

Decision 04-05-024

May 6, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application by the Utility Reform
Network For Rehearing of Resolution
E-3814

Application 04-01-004
(Filed January 5, 2004)

**ORDER GRANTING REHEARING OF RESOLUTION E-3814
AND GRANTING SOUTHERN CALIFORNIA EDISON'S
MOTION TO FILE CONFIDENTIAL MATERIALS UNDER SEAL**

I. SUMMARY

By this Order, the California Public Utilities Commission (“Commission”) grants rehearing and rejects the TrueSolar Solutions Inc. (“TrueSolar”) Power Purchase Agreement (“PPA”). The Commission rejects the TrueSolar PPA without prejudice to allow Southern California Edison (“SCE”) to resolicit 5 MW of emerging renewable power in the Renewable Procurement Rulemaking (R.) 04-04-026; a proceeding currently before the Commission that deals with the implementation of renewable procurement through competitive solicitations. We also modify Resolution E-3814 to clarify the definition of benchmark, and to correct an error. Finally, we grant SCE’s Motion for Leave to File Confidential Materials Under Seal dated January 20, 2004. Rehearing of all other issues is denied.

II. BACKGROUND

On September 28, 2002, SCE issued a Request for Proposal from eligible Renewable Resource suppliers. In its Renewable RFP, SCE stated its intent to evaluate proposals based on criteria “intended to achieve the lowest ratepayer cost and best fit with the utility retained generation, taking into account the preference expressed in D.02-

08-071 for a mixture of contracts with 5, 10 and 15 year terms.”¹ The RFP states “proposals will be rank ordered and the lowest total cost market based proposal based on the proposal evaluation criteria will be selected first, followed by the next lowest Market Based Proposal, and so on until the Solicitation Goal is achieved, or until there are not remaining Market Based Proposals.”²

On December 24, 2002, SCE filed Advice Letter (AL) 1676-E requesting Commission approval of five PPAs that would contribute toward procurement of at least an additional one percent of the utility’s annual electricity sales from renewable energy resources. SCE submitted these contracts for approval pursuant to Decision (D.) 02-08-071. The counter parties to these five PPAs were bidders in the September 2002 Renewable Power Solicitation. On January 30, 2003, we approved four of the five PPAs submitted in AL 1676-E in Resolution E-3809, and on May 8, 2003, we approved the fifth PPA in Resolution E-3816.

On January 14, 2003, SCE filed AL 1680-E requesting Commission approval of a sixth contract from the September 2002 Renewable Power Solicitation, the TrueSolar PPA. SCE submitted this contract for approval pursuant to D. 02-08-071. The TrueSolar PPA involves a new 5 MW central station solar photovoltaic facility to be constructed and operated by TrueSolar Solutions, Inc. On January 21, 2003, four protests to AL 1680-E were filed. The Office of Ratepayer Advocates (“ORA”) and the California Energy Commission (“CEC”) confidentially protested AL-1680-E. On January 21, 2003, AL 1680-E was jointly protested by TURN and the Natural Resources Defense Council (“NRDC”), and publicly protested by the California Wind Energy Association (“CalWEA.”) On January 27, 2003, SCE filed a confidential response under Public Utilities Code Section 583 to the protests of ORA, TURN/NRDC, CEC and CalWEA.

¹ See SCE’s Request for Proposals from Eligible Renewable Resources (ERR) Suppliers for Electric Energy or for Electric Energy and Firm Capacity, Procurement Protocol, Section VI., Evaluation of Proposals.

² Id.

There were five comment periods on Resolution E-3814. Draft Resolution of E-3814 was first issued for comment on February 7, 2003. On February 10, 2003, comments on the draft resolution were filed by TURN/NRDC, CEC, ORA and SEC. On February 11, 2003 additional comments were submitted by SCE. On February 21, 2003 Energy Division circulated a revised resolution, and comments were filed on February 24, 2003 by TURN/NRDC, CEC and SCE. On March 3, 2003 a further revised resolution was circulated. Timely comments were received from TURN/NRDC, ORA and the CEC on March 10, 2003. An alternate to Resolution E-3814 was circulated for comment on May 28, 2003, and timely comments were filed by NRDC, ORA, CEC and SCE. On November 17, 2003 an unredacted draft version of the resolution was issued for comment due December 1, 2003. Eight parties filed comments including SCE, California Solar Energy Industries Association (“CalSEIA”), California Wind Energy Association, Center for Energy Efficiency and Renewable Technologies (“CEERT”), Independent Energy Producers (“IEP”), ORA, PV Now, and jointly filed comments from TURN and NRDC, on December 1, 2003.

