

**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 18-07-003  
(Filed July 12, 2018)

**COMMENTS OF THE  
CALIFORNIA WIND ENERGY ASSOCIATION  
ON SUPPLEMENTAL FILING OF GEXA ENERGY CALIFORNIA, LLC,  
REGARDING REQUESTED WAIVER OF THE RENEWABLES PORTFOLIO  
STANDARD PROCUREMENT QUANTITY REQUIREMENT  
FOR COMPLIANCE PERIOD 2**

Nancy Rader  
Executive Director  
California Wind Energy Association  
1700 Shattuck Ave., #17  
Berkeley, CA 94709  
Telephone: 510-845-5077 x1  
E-mail: nrader@calwea.org

*On behalf of the California Wind  
Energy Association*

April 2, 2020

**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 18-07-003  
(Filed July 12, 2018)

**COMMENTS OF THE  
CALIFORNIA WIND ENERGY ASSOCIATION  
ON SUPPLEMENTAL FILING OF GEXA ENERGY CALIFORNIA, LLC,  
REGARDING REQUESTED WAIVER OF THE RENEWABLES PORTFOLIO  
STANDARD PROCUREMENT QUANTITY REQUIREMENT  
FOR COMPLIANCE PERIOD 2**

**I. INTRODUCTION AND SUMMARY**

In accordance with Administrative Law Judge Lakhanpal’s February 18, 2020, *Ruling to Review Compliance Determination Reconsideration Request as Part of the Motion for Waiver Request, Seeking Evidence as Part of Record and Denying the Joint Motion for Late Filed Response*, the California Wind Energy Association (“CalWEA”) submits these comments on the public version of the Supplemental Filing of Gexa Energy California, LLC, filed on March 3, 2020, regarding its requested waiver of the Renewables Portfolio Standard (“RPS”) Procurement Quantity Requirement (“PQR”) for Compliance Period 2.

The Commission should deny the Gexa Energy California, LLC (“Gexa”) Motion for Waiver Request and the Reconsideration Request by finding that its agreement with its affiliate company, NextEra Energy Power Marketing LLC (“NEM”), does not constitute a “long-term contract” as required by statute and the Commission’s rules and, therefore, that it failed to meet its PQR for Compliance Period 2 (2014-2016). Given the central role that long-term RPS contracts have played, and will continue to play, in meeting California’s RPS requirement, it is essential that the Commission disallow as “long-term contracts” those contracts that do not obligate the buyer to procure specific quantities of RPS-eligible resources at specific prices over the required minimum term of 10 years.

## II. COMMENTS

### A. Gexa Did Not Satisfy the RPS Long-Term Contracting Requirement and Does Not Meet Waiver Requirements

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.<sup>1</sup> The essence of a long-term contract, as CalWEA's wind energy project owners and developers can attest, is not only the required minimum 10-year term, but some degree of revenue certainty over that term sufficient to enable major capital investments. Standard features of RPS long-term contracts that are intended to foster major capital investments (whether to construct new or repowered projects or to maintain existing projects) include a specified (if not entirely fixed) contract price and specified contract quantities over a specific contract term; these features guarantee minimum expected revenues to the seller, presuming that the seller fulfills its contractual obligations. These features are present in the pro forma contracts of the investor-owned utilities, for example.<sup>2</sup> Absent these features, a contract does not establish an obligation on the part of the buyer that would support the financing of major capital investments and therefore does not constitute a valid long-term commitment. This is the case with Gexa's contract with NEM, which did not establish known quantities of energy (or RECs) to be delivered at specified prices for at least 10 years.

The Commission's Energy Division found, in its Compliance Determination notice dated October 4, 2019, that Gexa failed to meet the PQR for Compliance Period 2 because Gexa failed to meet the long-term contracting requirement then in effect,<sup>3</sup> which, for Compliance Period 2,

---

<sup>1</sup> See, e.g., CPUC Decision ("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 D.06-10-019 (October 2006), Finding of Fact 16: 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."

<sup>2</sup> See, e.g., PG&E's 2014 RPS Solicitation Protocol and Attachment H1: Form of Power Purchase Agreement. The solicitation protocol, for example, states "The *minimum expected revenue* is calculated using the average Contract Price and the average quantity of energy based on contractual Guaranteed Energy Production during the Delivery Term, which is the minimum energy production required under the PPA." (Emphasis added). Available at: <https://www.pge.com/en/b2b/energysupply/wholesaleelectricsuppliersolicitation/RFO/RPS2014.page>

<sup>3</sup> This document was included as Exhibit B in Gexa's March 3, 2020 Supplemental Filing.

was 0.25% of retail sales. Gexa claims that it “did in fact satisfy the long-term contracting requirement applicable to electric service providers (‘ESPs’) for Compliance Period 2 by entering into a long-term contract with a contract duration and delivery term in excess of 10 years, and therefore should not have been found to be out of compliance with its obligations under the RPS, and accordingly should not be assessed a penalty for Compliance Period 2.”<sup>4</sup>

