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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

**DECISION ON ENFORCEMENT OF CALIFORNIA RENEWABLES
PORTFOLIO STANDARD PROGRAM RULES**

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DECISION ON ENFORCEMENT OF CALIFORNIA RENEWABLES PORTFOLIO STANDARD PROGRAM RULES

Summary

This decision enforces California's Renewables Portfolio Standard (RPS)¹ program rules by imposing fines on two entities for failing to comply with certain program requirements and denying the entities' request for waiver of penalties. The two entities are Liberty Power Holdings, LLC (Liberty Power) and Gexa Energy, California LLC (Gexa). While the pleadings at issue were filed in the predecessor proceeding, Rulemaking 15-02-020, that proceeding is closed and this proceeding is the successor.

The RPS program requires that all load serving entities, including Liberty Power and Gexa, serve electric load with a specified percentage of renewable energy in each "compliance period." The compliance period at issue here spans the years 2011-2013. For that period, neither Liberty Power nor Gexa met their required levels of renewables procurement.

Decision 14-12-023 implemented the penalty program applicable to the 2011-2013 period. While the decision allows, and both Liberty Power and Gexa sought, waivers of such penalties, they do not meet their burden of showing entitlement to a waiver. Thus, we impose a penalty of \$431,014 on Liberty Power and \$1,725,461 on Gexa.

This proceeding remains open.

¹ Established by Senate Bill 1078 (Stats. 2002, ch. 516), the RPS program has been revised many times over the years it has been in effect. The RPS program is codified at Pub. Util. Code §§ 399.11-399.32.

1. Background of California’s Renewables Portfolio Standard Program and Compliance Requirements

In this proceeding, the Commission has adopted rules related to the California’s Renewables Portfolio Standard (RPS) program, reviewed RPS procurement plans submitted by retail sellers, and assessed retail sellers’ compliance with their RPS obligations. The RPS program began with a mandate requiring all retail sellers to provide 20 percent of the electricity they sold to retail end-user customers from RPS-eligible generation by the end of 2017. The Legislature increased the RPS percentage over several years, culminating in the latest statute, Senate Bill (SB) 100,² which requires 60 percent RPS-eligible generation by 2030, and 100 percent carbon free energy supply by 2045.

The Commission is authorized to enforce compliance with RPS mandates in multi-year compliance periods established by Public Utilities Code Section 399.15(b)(1). The period at issue here, and in which Liberty Power and Gexa did not satisfy their compliance requirements, ran from 2011 to 2013 and is deemed compliance period 1. During that period, sellers were subject to Procurement Quantity Requirements (PQRs) and enforcement rules adopted in Decision (D.) 11-12-052 and D.14-12-023. That decision restates the penalty as \$50 per Renewable Energy Credit (REC) deficiency³ and sets forth a strict process for seeking penalty waivers. It is that penalty and waiver scheme that Liberty Power and Gexa invoke here.

² Stats. 2018, Ch. 313 (de Leon).

³ D.14-12-023 at 38.

2. Liberty Power

The Commission's Energy Division notified Liberty Power on December 20, 2017 (Attachment A) that it had not met its compliance obligations for compliance period 1 (2011-2013) and imposed a penalty of \$431,014.

2.1. Liberty Power's Request and Parties' Positions

Liberty Power timely submitted its RPS Compliance Report (Report) by September 1, 2016. For compliance period 1, each retail seller was required to retire RECs averaging at least 20 percent of its retail sales. After review of the Report, the Commission's Energy Division determined that Liberty Power had failed to meet its 20 percent obligation, with a deficit of 8,620 RECs. At \$50/REC, Energy Division calculated an RPS penalty of \$431,014 and gave Liberty Power 30 days to comply with the notice and pay the penalty or request a waiver for non-compliance. Liberty Power timely requested a waiver by motion dated January 19, 2018.

Liberty Power asserts that its failure to meet its 2011-2013 procurement obligation was due to market forces beyond its control. It asks to make up its deficiency in a later compliance period, and argues for a reduced penalty, from the \$50/REC amount set in D.14-12-023 to "a penalty lower than \$50/REC."⁴ Liberty Power asserts it could not secure its shortfall of 8,620 Procurement Content Category (PCC) 2 RECs from any seller in the market at a reasonable

⁴ *Motion of Liberty Power Holdings LLC for a Waiver of the Renewables Portfolio Standard Compliance Period 1 Procurement Quantity Requirement, or, in the Alternative, to Defer its Renewables Portfolio Standard Compliance Period 1 Procurement Quantity Requirement Shortfall Until a Subsequent Compliance Period and for Hearings if Necessary (Liberty Power Motion)*, filed January 19, 2018, at 15.

cost.⁵ Liberty argues that the shortfall was the direct result of market conditions that made it difficult to find sellers willing to provide small quantities of PCC 2 RECs at a fixed price. Liberty argues that most sellers were offering variable pricing that included additional charges.

