

BEFORE THE
PUBLIC UTILITIES COMMISSION
OF THE
STATE OF CALIFORNIA

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

R.11-05-005

**JOINT MOTION OF SHELL ENERGY NORTH AMERICA (US), L.P. AND
THE ALLIANCE FOR RETAIL ENERGY MARKETS TO
STRIKE PORTIONS OF THE PRELIMINARY STAFF PROPOSAL
ON CONFIDENTIALITY RULES FOR RPS PROCUREMENT**

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Date: July 26, 2013

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In accordance with Commission Rule 11.1, Shell Energy North America (US), L.P. (“Shell Energy”) and the Alliance for Retail Energy Markets (“AReM”)¹ (together, the “Joint Parties”)² file this motion to strike three proposals from the Energy Division “Preliminary Staff Proposal” that is incorporated in Presiding Judge Anne Simon’s July 1, 2013 Ruling in the above-reference proceeding.³ The Joint Parties request that the Commission strike these three proposals because each of them, if adopted, would cause the Commission to act in excess of its authority and contrary to existing law. The Commission does not have legal authority to require electric service providers (“ESP”) to publicly disclose price information, cost information or contract terms from their Renewables Portfolio Standard (“RPS”) procurement contracts.

¹ AReM is a California mutual benefit corporation whose members are electric service providers that are active in California's direct access market. The positions taken in this filing represent the views of AReM but not necessarily those of any individual member of AReM or the affiliates of its members with respect to the issues addressed herein.

² Pursuant to Commission Rule 1.8(d), counsel for Shell Energy has been authorized to file this motion on behalf of the Joint Parties.

³ R.11-05-005, “Administrative Law Judge’s Ruling Requesting Comments on Preliminary Staff Proposal to Clarify and Improve Confidentiality Rules for the Renewables Portfolio Standard Program” (issued July 1, 2013).

In support of their motion, the Joint Parties state the following:

I.

INTRODUCTION

On July 1, 2013 Presiding Judge Simon issued a Ruling in which she solicited comments on a preliminary Energy Division staff proposal (“Preliminary Staff Proposal”) addressing “the appropriate treatment of [RPS procurement and compliance] information that may be or is claimed to be confidential [by LSEs] . . .” Ruling at p. 1. The Preliminary Staff Proposal, which is incorporated in the Judge’s Ruling, includes a series of proposed revisions to the Commission’s existing confidentiality rules, most of which were developed in D.06-06-066 (June 29, 2006), as modified in D.08-04-023 (April 10, 2008).

The Judge’s Ruling states that the Energy Division staff believes that “these proposals will better align the public disclosure of information about RPS procurement and planning with the significant public interest in the RPS program, as the Commission noted in D.06-06-066.” Ruling at p. 11. The Ruling continues: “Because of the evolution of the RPS market and the maturity of the RPS program, these proposals reflect the view of staff that greater disclosure of RPS-related information is both feasible and desirable.” *Id.* at pp. 11-12 (footnote omitted).

The Joint Parties do not address, in this motion to strike, most of the proposals in the Preliminary Staff Proposal. The Joint Parties acknowledge that most of the proposals advanced in the Preliminary Staff Proposal are appropriate subjects for consideration by the Commission. Although they may not agree with all of these proposals, the Joint Parties recognize that most of the proposals are within the Commission’s authority and raise issues that can and should be addressed through comments. The Joint Parties look forward to commenting, either together or individually, on most of the proposals in accordance with the procedural schedule established by the Presiding Judge.

The Judge's Ruling incorporates three proposals, however, that are not appropriate for comments, or for a Commission decision, in this or any other Commission proceeding. These three proposals, described below, seek to require ESPs to publicly disclose confidential RPS procurement price information and confidential RPS cost and contract information. As is described more fully in Section II below, because the Commission has no statutory authority to regulate the rates that ESPs charge their customers, or the prices that they pay their suppliers, a requirement to disclose ESPs' RPS contracts, prices and costs is outside the Commission's authority. The Joint Parties request that the Commission strike these three proposals from the Preliminary Staff Proposal because the Commission cannot lawfully adopt these proposals. Parties should not be required to expend time and resources commenting on, attending workshops on, or briefing proposals that are so clearly outside the Commission's jurisdiction.