On December 4, 2003 the Commission issued Resolution E-3814, which approved the TrueSolar PPA and a new 5 MW central station solar photovoltaic facility to be constructed and operated by TrueSolar. The Commission also released all confidential information at that point.³ On January 5, 2004, TURN filed an application for rehearing of the Resolution. SCE filed timely public and confidential responses opposing TURN's rehearing application. SCE also filed a separate motion for leave to file the nonpublic portion of Resolution E-3809 under seal.⁴ CalWEA, Cal SEIA, and CEERT also filed timely responses to TURN's rehearing application. In its rehearing application, TURN

³ See Resolution E-3814, Ordering Paragraph 3, which lifts the confidentiality protection from SCE's Advice Letter AL 1680-E, associated protests, and comments, except for the PPA itself, which will remain under seal.

⁴ On January 20, 2004, SCE filed a Motion for Leave to File Confidential Material Under Seal, Namely the Non-Public Portion of Resolution E-3809 (“Motion”). In its Motion, SCE requests to have treated as confidential certain quotes from the nonpublic portion of Resolution E-3809, which was partially filed under seal as a result of the protective order in R.01-10-024. SCE requests permanent protection of the confidential material.

challenges Resolution E-3814 on the following grounds: (1) the PPA is contingent upon the award of a specified amount of Public Goods Charge (PGC) funds by the California Energy Commission in violation of established policy, (2) the Commission failed to provide 30 days for public review and comment of the unredacted draft resolution, and (3) the finding that SCE conducted a reasonable solicitation cannot be reconciled with SCE's failure to indicate to prospective bidders that its selection criteria might become the exact opposite of those outlined in the RFP protocols.

We have reviewed the application for rehearing and find TURN has established legal error with respect to its third allegation of error. We therefore grant rehearing to reject the TrueSolar PPA. The Commission rejects the TrueSolar PPA without prejudice to allow SCE to resolicit 5 MW of emerging renewable power in the Renewable Procurement Rulemaking (R.) 04-04-026; a proceeding currently before the Commission that deals with the implementation of renewable procurement through competitive solicitations.

III. DISCUSSION

In its rehearing application, TURN challenges Resolution E-3814 on the following grounds: (1) SCE is permitted to make the PPA contingent upon the award of a specified amount of Public Goods Charge ("PGC") funds by the California Energy Commission ("CEC") in violation of established policy, (2) the Commission failed to provide 30 days for public review and comment of the unredacted draft resolution, and (3) the finding that the PPA results from a solicitation that SCE conducted reasonably is inconsistent with the fact that SCE never indicated to prospective bidders that its selection criteria might become the exact opposite of those outlined in the RFP protocols.

A. Making the TrueSolar PPA contingent on the award of PGC funds does not constitute legal error but the benchmark must be clarified.

On August 22, 2002, the Commission issued Decision (D.) 02-08-071, which, among other things, set aside a portion of procurement to come from renewable sources. D.02-08-071 ordered a separate competitive renewable solicitation by each electric utility

for at least an additional one percent of their actual energy and capacity needs. D.02-08-071 also set forth other requirements for power solicitations including: utilities are to solicit bids for electricity to be delivered beginning January 1, 2003, and extending for five, ten, and 15 year terms, with no contract shorter than five years; that resources come online and begin delivering electricity before the end of 2003; and utilities should give preference to existing renewable resources in the bidding process if their bids are equal to or lower than prices offered by new projects.⁵

In D.02-08-071, the Commission further required bids for renewable power to clearly identify any expected funds from the Public Goods Charge (“PGC”) that are included in the resource pricing. The proposed TrueSolar PPA is structured subject to the receipt of certain levels of PGC funding as determined by the CEC. In its rehearing application, TURN claims that permitting SCE to make the PPA contingent upon the award of a specified amount of Public Goods Charge funds by the CEC violates established Commission policy. (See Rehearing App., p. 1.) Specifically, TURN maintains that this contingency is impermissible under Commission policy articulated in a series of resolutions, rulings, and the latest procurement decision. (See Rehearing App., p. 3.) These claims do not rise to the level of legal error.

It is true that in past resolutions we have ordered similar contingency language removed. However, the Commission’s determinations in prior Resolutions E-3809 and E-3816 do not establish precedent for the contract in the present case. We concluded in the resolutions cited by TURN that “approval of these contracts is not indicative of approval of any contracts to be submitted in the future.”⁶ We further stated, “we wish to make clear that the decision we make here is based on the unique facts before us today.”⁷ Thus, based on the clear language of our prior resolutions, TURN’s claim of inconsistency does not establish legal error.