Citing Public Utilities Code Section 399.15(b)(5)(B),⁶ Liberty asserts that it is entitled to a waiver because there was an “insufficient supply of eligible renewable energy resources available to the retail seller.” Liberty bases this argument on its allegation that the PCC 2 RECs it needed were “too expensive,”

⁵ The RPS statute favors procurement of products in the PCC 1 category – energy bundled with environmental attributes. PCC 2 products allow firming and shaping to mitigate the intermittency of renewable resources, but a party may satisfy its requirements with PCC 1 products. PCC 3 instruments are unbundled RECs, and subject to significant caps in the compliance regime.

⁶ The full text of the relevant provision of Section 399.15(b)(5), which allows a waiver of compliance penalties, is as follows:
The commission shall waive enforcement of this section if it finds that the retail seller has demonstrated any of the following conditions are beyond the control of the retail seller and will prevent compliance:
... (B) Permitting, interconnection, or other circumstances that delay procured eligible renewable energy resource projects, or there is an insufficient supply of eligible renewable energy resources available to the retail seller. In making a finding that this condition prevents timely compliance, the commission shall consider whether the retail seller has done all of the following:

- (i) Prudently managed portfolio risks, including relying on a sufficient number of viable projects.
- (ii) Sought to develop one of the following: its own eligible renewable energy resources, transmission to interconnect to eligible renewable energy resources, or energy storage used to integrate eligible renewable energy resources. This clause shall not require an electrical corporation to pursue development of eligible renewable energy resources pursuant to Section 399.14.
- (iii) Procured an appropriate minimum margin of procurement above the minimum procurement level necessary to comply with the renewables portfolio standard to compensate for foreseeable delays or insufficient supply.
- (iv) Taken reasonable measures, under the control of the retail seller, to procure cost-effective distributed generation and allowable unbundled renewable energy credits.

even though Liberty could have made up its procurement shortfall with PCC 1 RECs. While Liberty Power acknowledges it could have procured additional PCC 1 RECs, as there is no cap on those RECs, it alleges it was not required to do so because such instruments were more expensive than PCC 2 RECs. Because the Commission had not determined penalty rules when the company submitted its compliance report, Liberty Power opted to wait and see whether the penalty scheme would result in a penalty lower than the added expense of meeting the RPS requirement.

Liberty Power describes its procurement effort in an attempt to justify its insufficient supply argument: it sent out 12 requests to solicit offers and received only one response; approached individual sellers and brokers to meet its compliance obligation (13 counterparties); sought RECs in all three PCC categories but had issues with offers being withdrawn; received three offers for PCC 1, three offers for PCC 2, and five offers for PCC 3, but all of the PCC 2 offers were subsequently withdrawn; and pursued PCC 1 products at \$34.00, PCC 2 products at \$7.50, and PCC 3 products ranging from \$1.50-2.00, with prices for all RECs ranging from \$1.35-\$45.00 in initial offers.

Several parties oppose the motion: The Utility Reform Network (TURN), the Office of Ratepayer Advocates (formerly ORA; now Public Advocates Office or Cal Advocates), Independent Energy Producers Association (IEP), California Wind Energy Association (CalWEA), and Green Power Institute (GPI). Their arguments can be summarized as follows:

1. Liberty has not established entitlement to a waiver. Liberty Power's failure to procure PCC 2 products was its own failing. There are few PCC 2 products available, and Liberty Power took a calculated risk of seeking these products rather than the more expensive PCC 1 products, which it was free to procure under RPS program rules. PCC 1 products were readily available. Thus, the "impossibility" to which Liberty

Power alludes is really a result of Liberty Power's own choices. Had it been willing to spend more to meet its compliance obligations, it could have been in compliance;

2. Liberty Power is barred by statute and Commission decision from carrying forward its RPS compliance deficit into future compliance periods; and
3. The \$50/REC penalty amount is non-negotiable, having been set in multiple decisions in the RPS proceeding.

IEP asserts that the unavailability of the PCC 2 product is not relevant to meeting a retail seller's PQR. According to CalWEA, Liberty Power's argument that it met its PCC 1 minimum and PCC 3 maximum is irrelevant and does not warrant a request for waiver.

