

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement the California Renewables Portfolio Standard Program.

Rulemaking 04-04-026
(Filed April 22, 2004)

**ADMINISTRATIVE LAW JUDGE'S RULING
GRANTING IN PART AREM's MOTION CONCERNING
CONTENTS OF ELECTRIC SERVICE PROVIDER
PRELIMINARY RENEWABLE PORTFOLIO REPORTS
AND MOTION FOR ADOPTION OF PROTECTIVE ORDER**

Background

In Decision (D.) 05-11-025, the Commission established the framework for the participation of energy service providers (ESPs), community choice aggregators (CCAs), small utilities, and multi-jurisdictional utilities in the Renewables Portfolio Standard (RPS) program. In accordance with that decision, an Administrative Law Judge's (ALJ) Ruling Setting Prehearing Conference and Requesting Prehearing Conference Statements (November 28, 2005) (ALJ PHC Ruling), required ESPs, potential CCAs, small utilities, and multi-jurisdictional utilities to file and serve preliminary renewable portfolio reports not later than December 12, 2005.

The Alliance for Retail Energy Markets (AREM) filed a Motion for Extension of Time for Electric Service Providers to Submit Preliminary Renewable Portfolio Reports (Extension Motion) on December 8, 2005. That motion was granted by an ALJ ruling dated December 13, 2005, extending the time for ESPs to file and serve the reports to January 17, 2006. The ALJ *sua sponte*

extended the time further to January 23, 2006 in a Ruling Extending Time dated January 9, 2006.

AReM filed a Motion for Adoption of Protective Order for Electric Service Provider Preliminary Renewable Portfolio Reports (Protective Order Motion) on December 6, 2005. Aglet Consumer Alliance, Southern California Edison Company (SCE), and The Utility Reform Network (TURN) filed responses to the Protective Order Motion on December 21, 2005. On December 23, 2005, AReM filed a Motion Concerning the Contents of Electric Service Provider Preliminary Renewable Portfolio Reports (Preliminary Reports Motion). Aglet and SCE filed responses to the Preliminary Reports Motion.

Discussion

Preliminary Reports Motion

AReM seeks three changes to the ESPs' preliminary renewable portfolio reports.¹ First, it seeks to eliminate the requirement that ESPs present projections of annual retail sales for 2006-2014. Second, AReM seeks to eliminate the requirement that ESPs provide projections of their annual RPS-eligible resource

¹ The reports, to be filed by ESPs, CCAs, small utilities, and multi-jurisdictional utilities, are required to include at least the following information:

1. Actual and projected annual retail sales, in kWh, beginning in 2001 and ending with 2014.
2. For ESPs only, actual and projected annual retail sales, in kWh, from January 1, 2003 to December 31, 2005.
3. For ESPs only, actual and projected annual retail sales due to retail contracts that expired or will expire between January 1, 2003 and December 31, 2005.
4. Annual RPS-eligible resource mix (in kWh and as a percentage of annual retail sales), beginning in 2001 and ending in 2005.
5. Projected annual RPS-eligible resource mix (in kWh and as a percentage of annual retail sales), beginning in 2006 and ending in 2014.

Footnote continued on next page

mix for the period 2006-2014. Third, AReM proposes to replace the requirement that ESPs report their annual retail sales due to retail contracts that expired between January 1, 2003 and December 31, 2005 with a requirement that ESPs report annual retail sales for 2003-2005 in two categories: contracts with new customers acquired after January 1, 2003, and new contracts (after January 1, 2003) with customers acquired before January 1, 2003.²

AReM supports its first two requests by claiming that “[t]he information an ESP is required to include in its preliminary report should be limited to that needed to determine the ESP’s baseline level and RPS obligations.” (Preliminary Reports Motion, p. 2.) D. 05-11-025, however, did not impose such a limitation. Rather, Ordering Paragraph 8 provided that ESPs, CCAs, and small and multi-jurisdictional utilities were to report on their “current *and projected future* renewable resources.” (Emphasis supplied.) ESPs’ projected retail sales are relevant to understanding the scope of their RPS obligations, since meeting the goal of 20% of retail sales from eligible renewable resources necessarily entails estimating the amount of retail sales in the denominator of the 20% calculation. The ESPs’ estimated mix of renewable resources is similarly relevant to their RPS planning, as well as to the Commission’s ability to identify possible issues in RPS attainment planning.³

² Although it is the party making these requests, AReM, as a trade association, is not obligated to file a preliminary renewable portfolio report in this proceeding. No party has objected to AReM making the requests in these motions.

