

Decision 11-04-008 April 14, 2011

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 08-08-009
(Filed August 21, 2008)

**DECISION GRANTING PETITIONS FOR MODIFICATION
OF DECISION 10-12-048 FILED BY NEXTERA ENERGY RESOURCES
AND THE INDEPENDENT ENERGY PRODUCERS ASSOCIATION**

1. Summary

This decision addresses the petitions for modification filed by NextEra Energy Resources and the Independent Energy Producers Association. We grant the petitions and modify Decision 10-12-048 to eliminate the prohibition on bilateral contracting. We also specify that the capacity associated with a contract executed outside of the Renewable Auction Mechanism (RAM) program does not count toward the 1,000 megawatts RAM program capacity cap with one exception. The exception is the capacity associated with 21 contracts Southern California Edison Company executed through its 2010 Renewables Standard Contract Program. The proceeding remains open.

2. Background

On December 16, 2010, the Commission adopted Decision (D.) 10-12-048 establishing the Renewable Auction Mechanism (RAM). RAM is a streamlined procurement program targeting smaller projects that generate electricity using renewable resources. Specifically, the decision directs the three largest

investor-owned utilities (IOUs) to collectively procure up to a total of 1,000 megawatts (MW) of capacity from projects using renewable fuels. The procurement is from individual projects up to 20 MW in size using a standardized, non-modifiable contract. RAM employs a competitive solicitation in which projects are compared on the basis of price with the least cost projects being selected and paid "as-bid." Among other elements of the program, the decision prohibits the utilities from seeking Commission approval of contracts with projects which result from bilateral negotiations when the project is 20 MW or less in size, or from approving projects resulting from voluntary programs that target the same market as that targeted by RAM.¹ The prohibition was adopted as a way of reducing the administrative overhead associated with review and disposition of bilateral contracts, and of maximizing competitive pressures in each solicitation.

On January 18, 2011, NextEra Energy Resources (NextEra) filed a petition for modification of D.10-12-048. NextEra seeks clarification regarding the extent of the prohibition on bilateral contracting with projects that would otherwise be eligible to participate in RAM. In particular, NextEra expresses concerns regarding the implications of the prohibition on ongoing negotiations between NextEra and Southern California Edison Company (SCE) relating to NextEra's Palm Springs wind facility. Although the facility itself is 49.2 MW in size, the generation is currently being delivered to SCE via five separate Standard Offer (SO) Qualifying Facility (QF) contracts. NextEra says it is presently in negotiations with SCE to transition these five contracts from the SO contracts to

¹ D.10-12-048 at 3-4; Conclusion of Law 5.

five new contracts with an increase in overall capacity of 0.3 MW, bringing the total to 49.5 MW and, due to new technologies and efficiency improvements, tripling the energy output. NextEra seeks clarification that the prohibition on bilateral contracting does not extend to bilateral negotiations involving QFs and repowering of QF projects.²

On February 2, 2011, the Independent Energy Producers Association (IEP) also filed a Petition for Modification of D.10-12-048.³ In its petition, IEP argues that the prohibition on bilateral contracting is bad policy in that it takes off the table a “well-trod” procurement option. In IEP’s view, allowing bilateral contracting does not undermine the RAM program. IEP further suggests that any capacity resulting from negotiations outside of RAM not count toward the RAM procurement requirements. IEP also contends that the prohibition is confusing in that the concept of bilateral contracting is not exclusive from RPS solicitations. The RAM decision did not preclude projects that would otherwise be eligible for the RAM program from participating in the annual RPS solicitations. This creates confusion vis-à-vis the bilateral contracting prohibition in that projects that are shortlisted in an RPS solicitation do negotiate bilaterally on the specific terms and price prior to contract execution. The prohibition would appear to interfere with the ability of these projects to meaningfully participate in an RPS solicitation by preventing them from engaging in the

² The pleading does not state if the renegotiated contract is a QF contract or a Renewable Portfolio Standard (RPS) contract.