TURN argues that Liberty Power provided no evidence that it was unable to find PCC 2 resources and clearly refused to procure PCC 1 resources even though they were available in the market. TURN asserts that Liberty's RPS compliance reports show "zero renewable procurement activity in 2011 and 2012,"⁷ and that Liberty Power only mentions dates in mid-to-late 2013 in describing its attempt to obtain PCC 2 RECs.⁸ Liberty states that the first offer for PCC 2 RECs "was withdrawn on August 22, 2013," very late in the compliance period. It states that "[o]n November 11, 2013, Liberty Power approached a

⁷ TURN opposed both the Liberty Power and the Gexa waiver requests. *Response of The Utility Reform Network to the Motions of Gexa Energy, Liberty Power Holdings, and Direct Energy for Waivers of Renewable Portfolio Standard Compliance Requirements (Rulemaking 15-02-020)*, Feb. 26, 2018 (TURN Comments) at 5.

⁸ Liberty Power Reply Comments filed March 8, 2018 (Liberty Reply Comments) at 4.

counterparty to add more PCC 1 RECs ... but that offer was unit contingent and unviable.”⁹

Cal Advocates asserts that Liberty Power’s request to reduce the amount of its penalty is improper because the Commission established penalty amounts in a proceeding in which all stakeholders participated, and it would be inappropriate to re-litigate this issue now in a waiver request. GPI states the excuse that insufficient PCC 2 products were available while PCC 1 products were available in abundance should not excuse a retail seller from meeting its procurement requirements.

2.2. Discussion – Liberty Power

A retail seller requesting a waiver bears the burden that a waiver meets the statutory requirements and is warranted. The Commission uses the "preponderance of the evidence" standard to define the burden of proof in most circumstances, including Liberty Power’s waiver request.¹⁰ The Commission makes decisions on waiver requests on a case by case basis.¹¹

Liberty Power has not established that it is entitled to a waiver, that it may carry its noncompliance forward to subsequent compliance periods, or that the Commission may reduce the \$50/REC noncompliance penalty. Therefore, the Commission upholds Energy Division’s original determination that Liberty Power should pay a penalty of \$431,014.

⁹ *Id.*

¹⁰ D.14-12-023 at 19.

¹¹ *Id.* at 20.

A waiver of RPS compliance requirements requires that the seller demonstrate the following:

1. The condition(s) justifying the waiver must be beyond the control of the retail seller. (Pub. Util. Code § 399.15(b)(5).)
2. The condition(s) must “prevent compliance.” At a minimum, the retail seller must demonstrate a connection between the condition(s) it asserts and its deficiency. (*Id.*)
3. The seller must have taken all reasonable actions under its control “to achieve full compliance.” (Pub. Util. Code § 399.15(b)(7).) The statute specifies that these required actions are “as set forth in paragraph (5).”¹²

Liberty Power does not meet these requirements. The reasons it cites for noncompliance were within its control, did not prevent compliance, and do not reflect reasonable action to achieve compliance. Liberty Power’s core argument is that it made significant effort to procure PCC 2 products, but ultimately was unsuccessful. Its argument rises and falls on the basic assumption that all it was required to do to satisfy compliance requirements was attempt to procure PCC 2 instruments. Such conduct was not reasonable, and the simple solution of procuring readily available (if more expensive) PCC 1 products would have eliminated the problem. Thus, the noncompliance was not due to circumstances beyond Liberty’s control, and the unavailability of scarce PCC 2 instruments did not prevent compliance.

First, Liberty Power gave itself very little time to comply with the compliance period 1 requirements, which covered the years 2011-2013. As TURN notes, Liberty’s RPS compliance reports show “zero renewable

¹² *Id.* at 21.

procurement activity in 2011 and 2012.”¹³ Liberty Power only mentions dates in mid-to-late 2013 in describing its attempt to obtain PCC 2 RECs.¹⁴ It states that the first offer for PCC 2 RECs “was withdrawn on August 22, 2013,” very late in the compliance period. It states that “[o]n November 11, 2013, Liberty Power approached a counterparty to add more PCC 1 RECs ... but that offer was unit contingent and unviable.”¹⁵ Liberty Power cites no efforts early in the compliance period, and it bears the burden of proving it acted prudently.

Liberty Power repeatedly notes that a key reason for not procuring PCC 2 product was cost: “Liberty Power sought to optimize its RPS procurement for Compliance Period 1 by maximizing its procurement of PCC 2 products, which were significantly less expensive than PCC 1 products.” It details at length cost considerations that led it to reject various PCC 2 offers it received, and notes that “the fact that the Commission had not yet adopted the enforcement requirements for Compliance Period 1, and, crucially, and not yet established the penalties for RPS procurement shortfalls” caused it to avoid the “more expensive PCC 1 RECs.”¹⁶ Liberty Power admits that it could have procured PCC 1 resources, but that it rejected offers for such PCC 1 RECs based on cost.¹⁷ This was a gamble Liberty Power took, but it does not excuse compliance.

