

**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 THE INDEPENDENT ENERGY PRODUCERS
ASSOCIATION ON STAFF PROPOSAL TO REFORM
PROCUREMENT REVIEW PROCESS FOR RENEWABLES
PORTFOLIO STANDARD PROGRAM**

INDEPENDENT ENERGY PRODUCERS
ASSOCIATION
Steven Kelly, Policy Director
1215 K Street, Suite 900
Sacramento, CA 95814
Telephone: (916) 448-9499
Facsimile: (916) 448-0182
Email: steven@iepa.com

GOODIN, MACBRIDE, SQUERI,
DAY & LAMPREY, LLP
Brian T. Cragg
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321
Email: bcragg@goodinmacbride.com

Attorneys for the Independent Energy Producers
Association

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On April 8, 2014, Administrative Law Judge (ALJ) Regina DeAngelis issued a ruling requesting comments on the “RPS Procurement Reform Staff Proposal” (Staff Proposal) prepared by the Energy Division and dated April 2014. The Staff Proposal is a part of an ongoing effort to streamline the review of contracts resulting from procurement to meet the state’s Renewables Portfolio Standard (RPS) goals, establish clear standards for the review process and the issuance of Commission determinations on contract reasonableness, and generally support market certainty in RPS procurement. The Independent Energy Producers Association (IEP) offers its comments on the Staff Proposal.

IEP appreciates Energy Division’s commitment to improving the RPS procurement process. While certain aspects of the Staff Proposal would be an improvement over the status quo (*e.g.*, the treatment of short-term contracts), IEP is concerned that some elements of the proposal will work against the Commission’s goals and hinder effective RPS procurement. IEP’s comments follow the format used in the Staff Proposal. After discussing the specific aspects of the proposal, IEP offers concluding observations regarding the overall proposal.

I. COMMENTS ON THE STAFF PROPOSAL

The Staff Proposal provides recommendations for streamlining the RPS procurement process, while increasing transparency and efficiency in RPS procurement and contract evaluation. Overall, IEP's impression is that the Staff Proposal's goal is to increase the amount of information in the front end of the procurement process to expedite the back end of the process, *i.e.*, final approval by the Commission. IEP is concerned that this objective will not be realized. The Starr Report's specific recommendations will be addressed in more detail below.

A. Data Adequacy Requirement

The Staff Proposal would require all submissions to the Commission for review to be "data adequate," *i.e.*, the submissions must have all the necessary information requested by the Commission in specified templates and documents. As a practical matter, IEP agrees that all submissions should contain the information required to facilitate the Commission's review. IEP's concern is that the Staff Proposal requests information that is not necessary for the Commission's review. More importantly, IEP is concerned that the amount of data required to be filed (a) will lead to needless delay in the utilities' filings related to RPS procurement; (b) will undermine timely consideration and review by the Commission; and (c) will not improve the quality of Commission review and decision-making.

The Staff proposes to require a tremendous increase in the amount of environmental data submitted for the Commission's review. Furthermore, the Staff proposes that this information would be publicly disclosed in the advice letters or applications seeking the Commission's approval of RPS procurement. While the Staff suggests that the purpose of this increased data requirement is to assess the overall viability of projects under consideration, and

specifically the data requirement is not intended to be an additional permitting requirement, IEP is concerned about the unintended consequences of this approach.

Under the Staff Proposal, the proposed data adequacy obligations are redundant of the environmental review required by the California Environmental Quality Act (CEQA) and other permitting processes, and they risk drawing the Commission into time-consuming and resource-intensive litigation. The environmental data submitted to meet the proposed data adequacy obligation will be publicly available, including a list of “any known issues that may put the permitting process at risk.” This information could easily provide project opponents with a guidebook for further litigation at the Commission or in the courts. This litigation will inevitably delay decision-making, as parties not able to block development of generation projects in the siting and permitting of these facilities will now have another chance to block the project, with the points of vulnerability identified by the project developer. The threat of additional litigation in effect doubles the risk of increased cost and delay associated with the permitting of new projects. More importantly, it will place the Commission in the vortex of permitting issues, even though primary permitting responsibility may lie with other entities.