³ There are pending applications for rehearing of D.10-12-048, and other pending petitions for modification. Today's decision is not intended to, and does not, dispose of or prejudge any issue in the applications for rehearing, nor any issue in the other petitions for modification.

negotiations that are part of that process. IEP also asks for clarification regarding whether the prohibition only applies to new agreements or existing agreements, arguing that a prohibition on bilateral negotiations between parties with regard to existing agreements would make it impossible for existing contracts to be amended or extended. Lastly, IEP suggests that the prohibition appears to inadvertently limit opportunities for experimental technologies since these technologies often require special contractual provisions.

A response to the two petitions was filed by Pacific Gas & Electric Company (PG&E) on February 17, 2011. SCE filed a response to the NextEra petition on February 17, 2011, and to the IEP petition on March 4, 2011. San Diego Gas and Electric Company (SDG&E) filed a response to the IEP petition on March 4, 2011. All three utilities agree with the requests and arguments of the petitioners. In its response, SCE agrees with NextEra's proposal but also suggests, consistent with IEP's petition, that the prohibition on bilateral contracts should be eliminated entirely. SDG&E says that it can accept IEP's suggestion that the bilaterally negotiated contracts with facilities of 20 MW and less should not count toward the 1,000 MW RAM procurement target but, if this proposal is adopted by the Commission, the Commission should expressly indicate that this "does not interfere with SDG&E's ability to count its two bilateral contracts currently under negotiation toward satisfaction of the SEP [Solar Energy Program] sub-set of its RAM procurement obligation."⁴ As SDG&E explains, SDG&E requests authority via its RAM implementation advice letter for the

⁴ Response at 3.

capacity associated with the SEP to be recast as a subset of the RAM procurement requirement.

3. Discussion

We address the NextEra and IEP petitions together since they raise concerns regarding the same program element, albeit for somewhat different reasons. As explained below, we grant the petitions subject to two provisions: (a) projects executed outside RAM do not count toward the 1,000 MW RAM capacity cap and (b) SCE may count 21 contracts executed through its 2010 Renewables Standard Contract (RSC) program toward SCE's RAM capacity cap.

Our adoption of a prohibition on bilateral contracting was for the two reasons noted above. First, prohibiting bilateral contracting with projects 20 MW and less, or with projects 20 MW or less otherwise contracted for outside of RAM, reduces the administrative burden associated with Commission review and disposition of such contracts. It does so by directing all such projects to rely on the standardized and non-modifiable RAM contract. While this approach necessarily reduces contracting flexibility and may leave some projects unable to move forward, there would appear to be only limited disadvantage from a ratepayer standpoint. This is the case because our regulatory approach is premised on this market being highly competitive with abundant supply. As a result, competition ensures reasonable prices for sufficient capacity to meet California's renewable energy targets (even if RAM is not a viable option for some projects in this market segment, with the ban on bilateral contracting foreclosing them from participating, because there is adequate other supply to meet demand). Second, directing projects into RAM solicitations maximizes competitive pressures, imposes greater cost discipline on projects, and should result in more competitive pricing for ratepayers.

At their core, both NextEra's and IEP's petitions take issue with the reasoning that there is limited disadvantage even if the prohibition prevents some projects from being able to move forward. Rather, they are concerned that the prohibition will substantially impact, and ultimately narrow, the range of projects with which the utilities (and by extension ratepayers) can contract, to the detriment of the RPS program.

There are a number of different approaches that could be taken to address the concern, ranging from narrow to broad. A narrow approach could, for example, allow exceptions in specific instances (e.g., existing contracts, contracts executed prior to a certain date, repowers). The broadest approach is to eliminate the prohibition altogether. These different options need to be weighed against the benefits and costs of the prohibition.

The benefits underlying the prohibition are twofold (reduce administrative burden and maximize competitive pressures). Regarding the first goal, we remain concerned that if we lift the ban (whether it be narrow or broad) the associated contract review will place a substantial strain on limited staff resources, particularly given the expected large number of unique contracts from many smaller sized projects.