¹³ TURN Comments at 5.

¹⁴ Liberty Power Reply Comments at 4.

¹⁵ *Id.*

¹⁶ Liberty Power Motion at 7. *See also id.* at 9 (“Liberty Power prudently managed its portfolio risks by taking into account the relative costs of PCC 1 and PCC 2 products”); and 10 (“Liberty Power would have secured additional PCC 1 RECs, but avoided such additional procurement given the disparate costs of such RECs compared to PCC 2 RECs”).

¹⁷ Liberty Power Reply Comments at 3-4.

Liberty Power also imposed its own conditions on the PCC 2 offers it did obtain, seeking “firm delivery quantities as a means of avoiding potential production shortfalls, which few suppliers were willing to accommodate.”¹⁸ It explains that it “prefers fixed amount offers because such offers guarantee both the quantity of RECs and the price for those RECs....”¹⁹ These restrictions made it even harder to obtain PCC 2 instruments, were not requirements of the RPS program, and were self-imposed. PCC 2 RECs are unnecessary for satisfying compliance obligations, and Liberty Power should have purchased PCC 1 RECs at the best deal it could find to ensure it met its procurement requirements.

Liberty Power’s shortfall was not beyond its control. It could have bought PCC 1 RECs but chose not to do so. Thus, all reasonable actions under the retail seller’s control “to achieve full compliance” were not taken. Liberty Power did not have to buy PCC 2 RECs, and its waiver argument hinges on the assertion that PCC 2 RECs were too expensive. The unavailability of PCC 2 product is not relevant to meeting a retail seller's PQR. Liberty Power did not prudently manage its portfolio risks; there were other REC products it refused to buy.

Nor is Liberty Power’s failure to provide evidence supporting its assertions the basis to grant its request for an evidentiary hearing. The Commission can rule on this matter without an evidentiary hearing. “The parameters of any [evidentiary hearing] on a waiver request will be set in the ordinary course by the ALJ at the time a hearing is determined to be needed.”²⁰

¹⁸ Liberty Power Motion at 11.

¹⁹ Liberty Power Reply Comments at 6.

²⁰ D.14-12-023 at 20.

All of the facts necessary to impose a penalty are admitted by Liberty Power, and its legal arguments are unpersuasive. Thus, Liberty Power's request for hearing²¹ is denied.

3. Gexa Energy

On December 20, 2017, Energy Division found Gexa out of compliance with the RPS program and assessed a \$1,725,461 penalty because Gexa did not have a long term contract. Therefore, all of Gexa's 69,018 RECs were disallowed, resulting in a \$1.7 million penalty. (*See* Attachment B.)

3.1. Gexa's Request and Parties' Positions

Gexa asserts it was not out of compliance, and also asks the Commission to reduce its penalty. First, Gexa argues that it satisfied the long term contracting requirement in RPS through a "full requirements" contract with a counterparty that itself held a long term contract.²² Gexa states that this reliance is appropriate because the contract is "similar" to repackaged contracts authorized by D.12-06-038.

Second, Gexa argues in both its waiver request and an accompanying Petition for Modification on D.12-06-038 that the long term contracting requirement does not apply to it because Gexa started its first year of operation in the last year of an RPS compliance period. Gexa bases this argument on language in D.12-06-038, which states the long term contracting obligation starts in the

²¹ The company sought a hearing "if necessary" in the Liberty Power Motion.

²² *Motion of Gexa Energy California, LLC for a Waiver of the Renewables Portfolio Standard Procurement Quantity Requirement for Compliance Period 1 and Requesting Evidentiary Hearings* (Rulemaking 15-02-020), Jan. 19, 2018 (Gexa Waiver Motion) at 9-11.

second year of operations.²³ It argues that it could only have procurement targets in its second year once it acquired historical data,²⁴ and that the long term contracting requirement only applied to it in the second year of retail operations.²⁵ The Petition for Modification seeks to modify D.12-06-038 to make this language clearer.