The Commission should not design a process that imposes this unnecessary, unwanted, and additional burden on developers, the utilities, and the Commission. To the extent that project viability is an issue for the Commission’s review and approval of a utility’s RPS resource selection, the RPS Project Viability Calculator should be improved to account for the status of environmental permitting. To the extent that the achievement of milestones is important to timely review and decision-making, PPAs should incorporate, and utilities should enforce, a more robust, yet granular, checklist of critical milestones measuring developers’ progress to completion.

B. Standards of Review for IOUs' Shortlists

Currently, when the utilities conduct their RPS solicitations, they select a shortlist of projects for review by the Commission's staff for consistency with the Least-Cost/Best-Fit (LCBF) bid evaluation methodology and the utility's net short. The solicitation process is monitored by an Independent Evaluator (IE), and the IE's report is provided with the request for approval of the shortlist. In addition, each utility works with a Procurement Review Group (PRG), and the PRG may have an opportunity to participate, review, and comment on the shortlist selection process. The utility submits its proposed shortlist to the Commission for review in the form of a Tier 2 Advice Letter (AL).

The Staff Proposal appears to modify this process in significant ways that threaten to delay timely and effective decision-making. Specifically, the Staff proposes to require submission of the shortlist through a Tier 3 AL, which has a more extensive and lengthier review process. If adopted, this proposal would mean that an individual contract will undergo not one but two AL review processes prior to final Commission approval of the contract--once for the shortlist review and again for the approval of the specific PPA. Tier 3 reviews tend to take longer than Tier 2 review, and an individual Tier 3 review today can take as long as eight to twelve months. Additional delay in routine decision-making is not warranted.

C. Establish a Date Certain for Contract Execution and Submission for Commission Approval

The Staff proposes to streamline the procurement process so that the Commission can make procurement review decisions based on substantially the same market conditions and RPS need evaluation as was relevant when the utility made its decision to execute the contract. IEP wholeheartedly agrees with this goal. However, it is unclear whether the Staff's proposed approach will achieve this goal.

In the entire selection and review process, the problem of delay occurs at three discrete points. First, delay may occur between the closing of bidding in the RPS request for offers (RFO) and the approval of the shortlist. Second, delay may occur between the approval of the shortlist and the submission of an executed contract for the Commission's review and approval. Third, delay may occur between the submission of the executed contract and final Commission approval. IEP's general impression has been that it takes about three to six months from the close of bidding in the RPS RFO to approval of the shortlist; it takes about six to eight months from approval of the shortlist to submission of an executed contract; and it takes approximately six to eight months from submission of an executed contract to final Commission approval. Overall, the current process may take 15-22 months to complete.

To shorten a process that can take 15-22 months, the Staff proposes to require utilities to execute an RPS contract within one-year after approval of the shortlist and to submit the executed contract for Commission approval within three months from the contract execution date. Note, however, this proposal addresses only one of the three discrete points of delay listed above. While this proposal will only modestly shorten the overall process, the proposal may have a significant negative impact: namely, it risks upsetting the balance between Buyers and Sellers when negotiating their contracts, and this could undermine the viability of the final project. For example, as negotiations approached the one-year deadline, the Seller might come under pressure from the Buyer to agree to modifications or accommodations that undermine the integrity of the project as a whole. Confronted with the choice between agreeing to the modification or accommodation and losing the PPA (and likely the project) due to the expiration of the deadline, a Seller might concede to provisions that increase the risk (and decrease the viability) of the project.

