Order Instituting Rulemaking to Continue Implementation and Administration, and Consider Further Development of, California Renewables Portfolio Standard Program.

Rulemaking 18-07-003
(Filed July 12, 2018)

AMERICAN CLEAN POWER – CALIFORNIA OPENING COMMENTS ON THE PROPOSED AND ALTERNATE DECISIONS CLARIFYING AND IMPROVING CONFIDENTIALITY RULES FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

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October 6, 2021
STATEMENT OF RECOMMENDATIONS

- The Commission should not adopt the Alternate Proposed Decision.
- The Commission should amend the Proposed Decision to only release contract information two years after a project has reached its Commercial Online Date.
- The Commission should not release bid information from solicitations when the bid was not ultimately selected for a contract.

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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ACP-California appreciates the CPUC’s efforts to ensure that the RPS program rules are up to date and satisfy the Commission’s obligation to provide transparency. We believe the existing confidentiality matrix meets these objectives while balancing the importance to the public in maintaining some information as confidential during the project development cycle. As explained below, California law does not require the degree of disclosure contemplated in the PD and APD. The confidentiality matrix in both the PD and APD are deeply concerning because they would disclose sensitive information during the development cycle, thereby creating greater

1 ACP-California members develop, own, and operate utility-scale wind, solar, storage, offshore wind, and transmission assets.
risks of project failure at a time when the State’s reliability and carbon-reduction future hinge on an unprecedented pace and scale of development.

Both the PD and the APD would release contract information prior to when a project has met its commercial online date. The PD and APD would also release solicitation information on project and contract proposals that were not selected by the load serving entity (“LSE”). As explained below, these proposed revisions would not only harm private parties, but could be disruptive to the market as a whole. These comments recommend that the Commission either find that the existing confidentiality matrix sufficiently balances the public’s right to records with the public interest in a market that respects privacy rights. In the alternative, ACP-California would continue to support changes to the existing matrix that release contract data sooner than the current three-year period, but limit information releases while projects are still in development.

DISCUSSION

I. The PD and APD Do Not Consider the Public Benefit of a Market That Protects Confidential Information During the Development Cycle.

The Proposed Decision discusses the “public interest balancing test” set forth in Public Utilities Code Section 6255(a), arguing that “a private economic interest alone is not enough to establish a public interest sufficient to withhold a document from disclosure.”\(^2\) This conclusion does not consider how a supplier’s right to privacy is consistent with the public interest because protecting confidential information will help ensure project success. We are deeply concerned that the PD and APD would create new risks of project failure by releasing contract information prior to when a project has met its commercial online date.

A PPA is one of several key contracts that a project must execute to successfully reach its commercial online date. In most cases, a PPA is executed before other key contracts that affect

\(^2\) PD at p. 15.
project success, such as the Engineering Procurement and Construction (“EPC”) agreements and original equipment manufacturer (“OEM”) supply agreements. These contracts can be determinative of project success and are typically executed after the PPA. We are very concerned that the PD and APD could have the unintended consequence of increasing risks of PPA-failure or increasing the total costs of developing a project. Thus, while the right to privacy is an individual right that is not necessarily considered a “public interest”, the potential unintended consequences of the PD and APD would certainly be inconsistent with the public interest.

II. The PD And APD Make Unnecessary Changes to Confidentiality Rules.

We do not agree with the conclusion in the PD that amending the matrix will foster greater competition and reduce costs of the RPS program. Under the existing program rules, renewable project costs have declined amidst healthy competition in the market. As noted in the PD’s findings, “[d]eclining RPS prices and increased overall contracted commitment in renewables by retail sellers in California indicate market competitiveness.” Arguably, the public interest in transparency of RPS pricing is already being served as evidenced by declining RPS prices. By protecting confidential information throughout the development cycle, the existing matrix balances the public’s right to view records with the public interest in a market that respects privacy rights.

III. Parties of Existing Contracts Have Reasonable Expectations of Privacy Under the Current Matrix that Are Protected by the California Constitution. The PD Should Be Revised to Protect Existing Contracts Consistent with the Rules of the Current Matrix.