The three staff proposals that should be stricken are as follows:

1. ESP RPS Procurement Contract Prices (Section 5.D.4): The staff proposes that the Commission require ESPs to make their RPS procurement contract prices publicly available six months after the contract is signed, or 30 days after deliveries of energy and/or RECs under the contract commence, whichever occurs first. Ruling at p. 25.
2. ESP Actual Annual RPS Procurement Costs and Forecast RPS Contract Generation Costs (Section 5.E.2, 3): The staff proposes that the Commission require ESPs to publicly disclose their annual total RPS procurement cost information for any previous year, as well as their forecasts of RPS procurement contract generation costs for future years (aggregated by resource category). Ruling at pp. 28-29.
3. ESP RPS Procurement Contract Terms (Section 5.F.8): The staff proposes that the Commission require ESPs to make the following RPS procurement contract terms (price; counterparty; resource type; technology; location; capacity (MW); procurement (MW, or RECs

if REC-only); delivery point; vintage; length of contract; contracted and forecasted online date; and WECC Bus ID where project is or will be interconnected) publicly available 30 days after deliveries begin under the contract, and to make all other ESP RPS procurement contract information publicly available on the earlier of three years after contract execution, or upon contract expiration. Ruling at p. 37.

These three preliminary staff proposals should be stricken because the Commission does not have jurisdiction over the prices or other terms in contracts between ESPs and their suppliers, and because the Commission does not have jurisdiction over the prices charged by ESPs to their customers. Neither the Commission's current RPS compliance rules nor its current confidentiality rules require disclosure of ESP RPS procurement cost or price information under any circumstances. The Preliminary Staff Proposal would impose entirely new RPS disclosure requirements on ESPs, without any basis in the law, and without any nexus to existing Commission rules.

Because the Commission does not have legal authority to regulate ESPs' RPS procurement costs, contract terms, or prices, the Commission does not have legal authority to require ESPs to publicly disclose their RPS procurement contracts, price or cost information. These staff proposals are outside the Commission's jurisdiction. These proposals should be withdrawn to remove any uncertainty regarding the potential for mandatory disclosure of ESPs' competitively sensitive price, cost and contract information, and to eliminate the unreasonable burden associated with having to respond to these ultra vires proposals.⁴

⁴ Public policy concerns and competitive concerns also compel rejection of these three proposals. The Joint Parties do not address policy-related issues in this motion, however, because the proposals must be stricken based on proper application of the law.

II.

THE THREE PROPOSALS SHOULD BE STRICKEN BECAUSE THE COMMISSION DOES NOT HAVE JURISDICTION OVER ESPs' RPS CONTRACTS OR THE PRICES PAID BY ESPs FOR RPS PROCUREMENT

The Commission has authority to ensure that ESPs comply with their RPS procurement obligations. See P.U. Code Section 399.13(a)(3); 399.15(b)(8). The Commission does not have authority, however, over the terms of contracts between ESPs and their RPS suppliers. The Commission does not have jurisdiction over the prices paid by ESPs for RPS procurement. Moreover, the Commission does not approve the “reasonableness” of ESPs’ RPS procurement contracts, and the Commission does not guarantee the pass-through of ESPs’ RPS procurement costs in the prices charged to direct access customers.

In this connection, the law is clear that the Commission does not have jurisdiction over the prices charged by ESPs to their retail customers. P.U. Code Section 394, which generally addresses the “registration” requirements applicable to ESPs, states (subsection (f)) that the Commission does not have authority over the “rates or terms and conditions of service offered by [ESPs].” Specifically, Section 394(f) provides: “Nothing in this part authorizes the [C]ommission to regulate the rates or terms and conditions of service offered by [ESPs].”