³ It is also relevant to planning for transmission for renewables, currently being addressed in R.05-09-005.

AREM's request related to expired contracts identifies an omission in the information required by the ALJ PHC Ruling. AREM correctly notes that ESPs should report annual retail sales for 2003-2005 in the two categories of contracts with new customers acquired after January 1, 2003, and new contracts (after January 1, 2003) with customers acquired before January 1, 2003. This does not mean, however, that this information should replace information about sales due to contracts that expired in that period.⁴ It should, instead, be added to it. Both types of information are needed in order to provide basic information about the status of renewable generation in ESPs' portfolios and to build in data that can be used to cross-check the information, in view of the timing requirements of Pub. Util. Code § 399.12(c)(3).⁵

Protective Order Motion

This ruling is issued against the backdrop of the Commission's review of confidentiality in Rulemaking (R.) 05-06-040 to implement Senate Bill 1488 (2004 Cal. Stats., Ch. 690). Because a Commission decision in that proceeding will be relevant, even if not definitive, to confidentiality issues in this proceeding, future confidentiality rulings in this proceeding will take any Commission decision in R.05-06-040, when issued, into account. A revised protective order is also under consideration in R.05-12-013, the continued resource adequacy proceeding. For now, confidentiality issues will be addressed as they are raised by the parties, with the ALJ's Ruling on Motions for Leave to File under Seal and

⁴ None of the information required for the preliminary renewable reports is contract-specific. Aggregated annual figures are to be provided by each ESP.

⁵ All further references to sections are to the Public Utilities Code unless otherwise noted.

for Protective Orders (June 9, 2005) (June 9 Ruling) in this proceeding as the jumping-off point for consideration of each request.

a. Confidential Treatment

In its Protective Order Motion, AReM contends that virtually all⁶ of the information required by the ALJ PHC Ruling is “non-public, confidential and/or proprietary.” (*Mimeo.*, p. 2.) AReM requests that a protective order it proposes be adopted to cover most of the material in the ESPs’ preliminary renewable portfolio reports.

As TURN points out, the Protective Order Motion does not comply with the requirement set out in the June 9 Ruling that all requests for confidential treatment in this proceeding “must show with particularity why protection should be given to each item of information sought to be protected.” (*Mimeo.*, p. 9.) Without such a showing, it is difficult to evaluate AReM’s claims for protection.

The Legislature created the RPS program as a state-wide program, and specifically included ESPs in its ambit. The public interest in having information by which to evaluate progress toward the goals of the RPS program is strong, regardless of the load-serving entity involved. AReM has not even suggested that this public interest is any less compelling in the case of ESPs than it is in the case of the large utilities.

Much of the information sought from ESPs is the same as that provided by the large utilities and required by the June 9 Ruling to be publicly available. In the absence of any particularized argument that ESPs’ information needs greater

⁶ AReM’s one exception is ESPs’ annual retail sales for the period 2001-2003.

protection than that of the large utilities, it is reasonable to look to the treatment of information provided by the large utilities in this proceeding.⁷ ESPs should therefore provide and make publicly available the same information as the large utilities: actual and projected annual retail sales, in kWh, beginning in 2001 and ending with 2014; annual RPS-eligible resource mix (in kWh and as a percentage of annual retail sales), beginning in 2001 and ending in 2005; and projected annual RPS-eligible resource mix (in kWh and as a percentage of annual retail sales), beginning in 2006 and ending in 2014.⁸

Some information in the preliminary renewable portfolio reports is specific to ESPs, in order to comply with the timing rules set out in § 399.12(c)(3). The annually aggregated information for each ESP on expired contracts, new customers after January 1, 2003; and new contracts with existing customers after January 1, 2003, is an important part of any determination of an individual ESP's baseline for RPS purposes. It is also necessary for developing an overall picture of the RPS contribution of ESPs as a group. This information covers transactions that occurred in the past. AReM has not shown either that this specific information cannot be determined from publicly available sources, or that any particular harm will result from its public disclosure. The information in Items 2

⁷ There may be circumstances in which the treatment of different types of entities in this proceeding with respect to confidentiality should be different. The preliminary information required here does not present such a circumstance.