In evaluating potential revisions to the matrix, the Commission should not apply new matrix rules to existing contracts. In addition to protections under the PRA, sellers also have

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3 PD Conclusion of Law 15 at p. 69.
4 As explained in the ACP’s (formerly, AWEA-California Caucus) comments March 2020 comments on the staff proposal (R.18-07-003, attached), the PRA exemption for “trade secrets” does not preclude one or more contractual terms from qualifying as Trade Secrets under the California Public Records Act.
constitutional rights to privacy, which are separately protected under the California Constitution.⁵ A “party claiming a violation of the state constitutional right of privacy must establish (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest.”⁶ Sellers entered into existing contracts with the reasonable expectation (based on the current confidentiality matrix) that price and other information would not be discoverable until three years after COD. If the Commission moves forward with changes to the confidentiality matrix, it should only apply those changes to contracts executed after the new matrix takes effect.

CONCLUSION

ACP-California encourages the Commission to continue supporting renewable developers by respecting developers’ privacy rights and avoid making fundamental changes to the established confidentiality procedures. ACP-California appreciates the opportunity to provide opening comments on the Proposed Decision.

DATED: October 6, 2021 Respectfully submitted,

By: /s/

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⁶ Id.
LISTING OF RECOMMENDED CHANGES TO THE PROPOSED DECISION
(Language to be removed in strike-out, language to be added is underlined.)

Following are ACP-CA’s recommended changes to the PD’s Conclusions of Law.

- Add NEW Conclusion of Law 13 (and renumber subsequent Conclusions of Law respectively):

  It is reasonable to modify the window of confidentiality adopted in D.06-06-066 to provide protection RPS Data until two years after a project has reached its Commercial Online Date.

- Add NEW Conclusion of Law 17:

  Non-winning bid information from LSE RPS solicitations should remain confidential.

The Proposed Decision should also be revised as follows:

P. 3: “For contracts requiring Commission approval, this decision orders that RPS procurement price and contract terms become public 30 days two years after the commercial operation date/energy delivery start date or three years from the date of Commission approval, whichever comes first.”

P. 3: “Similarly, for contracts that do not require Commission approval, contract price and contract terms shall be public 30 days two years after the commercial operation date/energy delivery start date or three years after the contract execution date, whichever comes first.”

P. 42: “Therefore, we determine that making RPS prices public 30 days 2 years after the commercial operation date (energy deliveries including deliveries from projects with REC contracts) will avoid market manipulations and protect ratepayers from higher costs.”

Pp. 44-45: “Therefore, we adopt the following revisions: For contracts that require Commission approval, the contract price is public 30 days 2 years after the commercial operation date or three years after the Commission approves a contract, whichever comes first. For contracts that do not require Commission approval, the contract price is public 30 days 2 years after the commercial operation date or three years after the contract execution date, whichever comes first. Similarly, the contract price is public 30 days 2 years after contract execution for bundled or unbundled RECs from an existing facility. Contract prices are public 30 days 2 years after the commercial operation date for RECs from new facilities yet to be built.”

P. 53: “1. Aggregated bid information for shortlisted bids and bids that do not reach the shortlisting stage in an IOU...
solicitation will be public after the final contract is submitted for Commission approval, as long as at least three bidders are in the resource category.

2. Executed contracts approved by the Commission will be public 30 days 2 years after the commercial operation date or three years from the Commission approval date, whichever comes first.

3. Executed contracts that do not require Commission approval will be public 30 days 2 years after the commercial operation date or three years after the contract execution date, whichever comes first."

4. Individual bid information for shortlisted bids and bids that did not reach the shortlisting will not be publicly available. Stage in an IOU solicitation may be kept confidential for three years after the close of the RPS solicitation to which the bids responded.