For that reason, IEP recommends not imposing an artificial deadline on contract execution. Rather, the IE should be required to make monthly (or perhaps quarterly) reports to the Energy Division on progress in negotiations between the utility and shortlisted Buyers. If the IE finds that the parties are making sufficient progress on negotiations and witnesses good-faith negotiating efforts on both sides, then this information should be reported to Energy Division. If, on the other hand, the IE witnesses negotiating behavior that is inconsistent with a good-faith effort, then this too should be reported to Energy Division. The IE's report should be taken into account in the Energy Division's review of the process, shortlists, and executed contracts.

D. Expedited Review of RPS Purchase and Sales Contracts

The Staff proposes to revise the review process for RPS contracts of less than five years. In addition, the Staff proposes that utilities would receive cost recovery through the Energy Resource Recovery Account (ERRA) for contracts based on a short-term pro forma RPS contract structure with standard modifiable and non-modifiable terms, provided that the pro forma contracts are approved in the utilities' RPS procurement plans.

IEP supports this approach. The determination of which contract provisions should be considered modifiable should be addressed in the Commission's review of the utilities' RPS procurement plans.

E. Expedited Review of RPS Purchase and Sales Contracts With Existing Facilities for a Term 5 Years or Greater

As existing renewable energy projects reach the end of their initial contracts, an RPS RFO may result in the selection of existing RPS eligible facilities. The Staff Proposal includes expedited treatment of contracts with for less than five years for projects that are already online, but existing facilities with new contracts of five years or more would continue to undergo the more rigorous Tier 3 review process.

Imposing a Tier 3 review process on an existing facility whose operations and essential characteristics are unchanged does not promote timely, streamlined review of projects the utilities select in the RPS RFOs. Because these projects at some time in the past have undergone a Tier 3 review process (or its equivalent at that time), it seems unreasonable to require another Tier 3 review unless the project has undergone a material change. Even if the project's new contract differs from its expired PPA, if the new PPA is based on a pro forma contract that the Commission has approved, the project should be eligible for an expedited Tier 2 review.

Accordingly, IEP recommends that an expedited Tier 2 review process should be available to existing, essentially unchanged projects selected in a utility's RPS RFO, unless a material change in the project's operations, technology, or other significant characteristic is present.

F. Improve Standards of Review for RPS Power Purchase Agreements

The Staff proposes to consider rules to improve the Commission's review of RPS contracts submitted under Tier 3 process that do not qualify for the proposed expedited review of short-term contracts. Currently, the primary standards of review (SOR) are consistency with approved RPS procurement plans, including LCBF bid-evaluation methodologies; consistency with prevailing Commission decisions; cost and value reasonableness; and overall project viability. The Staff proposes that if the Commission finds that a contract is consistent with the proposed SOR, then the contract may be approved without modification. If the contract does not comply with the proposed SOR, the AL may be rejected. In that case, the utility may seek the Commission's approval using the more rigorous application process.

IEP has assumed that the LCBF methodology includes consideration of factors such as cost, value, and project viability, etc. in an integrated fashion. IEP has assumed that an

array of bids is compared on a true LCBF basis, taking into consideration cost, viability, and other relevant factors, then rank-ordered. From this rank-ordering, the utility selected a shortlist of resources for Commission review and approval.

On the other hand, for non-routine matters, *e.g.*, situations in which the project has materially changed, the Commission has other vehicles for review. IEP, for example, has recommended establishing clear standards of review to determine whether a project has materially changed. If a project is found to have materially changed, then it should be required to rebid in a competitive solicitation. IEP continues to recommend this approach to address those few projects that materially change during the pendency of the Commission's review, rather than forcing all projects to undergo multiple time-consuming Tier 3 review processes.