Regarding the second goal, however, it is not as clear as we first thought, given the arguments presented and on further reflection, how eliminating the prohibition would adversely impact the level of competitive pressure in each RAM solicitation. To the extent the contract terms of the RAM are simply unworkable for certain projects, they will not participate absent the ability to negotiate bilaterally. The prohibition, in such a case, does not increase the number of market participants in a given RAM solicitation, it only reduces the number of sellers with no countervailing increase in competitive pressure. In

fact, rather than reducing the prices ratepayers incur, this could actually increase ratepayer costs by eliminating attractive contracts that for various reasons cannot participate in RAM.

On the other hand, we recognize that there could be circumstances where a given developer would prefer to negotiate bilaterally but could operate within the strictures of the RAM program. In these cases, the prohibition may drive more participants into a RAM solicitation than would otherwise participate, thus increasing price competition. Also, the risk of diluting the RAM program by allowing bilateral contracting may be an issue. In other words, if bilaterally negotiated contracts count toward the 1,000 MW program cap, the utilities may elect to pursue bilateral contracts to the complete exclusion of RAM solicitations. However, it is impossible to know the net impact of the prohibition on potential benefits or costs absent more extensive knowledge of potential market participants and their motivations.

Therefore, on balance we are persuaded that the prohibition on bilateral contracting is overly broad and appears likely to work to the detriment rather than to the advantage of ratepayers. While narrowly tailored solutions may help in specific instances, petitioners have presented a compelling case that eliminating the prohibition on bilateral contracting altogether makes the most sense given the breadth of potential unintended consequences and potentially forgone contracting opportunities, including amendments or extensions of existing contracts, and opportunities to support demonstration projects involving experimental or emerging technologies.⁵

⁵ Allowing bilateral contracting also permits participation by projects with phased-in development schedules, development schedules that extend beyond the number of

Footnote continued on next page

We remain committed, however, to testing the RAM program as we believe it represents an important procurement vehicle. We eliminate the prohibition on bilateral contracting for projects 20 MW and less, but we offset potential negative dilution effects by declining to count capacity contracted for outside of RAM toward the 1,000 MW RAM program capacity cap. We make one exception relative to contracts entered into before our RAM decision. Specifically, we allow the 21 contracts SCE has already executed pursuant to its RSC program to be counted toward SCE's portion of the RAM capacity cap. We did this in the RAM decision in the interest of market continuity, and we continue that here.⁶

While we remove the prohibition on bilateral contracting, the Commission still has a preference in this market segment for contracts where the price is determined by parties through a competitive solicitation rather than bilateral negotiation.⁷ Thus, the Commission expects the IOUs to use RAM as the main

months permitted in the RAM program, projects that have unique considerations related to the participation of a public agency partner, and projects with other unique characteristics or benefits that are not adequately captured by the RAM evaluation process but which nonetheless potentially provide net benefits to ratepayers and California.

⁶ D.10-12-048 at 23.

⁷ The preference for price determination by parties via competitive solicitation with regard to projects 20 MW and smaller does not apply in many other cases, such as but not limited to, the California Solar Initiative (CSI) program, net metering program, self-generation incentive program (SGIP), standard offer contracts at avoided costs under the QF program, bilateral contracts under the QF program, feed-in tariffs implemented pursuant to Public Utilities Code Section 399.20, IOU voluntary programs which may or may not select projects based on value (e.g., SCE RSC program), other programs for projects otherwise ineligible for RAM, or other programs for RAM-eligible projects where the Commission has established another pricing tool.

procurement tool for projects eligible for RAM. We expect IOUs to limit consideration of bilateral contracts for projects otherwise eligible for RAM to projects that cannot reasonably participate in RAM due to unique attributes. Because of the unique attributes that would lead parties to use bilateral contracts in those cases, all such contracts will continue to be reviewed by the Commission on a case-by-case basis, and must be submitted by a Tier 3 advice letter or application.⁸ In contrast, RAM contracts may be submitted through a Tier 2 advice letter, and will be eligible for expedited Commission review and consideration.