⁸ The same protection extended to the large utilities on projected mix of renewable resources should be extended to ESPs, so that only the years 2006, 2010 and 2014 need be publicly revealed in Item 5 of the list set out in the ALJ PHC Ruling. This should suffice to protect ESPs renewable procurement strategies, while allowing public evaluation of progress toward RPS goals.

and 3 of the list set out in the ALJ PHC Ruling should not be protected from public disclosure.

b. Protective Order

AReM proposes a protective order in Attachment A to its Protective Order Motion. It would, among other things, exclude any persons not staff of this Commission or the Energy Commission from having access to the protected materials and it would invoke the criminal penalties of § 2112 as its enforcement mechanism.⁹ Aglet and TURN object to this proposal; Aglet has also proposed a different protective order that would allow non-market participants to have access to the information.

AReM has not explained why the protective order adopted in the June 9 Ruling should not be applied to the limited information subject to protection in the ESPs' preliminary renewable portfolio reports: projected renewables mix for the years 2007-09 and 2011-13. Nor has it explained or justified its novel proposal that § 2112 should be adopted as the enforcement mechanism for the protective order. The protective order in the June 9 Ruling will therefore also be

⁹ Section 2112 provides:

Every person who, either individually, or acting as an officer, agent, or employee of a corporation other than a public utility, violates any provision of this part, or fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in such violation or non-compliance, in a case in which a penalty has not otherwise been provided for such person, is guilty of a misdemeanor, and is punishable by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

applied to the protected information in the ESPs' preliminary renewable portfolio reports. Recognizing that ESPs are not covered by the restrictions of § 583,¹⁰ Commission staff should be instructed to treat the ESPs' unredacted preliminary renewable portfolio reports as though they had been submitted pursuant to § 583.

IT IS RULED that:

1. The Alliance for Retail Energy Markets' (AReM) Motion Concerning Contents of Electric Service Provider (ESP) Preliminary Renewable Portfolio Reports is granted in part, to the extent that ESPs shall include in their preliminary renewable portfolio reports in addition to the information required by the ALJ PHC Ruling, the following information: retail sales for 2003-2005 due to contracts with new customers acquired after January 1, 2003, and due to new contracts (after January 1, 2003) with customers acquired before January 1, 2003.
2. In all other respects, AReM's Motion Concerning Contents of ESP Preliminary Renewable Portfolio Reports is denied.
3. Aggregated annual figures, not contract-specific figures, shall be provided by each ESP in its preliminary renewable portfolio report.

¹⁰ Section 583 provides:

No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. Any present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor.

4. AReM's Motion for Adoption of Protective Order is granted in part, to the extent that the following information in the ESPs' preliminary renewable portfolio reports shall be protected from public disclosure: projected renewable resource mix for the years 2007-2009 and 2011-2013.

5. In all other respects, AReM's Motion for Adoption of Protective Order is denied.

6. The protective order adopted in the Administrative Law Judge's Ruling on Motions for Leave to File under Seal and for Protective Orders (June 9, 2005) shall apply to the ESPs' preliminary renewable portfolio reports.

7. Commission staff shall treat the confidential portions of the ESPs' preliminary renewable portfolio reports as though they had been filed subject to the protections of Pub. Util. Code § 583.

Dated January 19, 2006, at San Francisco, California.

/s/ ANNE E. SIMON

Anne E. Simon
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Granting in Part AReM's Motion Concerning Contents of Electric Service Provider Preliminary Renewable Portfolio Reports and Motion for Adoption of Protective Order on all parties of record in this proceeding or their attorneys of record.

Dated January 19, 2006, at San Francisco, California.

/s/ FANNIE SID

Fannie Sid

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.