⁵ See D.02-08-071 p.33.

⁶ See Resolution E-3809, p. 10 and E-3816, p. 16.

⁷ See Resolution E-3814, p. 2.

In this case, the Resolution is based on the Commission's interpretation of the specific facts and proposed contract before it. Here, we left the decision as to the appropriateness of the level of the PGC funding to the CEC.⁸ Finding of Fact No. 8 specifically states "the merits and evaluation and analysis of the PGC funding as identified in the proposed PPA falls outside the threshold established by the Commission in D.02-08-071 and is for the CEC to assess." Under these circumstances, leaving the contingency language intact is appropriate and does not constitute legal error.

TURN also cites an August 13, 2003 Assigned Commission Ruling ("ACR") and Decision (D.) 03-12-062 in support of its allegation that the Commission violated established policy.² We disagree. First, the ACR referenced by TURN is an interlocutory ruling, not a Commission decision. In addition, TURN claims that D.03-12-062 explicitly prohibits any utility from anticipating new encumbrances from PGC funds. This argument fails because D.03-12-062 was issued after the Commission adopted Resolution E-3814 and is prospective only. Also, we do not find TURN's argument to be persuasive because the Commission is not bound by its own precedent. (*In re Pacific Gas & Electric Co.* (1988) 30 CPUC2d 189, 223-225). It is not legal error for the Commission to deviate from prior Commission decisions. The California Supreme Court explained this long-held principle as follows:

The departure by the Commission from its own precedent or its failure to observe a rule ordinarily respected by it is made the subject of criticism, but our reply is that this is not a matter under the control of this court. We do not perceive that such a matter either tends to show that the Commission had not regularly pursued its authority, or that said departure violated any right of the petitioner guaranteed by the state or federal constitution. Circumstances peculiar to a given situation may justify such a departure.¹⁰

⁸ See Resolution, p. 14. The Commission further noted that in approving this resolution, the Commission in no way obligates or binds the CEC to approve the contract absent going through its analysis and evaluation of expected PGC funding. In fact, the Commission expects and anticipates the CEC to fully evaluate the proposed PPA consistent with its established guidelines and criteria.

² See August 13, 2003 Assigned Commission Ruling ("ACR") Specifying Criteria for Interim Energy Solicitations, which TURN claims expressly prohibits a utility from anticipating new encumbrances of PGC funds pursuant to Public Utilities Code section 383.5.

¹⁰ *Postal Telegraph-Cable Company v. Railroad Commission of the State of California* (1925) 197 Cal.

Thus, TURN's claim that precedent binds the Commission is therefore unpersuasive. Simply because the Commission may have approached the PGC funding clause issue in the instant case differently than in other circumstances, does not, by itself, constitute legal error. The contingency language is entirely appropriate where, as here, our approval of the TrueSolar contract is contingent on the CEC's decision on the level of the PGC funding.

Next, TURN challenges the benchmark amount approved in the Resolution (See Rehearing App., p. 4.) Specifically, TURN argues that the TrueSolar pricing is well above the 5.37 transitional benchmark referenced in D.02-08-071. According to TURN, TrueSolar is really slated to receive 6.25 cents/kWh, in a combination of energy and capacity payments,¹¹ which amount exceeds the permissible benchmark amount. (See Rehearing App., p. 4.) On review, we find TURN's claim requires us to clarify our benchmark pricing.

In D.02-08-071, the Commission adopted a process to review and approve transitional period procurement contracts. The Commission determined "as a general proposition, any renewable contract approved through the transitional procurement process . . . will be deemed reasonable."¹² The Commission also concluded that establishment of a benchmark for the transitional period is not strictly required.¹³ However, the Commission adopted an interim provisional benchmark to give guidance to bidders to the utilities. The Commission adopted the provisional benchmark of 5.37 cents per kWh, which is consistent with prices previously adopted by the Commission. The Commission further stated that any contract that meets or exceeds the benchmark would be deemed per se reasonable.¹⁴ Also, D.02-08-071 stated that other contracts at

426, 436.

¹¹ See Rehearing App., p. 4. TURN claims that the 6.25 consist of 4.5 cents/kWh in energy payments and a capacity payment equal to 1.75 cents/kWh when averaged over annual expected production.