Pp. 56-57: “The contract should become public 30 days 2 years after the commercial operation date or three years from the Commission approval date, whichever comes first. Contracts that do not require Commission approval should be public 30 days 2 years after the commercial operation date or three years after the contract execution date. Similarly, a REC only contract will be public 30 days 2 years after the contract execution if contracting with an existing facility. For REC only contracts with facility that’s under construction or yet to be built the contract information will be public 30 days 2 years after the commercial operation date of the new facility. Accordingly, the Commission should revise Section VII.F (Appendix 1) and Section I. C (Appendix 2) of the confidentiality matrix to incorporate the updated RPS data confidentiality rules.”

P. 57: “Regarding individual bids (non-winning bid or shortlisted bids and those that do not reach the shortlisting stage), the Staff Proposal recommends that certain bid information be disclosed when the shortlist is approved (for bids not shortlisted) or when the shortlist expires (for bids that are shortlisted) and recommends that other individual bid information should kept confidential for three years after the close of the RPS solicitation to which the bids responded. We find Staff’s recommendation on the timing of the release of this information unreasonable as it allows a three-year protection window for any market-sensitive information that cannot incentivize market manipulation and increase ratepayers’ costs in ongoing bid negotiations. By setting a three year window of confidentiality, we protect information to the market and bidding by shortlisted sellers, insight regarding how many parties they are competing against, the level of competition to develop certain eligible technologies and/or product content categories, and the amount of competition at specific locations. The Commission should revise the confidentiality matrix and add a new subsection VIII. C. to include guidance on granting public access to individual bid information in IOU solicitations.

sellers is shortened to allow public access to an RPS-eligible resource contract 30
days 2 years after the commercial operation date or three years after the Commission
approves the contract, whichever comes first. Contracts can be accessed 30 days
2 years after the commercial operation date or three years after the contract execution
date, whichever comes first, for contracts that do not require Commission
approval.

“We authorize the release of aggregated data for RPS-eligible shortlisted
bids and bids that do not reach the shortlisting stage in an investor-owned
utility’s solicitation. The aggregated bid data will be publicly accessible after the
final contracts are submitted for CPUC approval when at least three bidders are
in the resource category. Individual bid information for shortlisted bids and bids
that did not reach the shortlisting stage may be kept confidential for three years
after the close of the RPS solicitation to which the bids responded.
Attachment:

“COMMENTS OF THE AMERICAN WIND ENERGY ASSOCIATION CALIFORNIA CAUCUS ON THE STAFF PROPOSAL TO CLARIFY AND IMPROVE CONFIDENTIALITY RULES FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM”

(March 30, 2020, R.18-07-003)
Order Instituting Rulemaking to Continue Implementation and Administration, and Consider Further Development, of California Renewables Portfolio Standard Program.

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COMMENTS OF THE AMERICAN WIND ENERGY ASSOCIATION CALIFORNIA CAUCUS ON THE STAFF PROPOSAL TO CLARIFY AND IMPROVE CONFIDENTIALITY RULES FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

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March 30, 2020
BEFORE THE PUBLIC UTILITIES COMMISSION
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PROGRAM

The American Wind Energy Association of California (“AWEA-California”) provides
the following comments in accordance with the February 27, 2020 Assigned Commissioner’s
Ruling Requesting Comments on the Staff Proposal to Clarify and Improve Confidentiality Rules
for the Renewables Portfolio Standard Program (“Ruling”). AWEA-California offers the
following comments on Questions 1, 5, and 7, and other direction provided in the Ruling.
AWEA-California has deep concerns with the Energy Division staff proposal (“Staff Proposal”)
and recommends the continued use of the existing confidentiality matrix.

