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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 15-02-020

ASSIGNED COMMISSIONER'S RULING ORDERING PARTY COMMENTS ON PROPOSED MODIFICATION ON LANGUAGE IN SECTIONS 4.1 and 4.2 OF THE BIOMAT POWER PURCHASE AGREEMENT

Summary

By this Ruling, I am requesting that parties serve and file comments by April 26, 2018, on whether the Commission should modify Sections 4.1 and 4.2 of the BioEnergy Market Adjusting Tariff (BioMAT) Power Purchase Agreement (PPA) in view of Pacific Gas and Electric Company's (PG&E) ongoing concerns about executing BioMAT contracts, as it was ordered to do in Resolution E-4922 (March 22, 2018).

Discussion

The need for issuing this Ruling is the result of the perceptions articulated by PG&E that the Commission's ability to enforce its BioEnergy Market Adjusting Tariff Power Purchase Agreement Decisions has been impaired by recent judicial developments.

In Decision 15-09-004, the Commission *Approved, as Modified, Bioenergy Electric Generation Tariff, Standard Contract, and Supporting Documents to Implement Decision 14-12-081 on BioEnergy Feed-In Tariff for the Renewables Portfolio Standard Program*. D.15-09-004 authorizes the investor-owned electric utilities to file a tariff,

standard contract, and ancillary documents that comply with the determinations made in this decision regarding the draft documents.

As a result of that Decision, PG&E along with Southern California Edison Company and San Diego Gas & Electric Company drafted a joint BioEnergy Market Adjusting Tariff Agreement.¹ Of note are Sections 4.1 (Representations and Warranties) and 4.2 (General Covenants), which provide as follows:

- 4.1. Representations and Warranties. On the Execution Date, each Party represents and warrants to the other Party that:
 - 4.1.2. the execution, delivery and performance of this Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party *or any Laws*; (Bold and italics added.)
- 4.2. General Covenants. Each Party covenants that throughout the Term of this Agreement:
 - 4.2.1. it shall continue to be duly organized, validly existing and in good standing under the Laws of the jurisdiction of its formation;
 - 4.2.2. it shall maintain (or obtain from time to time as required, including through renewal, as applicable) all regulatory authorizations necessary for it to legally perform its obligations under this Agreement; and
 - 4.2.3. it shall perform its obligations under this Agreement in a manner that does not violate any of the terms and conditions in its governing documents, any contracts to which it is a party, *or any Law*. (Bold and italics added.)²

But PG&E has recently raised a concern about its ability to make the representation with respect to, the “or any law” language in Sections 4.1 and 4.2. PG&E

¹ The link to PG&E’s BioMAT PPA is as follows:
www.pge.com/includes/docs/pdfs/b2b/wholesaleelectricssuppliersolicitation/BioMAT/BioMAT_PPA_De c2016.pdf.

² Similar language appears in Southern California Edison Company and San Diego Gas & Electric Company’s BioMAT PPAs.

questions whether the BioMAT program complies with the Public Utility Regulatory Policies Act of 1978 (PURPA), in light of a recent order of the U.S. District Court for the Northern District of California in *Winding Creek Solar LLC v. Peevey, et al.*, Case No. 13-cv-04934-JD (N.D. Cal. Dec. 6, 2017) (*Winding Creek*). In *Winding Creek*, the District Court concluded that the Renewable Energy Market Adjusting Tariff (ReMAT) Program’s pricing mechanism and contracting limits violate PURPA. Although *Winding Creek* was specific to the Commission’s ReMAT decisions, and despite the distinguishing characteristics of ReMAT and BioMAT, PG&E is concerned that the language from *Winding Creek* is broad enough to impact the viability of the BioMAT program. PG&E’s concern is memorialized in its Comments to Draft Resolution E-4922 (submitted March 12, 2018). As a result of this concern, PG&E is reluctant to execute BioMAT PPAs without modifying the standard language in the BioMAT PPA.

Without opining on the legitimacy or accuracy of PG&E’s concern, given the urgency of addressing the tree mortality crisis³ in California and the State’s priority in utilizing high fire hazard zone fuel, I am considering asking the Commission to agree to strike the phrase “or any laws” from Section 4.2, subsection 4.2.3, and Section 4.1, subsection 4.1.2, of the BioMAT PPA.

Accordingly, I am requesting that parties serve and file comments on this proposed modification of Sections 4.1.2 and 4.2.3 of the BioMAT PPA by April 26, 2018.

- Comments shall be served and filed no later than April 26, 2018.
- Comments shall not exceed 10 pages in length.
- No response or reply comments shall be permitted.

³ Governor Brown’s Tree Mortality Emergency Proclamation: https://www.gov.ca.gov/wp-content/uploads/2017/09/10.30.15_Tree_Mortality_State_of_Emergency.pdf.

IT IS RULED that the parties shall serve and file comments in the manner, and by the time frame, set forth above in this Ruling.

Dated April 16, 2018, at San Francisco, California.

/s/ CLIFFORD RECHTSCHAFFEN

Clifford Rechtschaffen
Assigned Commissioner