Third, Gexa claims it is not seeking a waiver based on the statutory criteria of Section 399.15(b)(5), but instead refers to a “catch-all” exception in D.14-12-023. Gexa states that it took the following reasonable actions that justify a waiver: (1) procured sufficient RECs to meet its PQR²⁶; (2) acquired under its own interpretation of the long term contract requirement a full requirements contract that met the requirement²⁷; and (3) sought resolution of the long term contract issue and received no clarity of the compliance status from the Commission.²⁸

On January 19, 2018 Gexa filed a Petition for Modification of D.12-06-038 seeking to clarify language Gexa alleges states that the long term contracting requirement does not arise until the retail seller’s second year of operations.²⁹ Because Gexa commenced operation in the third and final year of the compliance

²³ D.12-06-038 at 46-47, quoting D.07-05-028, ordering paragraph 6.

²⁴ Gexa Waiver Motion at 12.

²⁵ *Id.* at 15.

²⁶ *Id.* at 6.

²⁷ *Id.* at 7.

²⁸ *Id.*

²⁹ *Gexa Petition for Modification of Decision 12-06-038 (Rulemaking 11-05-005)*, Jan. 19, 2018 at 1.

period, it asserts it could not, by definition, have had a second year of operations in that period.³⁰

Gexa argues that no penalty is warranted because it took reasonable steps to ensure compliance.³¹ In the alternative, Gexa argues that the penalty is excessive given the reasonable efforts it took to comply. Gexa asserts that it should not have to pay a penalty in the same amount as would have applied had Gexa completely ignored RPS procurements and undertaken zero renewable procurement.³² Thus, Gexa requests that the Commission reduce the penalty from \$1,725,461 to \$43,150³³ based on equitable principles such as the severity of offense, Gexa's conduct, and its financial resources.³⁴ In so doing, Gexa cites the Commission's penalty decision interpreting the general penalty provision in the Public Utilities Code (Section 2107), rather than the RPS-specific penalty provisions in Public Utilities Code Section 399.15. Lastly, Gexa requests an evidentiary hearing.³⁵

CalWEA and TURN support Energy Division's compliance determination and penalty imposition. Regarding the long term contract determination, TURN states that Gexa entered into a contract with a 3-year term and classified it as a "short term contract" in its 2014 RPS plan. TURN notes that the Commission only qualifies repackaged contracts purchased from a third party as long term if

³⁰ *Id.*

³¹ *Id.* at 22.

³² *Id.* at 24.

³³ *Id.* at 27.

³⁴ *Id.* at 20-26, *citing* D.98-12-075, (1998) 84 CPUC 2d 155, 182-183, 1998 Cal. PUC LEXIS 1016.

³⁵ *Id.* at 27.

the underlying contract has a 10-year term.³⁶ Because the proper procedure to effectuate a procurement entity relationship between NextEra Power Marketing (the third party) and Gexa never occurred, TURN claims, the relationship required to convert Gexa's short term contract into long term contract is invalid.³⁷ TURN adds that there is no valid basis for Gexa's interpretation that a retail seller may avoid long term contracting requirements by entering into short term contracts with a third party that claims to have a long term relationship with an eligible renewable energy resource.³⁸

CalWEA similarly argues that the Commission should not grant Gexa's waiver request because its short term full requirements contract does not satisfy the RPS long term contracting requirement.³⁹ It also argues that there should be no exemption for sellers in their first year of operation because the decision clearly states that there are no exemptions.⁴⁰ CalWEA notes that D.12-06-038 contains no finding of fact, conclusion of law, or ordering paragraph exempting an Electric Service Provider from the long term contracting requirement if it enters the market in the final year of a compliance period. By contrast, CalWEA

³⁶ TURN Comments at 8-9.

³⁷ *Id.* at 9-10.

³⁸ *Id.* at 10.

³⁹ *Comments of the California Wind Energy Association on Requests for Waivers of the Renewables Portfolio Standard Procurement Quantity Requirement for Compliance Period 1 of Gexa Energy California, LLC, Direct Energy Business, LLC, and Liberty Power Holdings, LLC (Rulemaking 15-02-020)*, Feb. 26, 2018 (CalWEA Comments) at 6.

⁴⁰ *Id.* at 7.

notes, ordering paragraph 20 of that decision clearly states there is no exemption from the long term contracting requirement.⁴¹

Regarding the long term contract requirement for a new seller that starts in the last year of a compliance period, TURN similarly argues that Gexa ignores portions of D.12-06-038 and ordering paragraph 20, which state the seller must procure long term contracts in its first year of operation.⁴²

Both TURN and CalWEA argue that the full penalty should apply.⁴³ GPI asserts that while the RPS program must have significant and predictable enforcement to succeed, enforcing the rules against smaller participants in their initial year of operation and allowing larger market participants to get away with “more egregious” violations is wrong.⁴⁴

Cal Advocates agrees with Gexa that the “second year of operations” language is unclear for retail sellers in Gexa’s position. However, Cal Advocates does not believe modification of the relevant decision should have retroactive effect and cure Gexa’s non-compliance. Cal Advocates asserts that Gexa could have filed its Petition for Modification (PFM) when first notified about the issue by Energy Division, but waited until the final determination letter.⁴⁵ Finally,

⁴¹ *Id.*

⁴² TURN Comments at 10-11.