With regard to the specific SOR/Requirements listed in Table 2 of the Staff Proposal, IEP offers the following comments:

- **“Reasonableness of the PPA’s price, net market value and viability will be assessed relative to . . . (2) all PPAs that were executed in the 12 months prior to contract execution.”** As the utilities’ procurement efforts approach the 2020 goal of 33% renewable energy, the pace of RPS contracting may slow. IEP is concerned that there could be instances in which no relevant PPAs have been executed within the past 12 months. This reasonableness standard should be extended to “18-months prior to contract execution” or, in the absence of any cohort contracts, “the most recent contemporaneous competitive cohort RPS RFO.” IEP uses the term “cohort” to recognize that some contemporaneous RPS solicitations, *e.g.*, the

Renewable Auction Mechanism (RAM), may not provide a suitable comparison.

- **“For PPAs pending Commission approval, IOUs must provide monthly updates on project development milestones, potential compliance delays, updated project viability scores, an updated assessment of project risk, and an updated assessment of RPS net short.”** IEP questions the usefulness and application of this information, and, more importantly, this SOR/Requirement imposes an unnecessary risk of double-jeopardy to a fully negotiated contract. Many PPAs have milestones embedded in the contract. The Buyer typically has recourse, detailed in the PPA, if a project misses a milestone. As a practical matter, having executed a contract with a Buyer, project developers will await Commission approval of the executed contract before progressing on project development. Thus, the primary constraint is not developer malfeasance or delay, but rather the lengthy time it takes to receive Commission approval. This SOR/Requirement does nothing to improve that situation.

Imposing new and essentially redundant reporting obligations seems unnecessary. On the other hand, if the purpose of this proposed reporting obligation is to provide the Commission with the means to deny specific ALs due to changed circumstances, it would be an unnecessary and inappropriate risk imposed on developers if the Commission were positioned to essentially terminate or otherwise undermine an executed contract by

failing to adopt a specific AL for the reasons specified in this
SOR/Requirement.

G. Standards of Review for Power Purchase Agreements that Are Beyond the Scope of the Commission's Advice Letter Process

The Staff suggests different SOR/Requirements for projects that may have a worse net market value than comparable contracts, but have other attributes of notable value. The Staff includes in this category projects with a technology that is not commercially proven and projects that are a relatively significant portion of the utility's portfolio. The Staff proposes that these non-comparable projects be considered by means of an application process.

IEP agrees that non-standard, non-comparable projects should be presented and considered through an application. On the other hand, IEP is not convinced that high-volume, standard technology projects ought to be considered through an application simply because they represent a relatively high proportion of a utility's portfolio. To the extent that high-volume output creates higher risk, this factor can be incorporated into the LCBF bid evaluation methodology. IEP sees no reason that high-volume contracts should subject a project to a more rigorous review than similar projects with slightly lower expected outputs.

H. Standards of Review for Unbundled Renewable Energy Credits

Currently, unbundled Renewable Energy Credit (REC) contracts are reviewed on a case-by-case basis focusing on the same criteria as for bundled contracts. The Staff proposes to require a Tier 3 AL filing (similar to bundled transactions) and to compare an unbundled REC transaction to other contemporaneous unbundled REC transactions.

IEP supports this approach. However, as noted above, limiting the comparisons to unbundled REC transactions executed within the past 12 months may prove to be too constraining, particularly if no such deals have been executed within 12 months.

I. RPS Independent Evaluator Reports

The Staff proposes that the IE should provide a definitive recommendation in the IE Report regarding whether the utility conducted its evaluation in a fair and reasonable manner, and whether the shortlist should be either approved or rejected.

IEP does not oppose this recommendation. However, to the extent that the Commission relies on the IE Report to reject either a shortlist or an executed contract, the IE Report should be made publicly available so that stakeholders, particularly developers, have a better understanding about the reasons for the rejection of the shortlist or contract.