3.1. SDG&E Request

In light of our determination to eliminate the prohibition on bilateral contracting, we now turn to SDG&E's request for permission to count two bilateral contracts currently under negotiation toward the potential SEP sub-set of the RAM program. That is, SDG&E proposes that contracts under its SEP program count toward its RAM program capacity cap, despite our determination to not count bilaterally negotiated contracts toward the RAM procurement cap.

We decline to decide SDG&E's request here because to do so would prejudice our decision on whether or not to allow SDG&E to combine its SEP and RAM programs. SDG&E's request to combine its SEP and RAM Programs was only recently made via an advice letter.⁹ We have not yet reached a

⁸ This applies to the unique bilateral contracting situations, but does not apply to the cases identified in the prior footnote that do not require an advice letter or application, or where the Commission has otherwise specified a Tier 1 or Tier 2 advice letter (e.g., QF standard contracts, feed-in-tariffs).

⁹ SDG&E Advice Letter 2232-E filed February 25, 2011 (requesting Commission approval of SDG&E's Plan to Implement RAM).

determination on the advice letter. Rather, Energy Division will soon prepare a draft Resolution with its recommendation for our consideration, and the draft Resolution will be served on parties for comment. We will consider the draft resolution and parties' comments and will later decide the issue of consolidating SDG&E's programs. We need not rule on SDG&E's request to count two SEP bilateral contracts toward RAM until we first decide whether to combine the two programs.

We briefly note that one question in disposing of the specific SDG&E proposal to combine SEP and RAM programs or make other changes to the SEP program is whether or not SDG&E's request is appropriately raised and considered in an advice letter. SDG&E's requested modifications relate to a program and program elements that were adopted in our SEP decision (D.10-09-016). To the extent SDG&E's request requires modification of a decision, a petition for modification (Rule 16.4 of the Commission's Rules of Practice and Procedure) is the more appropriate procedural means to seek relief.

3.2. Other Issues

Even if we upheld the prohibition on bilateral negotiation (which we do not), NextEra's petition raises two situations that were not actually subject to the prohibition and which deserve comment. First, as described in NextEra's petition, the Palm Springs wind facility is a 49.2 MW wind farm delivering energy under five separate contracts, wherein each contract is associated with capacity less than 20 MW. The prohibition on bilateral contracting adopted in the RAM decision applied to projects 20 MW and less in size. Thus, as described by NextEra, the Palm Springs wind project, at 49.2 MW, was not subject to the prohibition on bilateral contracting. We remind parties that a project larger than

20 MW cannot be subdivided into pieces, each of which individually is equal to or less than 20 MW in size in order to be eligible for RAM.¹⁰

Second, NextEra's petition touches upon an issue with respect to renegotiation of QF contracts. We clarify that nothing in the RAM order, and nothing in this order, affects what QFs may or may not do. To the extent QFs may engage in bilateral negotiations, they may continue to do so. No decision made relative to the RAM Program, or projects otherwise eligible to participate in the RAM Program, changes any of the rules applicable to QFs.

3.3. Conclusion and Modifications

We grant the petitions to the extent described above. Accordingly, we modify text, conclusions of law and an ordering paragraph. These changes are contained in Attachment A.

4. Comments on Proposed Decision

On March 15, 2011, the proposed decision of Commissioner Michael R. Peevey in this matter was mailed to parties in accordance with Section 311 of the Public Utilities Code and Rule 14.3 of the Commission's Rules of Practice and Procedure (Rules). On April 4, 2011, comments were filed by NextEra, IEP, SCE, Western Power Trading Forum, and Republic Cloverleaf Solar LLC. No reply comments were filed.

5. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner, and Anne E. Simon and Burton W. Mattson are the assigned Administrative Law Judges for this proceeding.

¹⁰ D.10-12-048 at 44.