⁴³ TURN Comments at 10-11; CalWEA Comments at 7-8.

⁴⁴ *Id.* at 4.

⁴⁵ *Response of the Office of Ratepayer Advocates to Petition for Modification of Decision 12-06-038 by Gexa California, LLC (Rulemaking 11-05-005)* Feb. 20, 2018, at 1-3.

Cal Advocates asserts that the time to request relief through a PFM has passed, and that Gexa has not made the requisite showing for a late PFM filing.⁴⁶

3.2. Discussion – Gexa

The Commission upholds Energy Division’s original determination that Gexa should pay a penalty of \$1,725,461. Gexa’s “full requirements” contract did not satisfy the long term contracting requirement of the RPS statute; it was a one-year contract that was amended to a three-year contract.

The statute required a minimum quantity of procurement to originate from a 10 year contract in order to qualify. However, Gexa stated in its 2014 procurement plan that it “began serving retail load ... on January 1, 2013, and upon award of the new retail contracts, *procured short term contracts for 100% of the associated RPS supply.*”⁴⁷ Gexa made this filing less than four months after the year in question ended, which indicates that after 2013 elapsed Gexa did not believe it had a long term contract. Thus, Gexa was out of compliance with the long term contract requirement.

Gexa does not argue that it is entitled to a waiver of penalties under the RPS statute, focusing instead on the assertion that it was in compliance, or that the Commission’s decision in D.98-12-075 (which relates to a different penalty provision, Section 2107) governs here. Indeed, Gexa concedes that it “is not seeking a waiver based on the statutory criteria of Section 399.15(b)(5).”⁴⁸ Its sole

⁴⁶ *Id.* at 5; citing Rule 16.4(h).

⁴⁷ Gexa filed its 2014 Procurement Plan in Rulemaking (R.) 11-05-005 on March 26, 2014 (emphasis added).

⁴⁸ Gexa Waiver Motion at 5.

argument on penalties is that it is inequitable to assess it a penalty that is the same as it would incur if it had failed altogether to comply. Gexa notes that D.98-12-075 allows the Commission to consider the entity's conduct in preventing the violation, detecting the violation, disclosing and rectifying the violation, as well as whether the conduct at issue was deliberate and the financial assets of the company.

Nothing in the RPS statute allows a waiver based on this equitable argument. Rather, the statute sets forth the grounds for a waiver, as noted above:

1. The condition(s) justifying the waiver must be beyond the control of the retail seller. Pub. Util. Code § 399.15(b)(5).
2. The condition(s) must "prevent compliance." At a minimum, the retail seller must demonstrate a connection between the condition(s) it asserts and its deficiency. *Id.*
3. The seller must have taken all reasonable actions under its control "to achieve full compliance." Pub. Util. Code § 399.15(b)(7). The statute specifies that these required actions are "as set forth in paragraph (5),"⁴⁹ and nowhere refers to Public Utilities Code Section 2107.

Gexa does not establish that any of these conditions are present. Its sole arguments are 1) that it was not required to have a long term contract because it entered the market in the final year of the compliance period, and 2) that its own interpretation that a "requirements contract" meets the long term contract requirement should govern. Neither argument warrants a waiver.

Gexa's argument that the long term contract requirement does not apply to a provider that enters the market in the third year of the compliance period is

⁴⁹ *Id.* at 21.

based on language in D.12-06-038 about how (and not whether) to apply the long term contract percentage requirement to a new market entrant. The statement at issue in D.12-06-038 discussed the issues confronted by new retail sellers and observed that it is difficult to calculate what the percentage of a new retail seller's sales (the applicable percentage at that time was 0.25 percent of retail sales) must be under a long term contract. However, the decision did not excuse every new entrant from the long term contracting requirement simply because it is difficult to calculate a percentage. Instead, the decision simply arranged for the Commission's Energy Division to work with affected new entrants on how to calculate the percentage.

D.12-06-038 states the following:

There is one circumstance in which some variation on the long term contracting rules is required: a retail seller newly entering the California market. Such a retail seller, by definition, does not have California retail sales in the prior compliance period, or even in the prior year, by which to measure the minimum quantity of long term contracts necessary for it to count short term contracts in the current compliance period. D.12-06-038 at 47.