¹² See D. 02-08-071, mimeo, p. 34-36.

¹³ See D. 02-08-071, p. 34.

¹⁴ See. D.02-08-071, p. 34.

prices above the benchmark may also be approved by the Commission for cost recovery.¹⁵

The Commission did not specify, however, whether the 5.37 cents per kWh is based on energy payments alone, or includes capacity payments as well. However, on further reflection, we agree with TURN that our intent was that the benchmark include both energy and capacity payments. Therefore, TURN is correct in its claim that the amount TrueSolar is slated to receive includes a combination of energy and capacity payments, and exceeds the transitional benchmark referenced in D.02-08-071. Thus, the Commission clarifies that the term “benchmark” means a price that includes both energy and capacity payments. However, the benchmark is just that, a benchmark, and does not preclude our approval of contracts that exceed the benchmark. In this case, we are granting rehearing and rejecting the TrueSolar PPA; thus we do not need to reach the issue of whether we should approve the TrueSolar contract price for cost recovery purposes.

Lastly, TURN anticipates that SCE, in response to this application for rehearing, will seek to invent a distinction between Supplemental Energy Payments (SEP) issued by the CEC under Public Utilities Code section 383.5(d) and awards encumbered from the Emerging Buydown Account. (See Rehearing App., p.7.) TURN maintains that allowing TrueSolar to seek SEP awards from the New Resources Account would “severely compromise the integrity of this funding source,” and “requests that if this distinction is accepted in the final decision on rehearing, the Commission explicitly direct SCE to prohibit TrueSolar from seeking SEP awards from this account.” (See Rehearing App., p. 7.) This argument does not rise to the level of legal error.

First, TURN’s “anticipation” of SCE’s response is speculative. A party seeking rehearing has the burden to demonstrate the specific grounds upon which it considers the decision to be unlawful, and vague assertions to the record or law, without citation, may

¹⁵ See D.02-08-071, p. 34.

be afforded little weight.¹⁶ TURN's claim does not meet the requirements of Public Utilities Code section 1732 and therefore rehearing as to this allegation is denied on this ground.¹⁷

Second, the Commission denies rehearing with respect to this allegation because TURN's contention is unsupported. The Resolution does not authorize TrueSolar to seek SEP awards from the New Resource Account. In fact, the Resolution leaves all issues of the level and merits of the PGC funding to the CEC. (See Resolution, p. 13.) Thus, if the SCE were to seek SEP funds from the New Resources Account, this would be a matter for the CEC to decide and TURN should raise its concerns there.

B. The Commission did not err in shortening the time for public review and comment of the draft resolution.

TURN asserts that the Commission failed to provide 30 days for public review and comment of the unredacted draft resolution released November 17, 2002. (See Rehearing App., p. 9.) Essentially, TURN claims that the Commission's justification for a shortened time period is unfounded and unsupported by the facts. These contentions lack merit.

Public Utilities Code Section 311(g)(1) provides that Commission decisions are to be served on all parties at least 30 days prior to the hearing and be subject to at least 30 days review and comment. Section 311(g)(2) and Rule 77.7 of the Commission's Rules of Practice and Procedure also allows the 30 day time period to be reduced or waived.¹⁸ In Resolution E-3814, the Commission determined that public necessity requires a reduction of the 30 day period for public review and comment. Public necessity refers to "circumstances in which the public interest in the Commission adopting a decision before expiration of the 30 day review and comment period clearly outweighs the public interest

¹⁶ See Public Utilities Code section 1732, See also Rule 86.1; Cal Code Regs., Tit. 20, 86.1.

¹⁷ Further, we note that SCE did not discuss this issue in its response.

¹⁸ See Section 311(g)(2), which states "the 30 day period may be reduced or waived in an unforeseen emergency situation, upon the stipulation of all parties in the proceeding, for an uncontested matter in which the decision grants the relief requested, or for an order seeking temporary injunctive relief."

in having the full 30 day period for review and comment.”¹⁹ Public necessity includes, “without limitation, circumstances where failure to adopt a decision before expiration of the 30 day review and comment period would place the Commission or a Commission regulation in violation of applicable law, or where such failure would cause significant harm to public health or welfare.”²⁰

In the Resolution, the Commission weighed the public interest in avoiding the possible harm to public welfare flowing from delay in considering the Resolution against the public interest in having the full 30 day period, for review and comment. (See Resolution, p. 24.) The Commission concluded that “failure to adopt the resolution before the expiration of the 30 day review and comment period could result in significant harm to the public welfare.” (See Resolution, p. 24.) The Commission further explained the reduced comment period, stating “public necessity requires the waiver of the 30 day comment period in order to secure the potential benefits of the proposed interim procurement contracts to SCE customers.” (See Resolution, p. 24.) The comment period was then reduced to a 17 day period for public comment in advance of the hearing, and various parties filed comments. This is consistent with the law and the Commission’s rules implementing the law. Thus, there is no basis for granting rehearing on this issue.

