an existing project will have to be price competitive, the Commission should recognize that these types of commercial transactions are likely to be non-standard and may be

best addressed bilaterally so that legacy issues can be resolved. This recognition is consistent with the Commission's longstanding policy of supporting repowering of older wind projects, which can provide the added benefit of decreasing the environmental footprint of the existing project.[4]

There may be good reasons to enter into a long-term (*i.e.*, five years or longer) bilateral contract for an existing facility or one that will be repowered, and the Commission should allow those to be submitted and evaluated according to the expedited review process as long as the other criteria in Table 1 are satisfied. Because repowering of existing facilities has long been a Commission policy goal and because existing facilities do not face the same viability and milestone risks as new generation, NextEra suggests that long-term contracts for existing and repowered facilities should be eligible for expedited review, regardless of whether they are contracted bilaterally or through a competitive solicitation.

2. The required contract terms in Table 1 are too restrictive.

Table 1 specifies that the "Contract terms" for all PPAs submitted in the expedited process must be the "pro forma contract without modifications per Commission-approved Bid Solicitation Protocols." It is understandable that the Commission would want to limit expedited review to PPAs that do not deviate substantially from the pre-approved pro forma contract. But the requirement for the pro forma to be used "without modifications" is too restrictive. There must be some flexibility to adapt the pro forma contract to the specifics of a particular project. Developers also should be able to obtain modifications that facilitate project financing or allow reasonable flexibility to effectuate upstream ownership transfers without triggering the need for IOU consent. These types of changes are common in the negotiation process and they do not increase the IOU's risk under the contract. If adjustments to the contract are made that do not modify the nature of the product that was solicited or materially increase the IOU's risk under the PPA, then the contract should remain eligible for expedited review. One way to address this would be to specify that contract terms for a new facility must be the pro forma contract "without ***material*** modifications," and to clarify that a change would be "material" if it alters the product

[4] *See, e.g.,* Decision 03-06-071 and Decision 05-10-014.

or materially increases the IOU's risk under the pro forma contract. This would give parties some flexibility to agree upon reasonable changes.

For existing or repowering projects, the requirement to use the "pro forma contract without modifications" is misplaced and impractical. A PPA for an existing resource may be modeled on the current pro forma contract, but whole sections of the pro forma, such as those addressing project construction and establishing milestones and damages for construction delay, are simply not applicable and generally would not be included. Even a repowering project would require modifications to the pro forma depending on the nature of the work to be performed and the specifics of how the existing interconnection will be modified, if at all, to accommodate the new project. It also may be more efficient to extend a legacy contract for an existing resource rather than negotiate a new contract, depending on the circumstances. To accommodate the forms of contracts that are likely to be used for existing resources, Table 1 should be modified to specify that the contract terms must be "for new facilities, the pro forma contract without material modifications, and for existing and repowered facilities, either the pro forma contract with appropriate modifications or another form of contract that has previously been approved by the Commission."

3. <u>There should not be a requirement for the delivery start date to occur within 1 year of contract execution.</u>

For PPAs less than five years in term length, Table 1 would require the delivery start date to occur within 1 year of contract execution. It is not clear why this limitation is needed or what benefit it is intended to convey. If a developer or owner of an existing facility is willing to commit to a less than five-year contract with a delivery start date that is more than one year out, it may make sense to allow the utility to procure that in advance. A substantial number of existing renewable facilities are operating under contracts that will expire in the next decade. It makes little sense from a planning perspective for utilities and project owners to have to wait until a year before contract expiration to make plans regarding the resource's continuing availability and operating status. A utility may want to consider its options as the contract expiration date approaches. Accepting supplier bids for extensions or a new contract in advance of contract expiration will help utilities weigh those options and plan accordingly. From a

project owner standpoint, being able to bid in advance of contract expiration will increase certainty and aid investment decisions. Further, for legacy qualifying facility generators, one year is likely not enough time to bring the resource into compliance with modern transmission interconnection and telemetry requirements. For these reasons, if a contract less than five years in length meets the other criteria in Table 1 but has a delivery start date that is more than one year after contract execution, then it should be eligible for expedited review.

4. The project milestones for a PPA with a term length of five years or greater may not be applicable to existing or repowered facilities.