However, D.12-06-038 immediately thereafter lists the required procurement amount in long term contracts for new sellers, and states that it is the 0.25 percent figure:⁵⁰

⁵⁰ *Id.*

Table 3: Long term Contracting Requirement for New Retail Sellers

Compliance Period	Minimum Quantity of Expected Generation from Long term Contracts (MWh)
First Compliance Period of Operation	0.25% of Total Retail Sales in First Year of Operation

The Commission delegated to Energy Division the task of determining how to apply the requirement in D.12-06-038, but used language making clear that the long term contracting requirement would initially be applied to each new retail seller: “The Director of Energy Division is authorized to consult with new retail sellers and determine *how the long term contracting requirement will initially be applied to each new retail seller.*”⁵¹ Ordering paragraph 20 of D.12-06-038 made clear that all new sellers had to meet the long term contracting requirement:

In order to count procurement from short term contracts signed after June 1, 2010 for compliance with the California renewables portfolio standard in a compliance period, *a retail seller newly commencing operations in California must sign in the first compliance period of its operation in which any short term contract is signed, long term contracts with expected generation equal to at least 0.25% of its retail sales in the first year of its retail operations in California.* For all later compliance periods, each such retail seller is required to sign in that compliance period long term contracts equal to at least 0.25% of its retail sales in the immediately prior compliance period. The Director of Energy Division is authorized to consult with retail sellers about the application of this requirement. (Emphasis added.)

⁵¹ *Id.* (emphasis added).

Thus, Gexa's argument that it was not required to comply with a long term contracting requirement is rejected and its Petition for Modification is denied. Because the decision did not exempt sellers from compliance with the long-term contract in any year, no modification of D.12-06-038 is warranted.

We also reject Gexa's assertion that a "full requirements" supply contract that included "procurement from long term contracts" should be deemed to satisfy the long term contracting obligation in Public Utilities Code Section 399.13(b). Although certain aspects of the provision have changed over the years, during the compliance period a long term contract was one with at least a 10-year duration. Gexa's 3-year contract with NextEra Power Marketing never met this 10-year requirement.

Indeed, Gexa initially characterized its requirements contract as a three-year contract or a short term contract – not a long term contract. Gexa's submissions alternately characterized its contract as a three-year contract with NextEra Power Marketing for variable volumes of PCC 1, 2 and 3 resources and as a "short term contracts for 100% of associated RPS supply...."⁵² However, Gexa was required to have a 10-year contract with NextEra, so its 3-year contract did not satisfy the long term contract requirement. Even in its motion for a waiver, it concedes this point: "Although Gexa may not have executed a long term contract as typically contemplated by retail sellers, Gexa's actions were nonetheless justified."⁵³

⁵² Gexa 2014 RPS Procurement Plan, R.11-05-005, June 9, 2014, at 1.

⁵³ Gexa Waiver Motion at 10.

As for the amount of the penalty, the Commission's compliance requirement does not allow a seller to count its short term procurement if the seller does not meet the long term contracting requirement. Ordering paragraph 20 of D.12-06-038, quoted above, makes clear that "[i]n order to count procurement from short term contracts signed after June 1, 2010 for compliance with the California renewables portfolio standard in a compliance period, a retail seller newly commencing operations in California must sign in the first compliance period of its operation in which any short term contract is signed, long term contracts with expected generation equal to at least 0.25% of its retail sales in the first year of its retail operations in California. For all later compliance periods, each such retail seller is required to sign in that compliance period long term contracts equal to at least 0.25% of its retail sales in the immediately prior compliance period."

If Gexa's interpretation were correct that failure to meet the long term contract requirement called for a penalty calculated only on the percentage of procurement required to be long term, sellers might routinely avoid the long term contracting requirement altogether. Such avoidance, if Gexa's interpretation were correct, would result in a small penalty only on the long term contract deficiency. Here, for example, Gexa seeks a penalty of \$43,150 rather than \$1,725,461, based on the calculation that its long term contract requirement was "equal to approximately 863 RECs"⁵⁴ rather than its full PQR of 69,018 RECs. Gexa's short term contracting does not count because it failed to satisfy the

⁵⁴ Gexa Waiver Motion at 26.

long term contracting requirement. Thus, the \$50/REC penalty applies to the full 69,018 REC deficiency, not the 863 Gexa calculates.

