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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 18-07-003

ADMINISTRATIVE LAW JUDGE'S 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

SUMMARY

On October 4, 2019, the Commission's Energy Division issued a Compliance Determination notice finding that Gexa Energy California, LLC (Gexa) was not in compliance with certain renewables portfolio standard requirements. Gexa has requested waiver and reconsideration of the Compliance Determination in the form of (i) a Motion for Waiver Request filed in this proceeding and (ii) a letter to the Commission's Executive Director and Deputy Executive Director for Energy and Climate/Policy Director for reconsideration and reversal of the conclusions of the Compliance Determination (the Reconsideration Request).

Today's ruling finds that for judicial efficiency, the Motion for Waiver Request and the Reconsideration Request should both be addressed in this proceeding and directs Gexa to file additional documents and answer certain questions so that its requests can be efficiently resolved.

In addition, this ruling denies the Joint Motion of The Utility Reform Network (TURN) and the Coalition of California Utility Employees (CUE) to submit a late-filed response to the Motion for Waiver Request. The ruling also denies Gexa's request to respond to this Joint Motion. All parties will be allowed the opportunity to comment on Gexa's requests after Gexa files the information requested in this ruling.

1. Background

1.1. Gexa's Motion of Waiver Request and Reconsideration Request for Reversal of Penalty

On December 6, 2019, Gexa filed a Motion for a Waiver of the Renewables Portfolio Standard Procurement Quantity Requirement (PQR) for Compliance Period 2 (2014-2016). The Motion for Waiver was filed to comply with the instructions in the Commission's Energy Division's Compliance Determination notice, dated October 4, 2019. The Compliance Determination found that Gexa was out of compliance toward meeting its renewables portfolio standard requirements for Compliance Period 2 and assessed \$3,704,675 as penalty. The Compliance Determination notice gave Gexa two options - (a) comply with the determination and pay the penalty or (b) request a waiver for non-compliance with the procurement quantity requirement pursuant to state law and Decision (D.) 14-12-023.

Gexa disagrees with the Compliance Determination findings. It states that in the absence of any formal appeals process, it is filing this Motion for Waiver and, in addition, states that it submitted a separate letter to the Commission's Executive Director and the Commission's Deputy Executive Director for Energy and Climate/Policy Director, Energy Division requesting reconsideration and reversal of the conclusions in the Compliance Determination (Reconsideration Request).

1.2. TURN and the CUE Motion to Submit a Late-Filed Response and Gexa's Request to Respond

On January 24, 2020, TURN and the CUE submitted a joint motion to submit a late-filed response to Gexa's December 6, 2019. They state that response to Gexa's motion was due on January 6, 2020 (30 days after the initial filing). The motion states that due to workload associated with participation in other proceedings and the winter holidays, TURN and CUE did not become aware of Gexa's motion until January 8, 2020.

After reviewing the motion, they requested Gexa to provide them a copy of its contract that was found to be deficient and served as the basis for the Commission's proposed penalty. They state they have not received a copy of the contract or any indication on a timeline for response from Gexa.

The joint motion further states that TURN and CUE offer additional factual and legal arguments related to the eligibility of Gexa's contract to satisfy the long-term contract requirement and they have been actively involved in this proceeding and matters related to non-compliance penalties in the past.

On February 10, 2020, Gexa filed a response to TURN and CUE's Joint Motion to submit late-filed response. Referring to Rule 11.1(e) Gexa notes that the responses were due 15 days after the Gexa Motion was filed, which fell on December 23, 2019, as opposed to TURN and CUE's explanation that response was due on January 6, 2020. Gexa asserts that TURN and CUE have not demonstrated that good cause exists to accept their late-filed response to the Gexa's Motion for Waiver Request. Gexa requests permission to file a reply to the TURN/CUE's response if their January 24, 2020, response is accepted for filing.

2. Discussion

2.1. Gexa's Motion of Waiver Request, Reconsideration Request for Reversal of Penalty and Supporting Evidence

Gexa did not include a copy of the Reconsideration Request or a copy of contracts with its Motion for Waiver. For the Commission to consider Gexa's Motion for Waiver, it will need to review the underlying contract information. The underlying contract information should also have been included with the Reconsideration Request. Given the level of review needed for both the Motion for Waiver and the Reconsideration Request, it is logical that the Reconsideration Request be considered as part of the Motion for Waiver. It would be inefficient to review the Reconsideration Request and the Motion for Waiver separately. By jointly reviewing these documents in this proceeding, Gexa is afforded an opportunity for formal review of its Reconsideration Request.

In the Motion for Waiver, Gexa makes references to underlying documents that would act as supporting evidence, such as a long-term contract, Gexa Renewable Energy Credits (REC) Agreement¹, a retroactive amendment to its contracts with NextEra Energy Power Marketing LLC (NEM)² and REC Purchase and Sale Master Agreement dated December 22, 2015 (Master Agreement)³. However, Gexa did not include the underlying contracts or other supporting documentation with its Motion for Waiver.

Gexa is directed to file all information necessary for this joint review, including compliance documents, files and contracts submitted by Gexa for Energy Division's compliance review, the October 4, 2019, Compliance

¹ See Motion for Waiver Request, at 2.