As discussed above, Table 1 focuses on criteria applicable to a new facility under development and construction. One requirement is that a Phase II Study or Facilities Study (or equivalent) is completed. While this is a sound criteria for screening viable projects, the new procurement rules should recognize that an existing renewable facility that will be repowered may not go through the same interconnection process that applies to new facilities. Pursuant to the CAISO tariff, repowering projects may utilize a separate process for converting from a qualifying facility, which would not involve a Phase II Study or Facilities Study. This other process may be captured in the parenthetical "(or equivalent)" in Table 1, but it would be helpful to clarify that point to avoid confusion.

C. Comments on Proposal to Improve Standards of Review for Power Purchase Agreements Arising from Competitive Solicitations (Section 4.4(A) of the Second ACR; Questions 8-9)

Section 4.4 of the Second ACR proposes rules to improve review of RPS PPAs submitted by Tier 3 Advice Letter that do not meet the requirements for expedited approval (or for those that the IOU does not request expedited approval).[5] Subsection A includes proposed standards for review of PPAs the result from solicitations. NextEra understands that these standards would apply to a PPA that resulted from a competitive solicitation, but does not meet one or more of the criteria specified in Table 1 and thus does not qualify for the expedited review process outlined in Section 4.4 of the Second ACR. For example, if a new facility were contracted through a competitive solicitation, but did not meet the project development milestones, or if the executed

[5] Second ACR, p. 17.

PPA deviated significantly from the pro forma contract, then that PPA would be submitted through a Tier 3 Advice Letter and the standards of review in Table 2 would apply.

Under this proposal, the default for a PPA arising from a competitive solicitation that is ineligible for expedited approval would be the same Tier 3 Advice Letter process that applies to all RPS procurement contracts today (with the new standards of review in Table 2 applied). NextEra agrees that the Tier 3 Advice Letter process is appropriate for PPAs that do not qualify for the expedited process, and supports the standards of review in Table 2. However, the changes described in the preceding section of these comments should be made to the criteria in Table 1 to ensure that the expedited review process is available for the appropriate range of projects. Thus, as described above, Table 1 should be modified to specify that the contract terms for a PPA that is presented for expedited review must be "for new facilities, the pro forma contract without material modifications, and for existing and repowered facilities, either the pro forma contract with appropriate modifications or another form of contract that has previously been approved by the Commission." Further, as described above, Table 1 also should be modified to allow bilaterally negotiated PPAs with a term length of five years or longer to be considered using the expedited process, if they are for existing or repowered facilities and they meet the price competitiveness, utility need, and viability criteria referenced above.

D. Comments on Proposal to Improve Standards of Review for Power Purchase Agreements Arising from Bilateral Negotiations (Section 4.4(B) of the Second ACR; Questions 10-12)

Section 4.4(B) of the Second ACR describes a Tier 3 Advice Letter approval process for bilaterally negotiated PPAs. Table 3 specifies the standards of review for bilateral PPAs, which include the standards of review applicable to PPAs arising from a solicitation, plus minimum development milestones.[6]

NextEra's comments on these standards echo its comments above. As described above, bilaterally negotiated PPAs with a term length of five years or longer should be eligible for consideration under the expedited process if they are for existing or repowered facilities and they meet the price competitiveness, utility need, and viability criteria referenced above.

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6 *Id.*, pp. 21-24.

Any long-term bilateral PPAs for existing or repowered projects that do not meet those standards would be submitted via a Tier 3 Advice Letter as described in Section 4.4(B). In reviewing the standards for review of bilateral contracts in Section 4.4(B), they do not appear to create a hurdle for existing asset recontracting or repowering. As discussed above, however, repowered facilities may utilize a different interconnection process to convert their existing interconnection into one that will accommodate the repowered facility's output. It would be helpful to clarify that project milestones will be tailored to reflect the nature of the project.

E. Comments on Proposal to Improve Standards of Review for Amended Power Purchase Agreements (Section 4.4(C) of the Second ACR; Questions 13-15)

Section 4.4(C) of the Second ACR clarifies procedures and standards of review for contract amendments and/or amended and restated contracts. In essence, any amendments (or amended and restated contracts) that change the project's technology must be re-bid into the next RPS solicitation. This would include "major modifications to existing technology that potentially change the economics of the project, such as the incorporation of storage." In contrast, any other contract amendment or amended and restated contract that substantially changes the contract, or modifies a term that is an explicit term of approval, is subject to a Tier 3 Advice Letter filing. This would include a contract price change, an increase or decrease in contract capacity, a change to the commercial online date by more than three months, a change in project location, or a change in interconnection point.[7]

The strict rule for changes in technology – which cannot be submitted as a contract amendment and must be terminated and is allowed to re-bid into the next solicitation – is difficult to reconcile with the policy that allows contract amendments for other changes that are equally significant (*i.e.*, price, contract capacity, product, online date). To be consistent with the Commission's stated preference for competitive solicitations, the policy disfavoring contract amendments also should cover changes in price, changes in AC, but not DC, contract capacity, and online date. A project that must make modifications in these critical areas should be allowed to re-bid into the future solicitations to ensure that it remains competitive.