Because the Commission does not have legal authority to approve the prices charged by ESPs to direct access customers, and because the Commission does not guarantee ESP recovery of its RPS procurement costs, the Commission does not have any reason to assert authority over the prices paid by ESPs in the wholesale market. The Commission does not have the authority to review ESPs’ RPS procurement prices, and the Commission does not have authority to order ESPs to disclose (publicly or to the Commission) their RPS procurement prices or costs. No lawful basis has been established for proposing that ESPs be required to disclose details of their

RPS procurement contracts, except to disclose to the Commission those contract provisions that may be necessary to establish RPS compliance.

The Energy Division's Preliminary Staff Proposal cites Senate Bill (SB) 695 (P.U. Code Section 365.1(c)(1) and Section 399.12(j)(3)) as support for the proposal to require ESPs to disclose their RPS procurement prices, costs, and contract terms (See Ruling at pp. 26; 29; 37). The Commission has made it clear, however, that although SB 695 provides that ESPs and IOUs should be subject to the same RPS compliance obligations (RPS procurement targets; RPS compliance reports; RPS procurement plans), SB 695 does not authorize the Commission to regulate ESPs' RPS procurement prices, or RPS procurement contracts.

In D.11-01-026 (January 13, 2011), the Commission addressed the RPS compliance responsibilities of ESPs in light of SB 695. In this Decision, the Commission stated that it (the Commission) "has no responsibility for the price reasonableness of ESP procurement (whether conventional or RPS-eligible), and has no regulatory authority over ESP rates." Decision at p. 22. The Commission stated further:

[SB 695] does not require that the Commission take elements of the procurement practices of the utilities it regulates with respect to procurement and rates and impose them on ESPs that it does not regulate with respect to procurement and rates, simply because the Commission has authority over ESPs' participation in the RPS programs and we decline to do so here.

Id. at pp. 22-23.

Because the Commission does not regulate the prices paid by ESPs for RPS products, and does not regulate the prices charged by ESPs, the Commission does not have legal authority to order ESPs to disclose their RPS procurement prices, costs or contracts. As provided in D.12-06-038 (June 21, 2012), the Commission is authorized to require ESPs to submit appropriate documentation to the Energy Division, including copies of RPS procurement contracts, to demonstrate compliance with ESPs' RPS procurement obligations. See Decision at p. 77 and p.

104 (Ordering Paragraph No. 41). This authority does not extend to ordering public disclosure of RPS procurement prices, costs and contract terms that are not relevant to an ESP's compliance with its RPS obligations.

III.

CONCLUSION

The three above-referenced proposals should be stricken from the Preliminary Staff Proposal. The Commission does not have legal authority to order public disclosure of an ESP's RPS procurement prices, costs, or contract terms. The Joint Parties are prepared to comment on those elements of the Preliminary Staff Proposal that reflect the lawful exercise of the Commission's authority. Parties should not be required to address proposals that are outside the Commission's jurisdiction.

Respectfully submitted,



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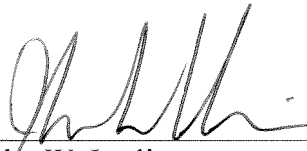
VERIFICATION

I, John W. Leslie, declare:

I am the attorney of record for Shell Energy North America (US), L.P. in the referenced proceeding and I am authorized to act on behalf of The Alliance for Retail Energy Markets with respect to the forgoing document. I am authorized to make this verification on behalf of Shell Energy and AReM. The contents of the forgoing document are true of my own knowledge, except as to matters that are stated on information or 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 July 26, 2013 at San Diego, California.



John W. Leslie
Attorney for
Shell Energy North America (US), L.P.
and on behalf of The Alliance for Retail Energy Markets