J. IEP's Comments on Additions, Deletions, and Modifications Presented in the Staff Proposal

The Staff Proposal highlights specific additions, deletions, and modifications it proposes to make to the Assigned Commissioner's Ruling of October 5, 2012 regarding RPS procurement review. Generally, IEP supports the proposed changes. IEP's concerns or points of disagreement are noted below:

Additions. IEP has previously raised concerns about the time limitations within which a utility must execute a contract. As a practical matter, the time limitation may become leverage in negotiations that can undermine the viability of projects as last-second concessions are made in hopes of getting an executed contract approved by the Commission. While the proposed single time extension is helpful, it doesn't minimize the concern over inappropriate leveraging. From IEP's perspective, delays in contract negotiations weaken the probability of a project's success due to the passage of time. IEP remains unconvinced that a strict deadline provides any additional value to the Commission.

Deletions. At this time, IEP has no comments on the proposed deletions.

Modification. As noted above, IEP opposes the proposal to modify the data adequacy requirements to include information regarding environmental permitting status of projects. The proposal will place developers in a situation of double-jeopardy with regard to permitting. Furthermore, this proposal will significantly increase the risk of litigation at the Commission over the environmental information placed on the record for decision-makers. As a result, this proposal will dramatically increase the risk of delay in timely decision-making and result in unnecessary increases in costs for project development.

Modification. The staff proposes to modify the requirement for purchase and sale contracts of less than five years to allow deliveries for online projects “consistent with need” as stated in the RPS Plan. AB 327 clarifies that the 33% RPS establishes a floor on RPS procurement, and not a ceiling. While IEP recognizes the role of the RPS Procurement Plan is to establish procurement targets, IEP suggests that “need” in the context of RPS procurement is now a function of the 33% floor and cost-effectiveness. As a result, “need” determinations are not necessarily appropriate for purposes of determining procurement value.

II. CONCLUSION

IEP is concerned that the latest proposal for RPS procurement reform may be attempting to solve problems that existed in the past rather than those that are prevalent today. Some of the proposals will not help the Commission reach its goals of streamlining the process, improving the speed of decision-making, or improving the transparency of the process. Furthermore, some of the proposals actually will work against these goals. Imposing multiple Tier 3 reviews on individual projects, *i.e.*, approval of the shortlist and approval of the executed PPA, when only a single Tier 3 AL is required today, does not appear to expedite decision-making.

Similarly, the proposal to impose more stringent data adequacy requirements on bid submissions will simply place the developer in double-jeopardy and risk litigation and delay. On the other hand, the proposal for contract submission of short-term PPAs makes sense.

Finally, IEP understands the original reasons each utility is required to submit an RPS Procurement Plan for the Commission's approval. With the passage of AB 327, however, the existing 33% standard has become a floor on renewables procurement, not a ceiling. Accordingly, the concept of "need." *i.e.*, the amount of renewable energy needed to meet the 33% goal, is no longer the focus of a utility's RPS Procurement Plan. Rather, the Plan should now establish minimum procurement obligations. As a result, procurement determined to be above the 33% floor obligation should be subject to an LCBF evaluation.

Overall, IEP suggests that the Staff Proposal requires a great deal more review and discussion.

Respectfully submitted this 7th day of May, 2014 at San Francisco, California.

GOODIN, MACBRIDE, SQUERI,
DAY & LAMPREY, LLP
Brian T. Cragg
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321
Email: bcragg@goodinmacbride.com

By /s/ Brian T. Cragg

Brian T. Cragg

Attorneys for the Independent Energy
Producers Association

VERIFICATION

I am the attorney for the Independent Energy Producers Association in this matter. IEP is absent from the City and County of San Francisco, where my office is located, and under Rule 1.11(d) of the Commission's Rules of Practice and Procedure, I am submitting this verification on behalf of IEP for that reason. I have read the attached "Comments of the Independent Energy Producers Association on Staff Proposal to Reform Procurement Review Process for Renewables Portfolio Standard Program," dated May 7, 2014. I am informed and believe, and on that ground allege, that the matters stated in this document are true.

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

Executed on this 7th day of May, 2014, at San Francisco, California.

/s/ Brian T. Cragg

Brian T. Cragg