Findings of Fact

1. Prohibiting bilateral contracting pursuant to D.10-12-048 limits the procurement and contracting options of the IOUs and project developers.
2. The prohibition on bilateral contracting may prevent some developers from participating in the market altogether and pose substantial barriers to amending or extending existing contracts.
3. It is not clear that eliminating the prohibition on bilateral contracting would adversely impact the level of competitive pressure in each RAM solicitation.
4. The allowance of bilateral contracting or other contracting options for projects otherwise eligible for RAM is unlikely to dilute or reduce the benefits of RAM, provided that bilateral negotiations or other contracting options outside of RAM do not count toward the RAM procurement targets.
5. Market continuity is facilitated by allowing the 21 contracts executed by SCE pursuant to SCE's RSC program to be counted toward SCE's portion of the RAM capacity cap, as was also permitted in the RAM decision.
6. The Commission has a preference for RAM-eligible projects in this market segment to use contracts where the price is determined by parties through a competitive solicitation rather than bilateral negotiation, with some exceptions.
7. The Commission has not yet reached a determination whether or not to allow SDG&E to combine its SEP and RAM programs.

Conclusions of Law

1. The petitions for modification should be granted as described herein.
2. The prohibition on bilateral contracting for purposes of procuring renewable resources that would otherwise be eligible to participate in the RAM program should be eliminated.

3. To ensure that alternative procurement options do not dilute or conflict with the RAM program, contracts for RAM-eligible projects consummated outside of RAM should not count toward the RAM procurement targets, with the exception of the 21 contracts SCE has already executed through its RSC program.

4. SDG&E's request that the Commission not interfere with SDG&E's ability to count certain bilateral SEP contracts toward its RAM capacity cap is premature and should not be acted upon here.

5. This order should be effective today to facilitate early implementation of the RAM program with clarity regarding the ability of projects to engage in bilateral negotiations.

O R D E R

IT IS ORDERED that the January 18, 2011 petition for modification of Decision 10-12-048 filed by NextEra Energy Resources, and the February 2, 2011 petition for modification of Decision 10-12-048 filed by Independent Energy Producers Association, are granted to the extent provided herein, and denied in all other respects. The modifications are contained in Attachment A.

This order is effective today.

Dated April 14, 2011, at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK FERRON
Commissioners

I reserve the right to file a concurrence.

/s/ TIMOTHY ALAN SIMON
Commissioner

ATTACHMENT A

MODIFICATIONS TO DECISION 10-12-048

Decision 10-12-048 is modified as follows:¹

1. Text at page 3-4

From:

“It is contrary to the intent of this program to allow projects in this size range to use other procurement options, in particular voluntary programs that target the same market segment or bilateral negotiations. Thus, going forward, SCE shall conform its Renewables Standard Contract (RSC) program to the guidance and framework provided herein. However, SCE may count contracts already executed pursuant to its 2010 RSC towards its capacity cap to the extent they are approved by the Commission. Furthermore, SCE may submit additional contracts resulting from its 2010 RSC solicitation via a Tier 3 advice letter for Commission approval, however, these additional contracts will not further reduce SCE’s procurement obligation under the RAM program.”

To:

“It is not contrary to the intent of this program to allow projects in this size range to use other procurement options, in particular voluntary programs that target the same market segment or bilateral negotiations. ~~Thus, going forward, SCE shall conform its Renewables Standard Contract (RSC) program to the guidance and framework provided herein. However, SCE~~ may count contracts already executed pursuant to its 2010 Renewables Standard Contract (RSC) program towards its capacity cap to the extent they are approved by the Commission. However, other than this narrow exception, any additional capacity procured by the utilities outside of RAM shall not count toward the capacity amounts required in this

¹ Underlined language reflects new words to be added while strike-through reflects words that were included that should be removed.