As a foundational matter, AWEA-California questions the very problem that the Staff
Proposal seeks to fix. Many of the upcoming RPS and RA contracts will be with public entities,
and as such, much of the information the Staff Proposal seeks to disclose on an entity-specific
basis is already becoming available through local CCA’s implementation of the California Public
Records Act (“PRA”) and the Brown Act. The Staff Proposal seeks to provide transparency into
the market, yet that transparency already exists whether through CCA public disclosures, the
annual Padilla Report, or the IRP’s modeling data sets. While we acknowledge the importance
of accurate and recent procurement and pricing information to inform policy and market
decisions, AWEA-California does not subscribe to the notion that there is a transparency
problem that needs to be fixed.
In response to Question 7 relating to potential legal ramifications, AWEA-California opposes the Staff Proposal because it would violate renewable energy and clean capacity supplier rights to privacy under both state and federal law. State law balances the public’s rights to transparent decision-making with private entities’ rights to privacy. The blanket release of price and solicitation information would violate suppliers’ rights to protect their trade secrets under the California Public Records Act. The disclosure of existing contract information would also violate the sanctity of existing contracts, and as such may run afoul of federal Constitutional protections under the Contract Clause. Further, in response to Question 5, these comments express AWEA-California’s concerns regarding the potential market implications of the Staff Proposal, and the risk that it could quell innovation in the clean capacity and renewable energy sector.

Finally, these comments respond to the Ruling’s direction to provide “proposals and provide interpretations that . . . would provide clear guidance to parties, RPS market participants, and Commission staff on the subjects being addressed.” Instead of focusing on trying to enable more informed Commission and market decision-making through a blanket release of individual contract data, the Commission should work to aggregate post-COD data and evaluate how the most up-to-date price information can be presented to decision makers through open-source models such as RESOLVE and SERVM. The Commission should also evaluate how the annual aggregated price disclosures to the Legislature can be improved to account for the most recent, aggregated price data. Such policy integration and public reporting would achieve many of the same policy objectives outlined in the Staff Proposal without violating suppliers’ rights to protect against the release of trade secrets.
DISCUSSION

I. Question 7: Legal Ramifications. Staff Proposal Parts 4 and F Would Lead to Blanket Disclosure of Trade Secrets in Violation of Sellers’ Rights to Privacy.

The California Public Records Act (“PRA”) requires all public agencies to provide transparency into their decision making, while at the same time respect individual privacy rights through the application of disclosure exceptions. In 2017, the California Supreme Court explained the scope of the Public Records Act (“PRA”) in balancing transparency and privacy in City of San Jose v. Superior Court:

In general, [the PRA] creates “a presumptive right of access to any record created or maintained by a public agency that relates in any way to the business of the public agency.” Every such record “must be disclosed unless a statutory exception is shown.” Section 6254 sets out a variety of exemptions, “many of which are designed to protect individual privacy.” The Act also includes a catchall provision exempting disclosure if “the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure.”

California Government Code Section 6254.7 contains one such “exception” for “trade secrets.” The code defines the term broadly:

“Trade secrets,” as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.1

(Emphasis added)

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1 Government Code § 6254.7(d).
Section 4 of the Staff’s Proposal to allow contract price to be publicly available six months after the contract is signed or 30 days after deliveries of energy and/or RECs under contract, whichever occurs first, would result in the release of highly sensitive confidential information that many suppliers consider trade secret.\textsuperscript{2} Section F poses similar concerns. The release of bidding information (both successful and unsuccessful bids) would result in the release of trade secrets to the public.\textsuperscript{3} Suppliers consider this information trade secret because the information is “known only to certain individuals” and their pricing and solicitation strategies, whether successful or not, create a “business advantage over competitors.” This is especially true as developers are striving to develop a diverse array of both renewable products and reliability services to meet the evolving needs of grid operators and LSEs. The Commission should recognize and encourage these efforts by respecting developers’ privacy rights as to the unique suite of services they may wish to market to LSEs including RECs, capacity and various scheduling and product management services. Price data alone is considered by many developers to be trade secret for a period of time after the Commercial Online Date (“COD”). The suite of products, services, and energy management strategies also constitutes a trade secret. AWEA-California is particularly concerned by the portions of the proposal that would disclose full contracts and price data six months after contract execution. The disclosure of information related to unsuccessful bids is also intrusive and risks create a material pall on sellers’ abilities to be innovative in solicitations.