² See Motion for Waiver Request, at 5.

³ See Motion for Waiver Request, at 8.

Determination notice it received from the Energy Division, its Reconsideration Request letter to the Executive Director, any documents submitted in support of its request to reverse and reconsider the penalty, copies of amended contracts with markups to show the amendments and any additional supporting documents as supplemental filing into the record of this Motion for Waiver.

Gexa shall file all the above items within 10 business days of issuance of this Ruling.

Additionally, the Motion for Waiver states, “if Gexa’s request for reconsideration and reversal of the Compliance Determination is not granted, then Gexa requests a waiver of its PQR for Compliance Period 2. If neither request is granted based on documentation submitted to date, then Gexa requests a hearing and the *opportunity to present evidence* (emphasis added) that the Gexa REC Agreement is a long-term contract executed in accordance with D.12-06-038.”⁴

If there is evidence to be presented in this case to support its Motion for Waiver or its Reconsideration Request, that evidence should be submitted now. This motion is Gexa’s *opportunity to present evidence*. We do not see any obstacles to Gexa presenting evidence as part of this motion. Therefore, as directed above Gexa should include all evidence needed to support its case by filing it in this proceeding. By doing so we may be able to avoid a hearing.

In addition, Gexa is directed to file responses to the questions set forth in Attachment 1 to this Ruling.

⁴ See Gexa Motion for Waiver, Section III -Conclusion, at 35.

2.2. TURN and CUE's Motion to Submit Late-Filed Response and Gexa's Request to File a Response to TURN and CUE's Joint Motion

For procedural efficiency we are denying TURN and CUE's request to submit the late-filed request for filing comments. We also deny Gexa's request to file a response. This Ruling directs Gexa to supplement their Motion for Waiver with the underlying contracts and any other supporting documents, as evidence. The parties will have the opportunity to file comments on Gexa's request once they have reviewed the supporting evidence and information. Similarly, Gexa will have the opportunity to respond to any comments. It will be efficient for the Commission to avoid reviewing multiple filings on the same issue at different times.

Parties will have 30 days to provide comments and Gexa will have 15 days to file its reply comments.

IT IS RULED that:

1. Gexa Energy California, LLC's letter to the Executive Director and Deputy Executive Director for Energy and Climate/Policy Director, Energy Division requesting reconsideration and reversal of the Compliance Determination conclusions and \$3,704,675 penalty will be reviewed along with this Motion for Waiver Request.
2. Within 10 business days from this Ruling, Gexa Energy California, LLC (Gexa) shall file all supporting evidence, such as contracts and supporting documentation, as discussed in Section 2.1. above, including response to the questions in Attachment 1, as supplemental filing to the record in this motion. Parties will have 30 days to provide comments. Gexa will have 15 days to provide its response.

3. The Joint Motion of The Utility Reform Network and the Coalition of California Utility Employees to submit a late-filed response to this Motion of Waiver and Gexa Energy California LLC's request to file a response to this Joint Motion, are denied.

Dated February 18, 2020, at San Francisco, California.

/s/ MANISHA LAKHANPAL

Manisha Lakhanpal
Administrative Law Judge

ATTACHMENT 1

Attachment 1

Questions regarding information in Gexa’s Motion for Waiver Request. In your response provide citations to the underlying contract or supporting files/ documents.

1. On page 5, the motion states, “Gexa and NEM have executed a retroactive amendment to the Gexa REC Agreement that fully remedies these issues.”

Question: When did Gexa execute the amendment with NEM?

2. On page 11, Gexa states that “Gexa REC Agreement is a contract of at least 10 years ... with delivery of the second Contract Quantity of RECs by no later than April 1, 2021, and concludes with delivery of the third Contract Quantity of RECs by no later than April 1, 2029.”

Question:

- a. How does Gexa define the start and end date of this contract?
 - b. What is the contract term length of the contract?
3. On pages 18-27, under Section C - the motion describes that Gexa’s Deviations from the Standard Terms and Conditions (STC) do not affect the terms that make the Gexa REC Agreement a Long-Term Contract. On page 21, it states that the Gexa REC Agreement did not use the language from the STCs. The motion also refers to a First Amendment to its contract submitted in support of its request for reconsideration and reversal of the Compliance Determination. Gexa states that execution of the First Amendment, applies retroactively to the date when the Gexa REC Agreement was signed, and it resolves any compliance issues arising from deviations from the Standard Terms and Conditions.

Question:

- a. Does the amended contract include all required non-modifiable STCs?

Non-Modifiable STC	Provide Reference to Gexa Contract
STC 1. Transfer of RECs	
STC 2. Tracking of RECs in WREGIS	
STC 3. CPUC Approval	

STC 17. Applicable Law	
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b. Does the amended contract include all required modifiable STCs?

Modifiable STC	Reference to Gexa Contract
STC 4. Confidentiality	
STC 5. Contract Term	
STC 7. Performance Requirements	
STC 8. Product Definitions	
STC 9. Default Provisions	
STC 12. Credit Terms	
STC 15. Contract Modifications	
STC 16. Assignment	
STC 18. Application of Prevailing Wages	