~~decision to be procured via the RAM program. Furthermore, SCE may submit additional contracts resulting from its 2010 RSC solicitation via a Tier 3 advice letter for Commission approval, however, these additional contracts will not further reduce SCE's procurement obligation under the RAM program."~~

2. Text at page 22

From:

"Accordingly, in the interest of promoting competition and streamlining of the administrative process, the utilities should pursue this market segment specifically via RAM. In other words, while the IOUs may use RAM, annual RPS solicitations, or other Commission-approved programs such as the photovoltaic programs to procure system-side DG projects up to 20 MW, they may no longer use bilateral negotiations or voluntary programs like SCE's RSC."

To:

~~"Accordingly, in the interest of promoting competition and streamlining of the administrative process, the utilities should pursue this market segment specifically via RAM in addition to other procurement options. In other words, while the IOUs may use RAM, annual RPS solicitations, or other Commission-approved programs such as the photovoltaic programs to procure system-side DG projects up to 20 MW, they may no longer use bilateral negotiations or voluntary programs like SCE's RSC."~~

3. Conclusion of Law (COL) 5

From:

"The IOUs should be required to use RAM exclusively for the procurement of system-side renewable projects up to 20 MW in size with the exception of other Commission-approved programs such as the utility solar photovoltaic programs already authorized by the Commission and annual RPS solicitations; IOUs should not use voluntary programs that target the same market segment or bilateral negotiations."

To:

~~“The IOUs should be required to use RAM exclusively for the procurement of system-side renewable projects up to 20 MW in size with the exception of in addition to other Commission-approved programs such as including the utility solar photovoltaic programs already authorized by the Commission and annual RPS solicitations; IOUs should not use as well as voluntary programs and that target the same market segment or bilateral negotiations.”~~

4. COL 6 is eliminated

Eliminated:

~~“IOUs should limit their procurement of system-side renewable DG to the RAM, to annual RPS solicitations, and to Commission-approved utility solar photovoltaic programs.”~~

5. COL 9 is eliminated and replaced:

Eliminated:

~~“SCE should be given the discretion to submit additional contracts to the Commission for approval resulting from its 2010 RSC solicitation via a Tier 3 advice letter; however, the capacity associated with these contracts should not reduce SCE’s procurement obligations under RAM.”~~

Replaced with

“The capacity associated with contracts entered into outside of RAM solicitations, with the exception of the 21 contracts SCE has already executed through its 2010 RSC program, shall not count toward the capacity amounts we require the utilities to solicit via RAM.”

6. Ordering Paragraph (OP) 3

From

“Each electrical corporation named herein shall file and serve one Tier 2 advice letter with the Commission including all executed contracts resulting from each auction up to the approved capacity limits. After the effective date of this decision, the electrical corporations may not submit contracts with facilities up to 20 MW in size that are negotiated and executed outside of the Renewable Auction Mechanism program with the

exception of contracts executed pursuant to the annual Renewables Portfolio Standard Program, the Commission approved utility solar photovoltaic programs, and the contracts that Southern California Edison has or will execute pursuant to its 2010 Renewables Standard Contract program, or other Commission-approved programs. The electrical corporations are: Southern California Edison Company, Pacific Gas and Electric Company, and San Diego Gas & Electric Company.”

To:

“Each electrical corporation named herein shall file and serve one Tier 2 advice letter with the Commission including all executed contracts resulting from each auction up to the approved capacity limits. After the effective date of this decision, the electrical corporations may ~~not~~ continue to submit contracts with facilities ~~up to 20 MW in size~~ that are negotiated and executed outside of the Renewable Auction Mechanism program ~~with the exception of contracts executed pursuant to the annual Renewables Portfolio Standard Program, the Commission approved utility solar photovoltaic programs, and the contracts that Southern California Edison has or will execute pursuant to its 2010 Renewables Standard Contract program, or other Commission approved programs,~~ however, the capacity associated with these contracts will not count toward the capacity amounts sought through the Renewable Auction Mechanism program, with the exception of the 21 contracts Southern California Edison Company has already executed through its 2010 Renewables Standard Contract program. The electrical corporations are: Southern California Edison Company, Pacific Gas and Electric Company, and San Diego Gas & Electric Company.”

(END OF ATTACHMENT A)