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[7] *Id.*, pp. 25-26.

On the other hand, the Second ACR is overly strict in its treatment of changes that may not affect the overall benefit of the bargain reflected in an executed PPA. If a project must adjust its location (for example, to facilitate mitigation measures addressing biological resources) or its point of interconnection (for example, to enhance grid reliability often at the utility's or the ISO's request), but it can still perform under the executed PPA without altering terms that define the benefit of the parties' bargain under the contract, then those types of changes should be allowed without the need for Commission approval. For instance, if the price, AC capacity, and online date are not altered, then the utility should be able to administer technical changes in the project's site or its point of interconnection without seeking Commission approval.

With regard to technology changes, the Commission should further explore this complex area and the possibility of distinguishing between major changes that materially impact price, commercial online date, product, or overall cost exposure borne by the utility on the one hand, and minor changes within the same technology class that reflect technological improvements on the other hand. For example, solar photovoltaic technologies are advancing quickly. A supplier may be able to capitalize on advancements after the solicitation. Such advancements may include improved panel efficiency, efficiency that allows a change to tracking technology from fixed, or a different AC to DC ratio, to offer a better product that can lead to both ratepayer benefits and improved project economics. Some threshold of materiality must be established to prevent unintended consequences, but unless there is some accommodation for minor technological improvements that do not fundamentally change the respective benefits of the transaction, parties will have no incentive to improve a project after the solicitation. Given that such improvements could benefit ratepayers, this topic should be explored further with a view towards establishing circumstances where minor improvements within the same technology realm that do not alter the benefit of the bargain in an executed PPA would be left to utility discretion.

F. Comments on Proposal to Improve Standards of Review for Power Purchase Agreements that are Beyond the Scope of the Commission's Advice Letter Process (Section 4.4(D) of the Second ACR; Questions 16-19)

Section 4.4(D) of the Second ACR proposes that any contract that is expected to annually provide more than one percent of the IOU's total bundled sales in its first full year of deliveries should be filed as an application and reviewed with the standards of review in Table 5. This new

burdensome requirement is included based on the "higher risk" to an IOU's RPS portfolio from contracts representing a significant portion of that portfolio.[8] This is an arbitrary requirement that is not necessary to ensure a thorough review of contracts providing large quantities of renewable deliveries. If a project can satisfy the criteria in the Second ACR that emphasize price competitiveness, conformance with utility RPS needs, and viability through commercially proven technologies, then there is no reason to set an artificial limit on such a transaction. The standards of review in Table 5 are essentially the same standards of review that are applicable to contracts resulting from a solicitation that do not qualify for expedited review. The main difference is that Table 5 would require public disclosure of the contract for the project whose sales exceed the one percent threshold, including the price. Public price disclosure is not mitigation for the "higher risk" associated with large volume contracts. Given that the public price would be compared with and evaluated against prices that are not available to the public, it is not clear how the public price disclosure would help advance the Commission's evaluation of the reasonableness of the contract. Further, the only added requirement in Table 5 is public price disclosure; there is no mention of increased viability or project milestone requirements. Adding such requirements would be far more useful in protecting against risk than simply publishing the contract price. NextEra recommends that this requirement be removed as redundant and unnecessary and that such contracts be treated like any other PPA based on the other processes outlined in Section 4.

III. CONCLUSION

NextEra appreciates the opportunity to submit these comments.

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[8] *Id.*, pp. 29-33.

Respectfully submitted,

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On behalf of NextEra Energy Resources, LLC

November 20, 2012

VERIFICATION

I, Kerry Hattevik, am the Director of West Market Affairs of NextEra Energy Resources, LLC. I am authorized to make this Verification on its behalf. I declare under penalty of perjury that the statements in the November 20, 2012 Comments of NextEra Energy Resources, LLC on Second Assigned Commissioner's Ruling Issuing Procurement Reform Proposals and Establishing a Schedule for Comments on Proposals 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.

Dated as of November 20, 2012.

/s/ Kerry Hattevik

Kerry Hattevik
Director of West Market Affairs
NextEra Energy Resources, LLC