C. TURN’s claim that the Resolution fails to reconcile Finding of Fact No. 11 with SCE’s actions regarding the solicitation has merit.

Third, TURN alleges that the Resolution fails to address TURN’s concern raised in its protest to the advice letter filing that SCE ignored its own publicly stated evaluation criteria in selecting TrueSolar. (See Rehearing App., p.12.) Specifically, TURN contends that instead of carrying out its stated intent to select the lowest total cost market based bids, SCE decided to select the single highest priced bid submitted in response to the RFP.²¹ TURN claims that the Resolution fails to address this concern and how this

¹⁹ See Rule 77.7(f)(9).

²⁰ *Id.*

²¹ See SCE’s Request for Proposals from Eligible Renewable Resources (ERR) Suppliers for Electric Energy or for Electric Energy and Firm Capacity, Procurement Protocol, Section VI., Evaluation of

discrepancy can be reconciled with the finding that SCE conducted a reasonable solicitation. (See Rehearing App, p. 4.)

Our review shows that the record does not support the finding that the TrueSolar PPA was the result of a solicitation that SCE conducted reasonably, when the solicitation did not provide notice to all potential emerging renewable bidders that SCE would ignore its own stated RFP criteria intended to achieve lowest ratepayer cost in selecting TrueSolar. Indeed, whether or not SCE conducted the solicitation reasonably is irrelevant since the TrueSolar PPA did not result from the RFP. We find merit in TURN's claim that we cannot reconcile SCE's rejection of the RFP's least cost criteria as a means for selecting TrueSolar with the finding that the PPA resulted from SCE's RFP. Since this finding is material to our resolution approving the TrueSolar PPA, we will grant rehearing to reject the TrueSolar PPA without prejudice. TrueSolar may resubmit its bid for 5 MW of emerging renewable power in the Renewable Procurement Rulemaking R.04-04-026; a proceeding currently before the Commission that deals with the implementation of Renewable Procurement through competitive solicitations.²² SCE and other parties should also define "emerging technology" so that the Commission can ensure that all appropriate technologies are solicited for the emerging technology solicitation. Thus, if SCE chooses to pursue the 5 MW of emerging renewable power, this will ensure that all other emerging technologies are given a fair opportunity to compete, as envisioned by D.02-08-071.

IV. CONCLUSION

We find merit in TURN's claim that the record does not support the finding that the TrueSolar PPA resulted from a solicitation that was conducted reasonably. It is obvious that SCE used different criteria than that set forth in the RFP to select TrueSolar. Therefore, we grant rehearing and reject the TrueSolar PPA without prejudice as

Proposals.

²² R.04-04-026 also proposes to set guidelines and develop criteria for plants such as the TrueSolar facility.

discussed above. SCE may resolicit 5 MW of emerging technology in the Renewable Procurement Rulemaking, R. 04-04-026.

IT IS THEREFORE ORDERED that:

1. Rehearing is granted. The TrueSolar PPA is rejected without prejudice. SCE may pursue 5 MW of emerging renewable power in the Renewable Procurement Rulemaking, R.04-04-026. TrueSolar may resubmit its bid for 5 MW of emerging renewable power in R.04-04-026.

2. SCE's Motion for Leave to File Confidential Materials Under Seal, Namely the NonPublic Portion of Resolution E-3809, is granted. The confidential material referred to in SCE's motion, shall be permanently sealed and protected from public disclosure by the Commission's Energy Division.

3. Finding of Fact No. 9 of Resolution E-3809, is deleted. The revised Finding of Fact should read as follows:

This resolution finds that certain material filed under seal pursuant to Pub. Util. Code Section 583 and General Order (G.O.) 66-C, and considered for possible disclosure, will be made public. Accordingly, all text in this resolution which appears in this light blue highlight in the unredacted electronic copy, in gray highlight in the unredacted hardcopy, or which is marked "[REDACTED]" in the redacted copy, is made public upon Commission approval of this resolution.

This Order is effective today.

Dated May 6, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I dissent.

/s/ CARL W. WOOD
Commissioner