Gexa explained that its Master Agreement and associated Confirmation agreement with NEM specify a contract quantity of RECs

equal to “0.25% of Gexa Total Retail Sales in 2013” for delivery not later than April 1, 2017.... The contract quantities that Gexa agreed to purchase for the subsequent two compliance periods (specified in the Confirmation as 2017-2020 and 2021-2028) “were tied to the quantities that were *expected to be required* to be purchased under long-term contracts in order to meet Gexa’s RPS long-term contracting requirement. Thus, for 2017-2020, the specified Contract Quantity is “0.25% of Gexa Total Retail Sales in 2014-2016; *provided, however, if Gexa Total Retail Sales for 2017-2020 is zero then the Contract Quantity shall be zero.*”<sup>5</sup> (Emphasis added.)

Gexa makes it quite clear in its own explanation, however, that its contract with NEM did not establish known quantities of RECs to be delivered at known prices for at least 10 years, because those quantities were conditioned on Gexa’s sales, which could be reduced to zero without violating the terms of the contract. In fact, Gexa’s sales were reduced to zero little more than six months after it executed the contract in December 2015,<sup>6</sup> because Gexa exited the market after the second quarter of 2016.<sup>7</sup> Thus, the contract cannot be construed to be a “long-term” contract because it did not provide any revenue certainty over a 10-year term, which is necessary to support major capital investments.

Further, Gexa’s request does not meet the required grounds for waiver set forth in law, namely, that the conditions justifying the waiver were beyond the control of the retail seller or otherwise prevented compliance.<sup>8</sup> Moreover, Gexa clearly did not take all reasonable actions

---

<sup>4</sup> Gexa March 3, 2020, Supplemental Filing at p. 2.

<sup>5</sup> *Id.* at pp. 13-14. Footnotes omitted.

<sup>6</sup> *Id.* at p. 13.

<sup>7</sup> D.19-04-040 at p. 80-81 (April 25, 2019).

<sup>8</sup> Pub. Util. Code § 399.15(b)(5) and as discussed in D.19-08-007 (August 1, 2019).

under its control to achieve full compliance<sup>9</sup> because it was fully capable of signing a valid long-term contract. If it was not capable, the company should have exited the market sooner than it ultimately did in 2016. Finally, this is the second RPS compliance violation by Gexa, both of which involve the long-term contracting requirement.<sup>10</sup>

**B. Enforcing the Long-Term Contracting Requirement is Essential to the Success of the RPS**

It is very important to the continued success of the RPS program that the Commission hold load serving entities (“LSEs”) fully accountable for any non-compliance that cannot reasonably be excused based on the standards set forth in D.12-06-038 and D.14-12-023. Without long-term contracts, renewable energy generators are highly unlikely to materialize (or be properly maintained). Even contract durations shorter than the 20-year terms that were common during the first 15 years of the RPS program will come at a higher cost, given the increased risk caused by greater revenue uncertainty.<sup>11</sup>

It is particularly important not to ease up on this standard now -- less than a year before the 65 percent long-term contracting requirement takes effect -- because such laxity would invite gaming that will undercut the essential purpose of the requirement. Failing to enforce the standard now would encourage LSEs to cut corners and take greater compliance risks in the future, 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. Granting waivers when not fully justified would be unfair not only to these compliant LSEs, but to any ESPs that are found to be out of compliance but choose to pay the penalty rather than request a waiver.

---

<sup>9</sup> Pub. Util. Code § 399.15(b)(7) and as discussed in D.19-08-007 (August 1, 2019).

<sup>10</sup> D.19-08-007 (August 1, 2019).

<sup>11</sup> See, e.g., Renewable Energy Finance: State of Play, Norton Rose Fulbright (August 2017) (available at: <https://www.nortonrosefulbright.com/en-us/knowledge/publications/b14ab86f/renewable-energy-finance-state-of-play>) and Stephen Lacey, “Merchant Solar And Wind: A Ticking Time Bomb?” (August 25, 2019) (podcast available at: <https://www.greentechmedia.com/articles/read/merchant-solar-and-wind-a-ticking-time-bomb>).

### III. CONCLUSION

For the above reasons, CalWEA respectfully urges the Commission to deny Gexa's Motion for Waiver Request and to enforce the full \$3,704,675 penalty for Compliance Period 2 as proposed by Energy Division.

Respectfully submitted,

/s/ Nancy Rader  
Nancy Rader  
Executive Director  
California Wind Energy Association  
1700 Shattuck Ave., #17  
Berkeley CA 94709  
Telephone: (510) 845-5077 x1  
Email: nrader@calwea.org

*On behalf of the California Wind Energy  
Association*

April 2, 2020

## 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 Supplemental Filing of Gexa Energy California, LLC, Regarding Requested Waiver of the Renewables Portfolio Standard Procurement Quantity Requirement for Compliance Period 2” 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 April 2, 2020, at Berkeley, California.

*/s/ Nancy Rader* \_\_\_\_\_  
Nancy Rader  
Executive Director  
California Wind Energy Association