In addition to statutory protections relating to trade secrets, AWEA-California is concerned the Staff Proposal may violate sellers’ constitutional rights to privacy, which are

\textsuperscript{2} Staff Proposal, Section 4 at pp. 13-14.  
\textsuperscript{3} Staff Proposal, Section F, 1 at pp. 14-15.
separately protected under the California Constitution. A “party claiming a violation of the state constitutional right of privacy must establish (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest.” Sellers entered into existing contracts with the reasonable expectation (based on the current confidentiality matrix) that price and other information would not be discoverable until three years after COD. Complete disregard for that timeframe will invade their privacy rights and thwart innovation in clean capacity products and services when such innovation and large-scale development is sorely needed.

Finally, the Staff Proposal to disclose existing contracts that were executed while the current matrix was in place may violate the Contract Clause of the United States Constitution, which protects against the impairment of existing contracts. The disclosure of price and contract information can disrupt existing contractual relationships insofar as the right to confidential treatment within the contract itself would be unenforceable and void. In this way, the Staff proposal would violate the rights of existing renewable energy suppliers and their off-takers. Courts have evaluated potential violations of Article I, Section 10 of the U.S. Constitution (Contract Clause) by determining whether (1) the state law in fact, substantially impairs a contractual relationship; (2) is not supported by a significant and legitimate public purpose, and (3) the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation’s adoption. As explained in the introduction to these comments, there is no transparency problem that needs to be fixed. The Staff Proposal risks impairing contracts and

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5 Id at 706338.
6 See RUI One Corp. v. City of Berkeley, 371 F.3d 1137, 1147 (9th Cir. 2004).
there is no significant or legitimate public purpose served by disclosure of individual contract data in light of the fact that aggregated data can enable informed decision making.

II.  AWEA-California Response to Questions 1, 5 and general Direction to provide Proposals: To the Extent that the Commission Believes Greater Transparency is Needed, The Commission Should Focus its Efforts on Aggregating Data and Improving IRP Modeling Data as Well as the Annual Padilla Report.

AWEA-California supports the continued use of the existing confidentiality matrix. Should the Commission nevertheless revise the Confidentiality Matrix in some fashion, AWEA-California recommends the Commission ensure there are robust protections in place regarding price and solicitation information. Solicitation information of unsuccessful bids should never be released because, as explained above, doing so risks stifling innovation. Once a contract is executed, price data should not be released before a resource reaches its Commercial Online Date. Price data should be protected from disclosure on an individual basis for a minimum of two years after COD. Most suppliers find the aggregation of price data to be generally acceptable, but if there are three or fewer projects, individual project information may still be discoverable. Consequently, the Commission should only release aggregated data consisting of four or more projects. Since sellers have varying sensitivities to disclosure of price and other product/services data, voluntary Requests For Information ("RFI") can create meaningful opportunities for price discovery. Such voluntary RFI information may be one means of bolstering the Padilla Report with more recent RPS cost data.

Finally, it is important to recognize that the Commission staff has made considerable strides in the recent iteration of the IRP, as well as the modeling advisory group process in making the RESOLVE and SERVM more accessible tools for system planners. Use of the most up to date price information is critical to making the IRP’s outputs as accurate and informative as possible. Thus, to the extent that the Commission strives to create greater transparency to inform
decision making, the use of aggregated RPS Contract data to inform more regular updates to RESOLVE and SERVM data files would enable more informed decision making by the LSEs using and relying on these models for decisions that will affect their rate.

Dated: March 30, 2020

Respectfully submitted,

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VERIFICATION

I am the Director of the American Wind Energy Association, California Caucus. Pursuant to Rule 1.11(a)(4), as Director, I make this verification for AWEA-California. The statements in this submission titled, COMMENTS OF THE AMERICAN WIND ENERGY ASSOCIATION CALIFORNIA CAUCUS ON THE STAFF PROPOSAL TO CLARIFY AND IMPROVE CONFIDENTIALITY RULES FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM, have been prepared and read by me and are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the forgoing is true and correct and executed on March 30, 2020 at Meadow Vista, California.

Respectfully submitted,

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