Nor is Gexa's "good faith," "prudence" or "belief that it was in compliance" enough to warrant waiver.⁵⁵ In D.14-12-023, the Commission rejected such an argument: "The suggestion by [two parties] that the penalty should vary by some measure of the retail seller's good faith efforts to comply is not consistent with the enforcement framework of SB 2 (1X)."⁵⁶

Finally, there is no other basis to reduce Gexa's penalty amount. As GPI points out,⁵⁷ the penalty amount has been \$50 per REC since the inception of the RPS program.⁵⁸ The Commission expressly rejected the very argument that Gexa makes here - that its short term contract procurement should be subtracted from the penalty. "*In order to count procurement from contracts of less than 10 years duration signed after June 1, 2010 for compliance with the California renewables portfolio standard in a compliance period, a retail seller as defined in Public Utilities Code Section 399.12(j) must sign in the compliance period in which the short term contract is signed, contracts of at least 10 years in duration with expected generation equal to at least 0.25 percent of its retail sales in the immediately prior compliance period.*"⁵⁹ Because Gexa failed the long term

⁵⁵ See Gexa Waiver Motion at 26 (good faith) and 24 (prudence and Gexa's belief that it was in compliance).

⁵⁶ D.14-12-023 at 39.

⁵⁷ GPI Comments at 1.

⁵⁸ D.14-12-023 at 38.

⁵⁹ D.12-06-038, ordering paragraph 15 (emphasis added); *see also* ordering paragraph 20 ("In order to count procurement from short term contracts signed after June 1, 2010 for compliance with the California renewables portfolio standard in a compliance period, a retail seller newly

Footnote continued on next page

contract portion of the requirement, it may not “count procurement from contracts of less than 10 years duration.” A penalty in the amount of \$1,725,461 is proper.

Finally, Gexa’s request for hearing should be denied. Its argument is based either on facts it concedes, or on a misinterpretation of RPS legal requirements. Thus, Gexa has not provided a basis for an evidentiary hearing.

4. Payment of Penalty

The Energy Division letters assessing penalties stated that Liberty Power and Gexa should make their payment to the State General Fund. However, after the letters were issued, SB 350 changed the penalty rules for the RPS program so that they now are payable as follows: “Any penalties collected under this article shall be deposited into the Electric Program Investment Charge [EPIC] Fund and used for the purposes described in Chapter 8.1 (commencing with Section 25710) of Division 15 of the Public Resources Code.”⁶⁰ The California Energy Commission (CEC) maintains the EPIC fund and therefore the penalties should be deposited with the CEC for use in the EPIC program in accordance with the statute.

commencing operations in California must sign in the first compliance period of its operation in which any short term contract is signed, long term contracts with expected generation equal to at least 0.25% of its retail sales in the first year of its retail operations in California. For all later compliance periods, each such retail seller is required to sign in that compliance period long term contracts equal to at least 0.25% of its retail sales in the immediately prior compliance period.”).

⁶⁰ Pub. Util. Code § 399.15(b)(8).

5. Categorization and Need for Hearing

The Scoping Memo confirmed the categorization of this proceeding as ratesetting and that hearings are needed. Although no hearings were necessary on the issues addressed in this decision, the proceeding remains open and hearings may be needed on other issues in this proceeding.

6. Comments on Proposed Decision

The proposed decision of Administrative Law Judge Thomas in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on July 22, 2019 by Gexa, CalWEA and GPI. Gexa asserts that the penalty is excessive, but does not offer a legal or factual basis to change it. Gexa also asserts that the decision is unclear as to whether new retail sellers have to comply with RPS requirements. We disagree that it is unclear, but we add a conclusion of law and ordering paragraph stating that all retail sellers must comply with RPS requirements regardless of when during a compliance period they begin serving load. GPI and CalWEA support the proposed decision without change.

Liberty Power was served with the proposed decision but did not file comments.

We add one provision to the decision to require Gexa and Liberty Power to notify the Commission's Energy Division once it pays the penalty, since such payment will go to the CEC.

7. Assignment of Proceeding

Clifford Rechtschaffen is the assigned Commissioner and Sarah R. Thomas and Nilgun Atamturk are the assigned Administrative Law Judges in this proceeding.

Findings of Fact

1. The Commission's Energy Division notified Liberty Power on December 20, 2017 that it had not met its compliance obligations for compliance period, and imposed a penalty of \$431,014.
2. Liberty Power's RPS compliance report shows no renewable procurement activity in 2011 or 2012.
3. Liberty Power only mentions dates in mid-to-late 2013 in describing its attempt to obtain PCC 2 RECs.
4. Liberty Power's first offer for PCC 2 RECs was withdrawn on August 22, 2013.
5. Liberty Power approached a counterparty to add PCC 1 RECs on November 11, 2013.
6. Liberty Power received offers to purchase PCC 1 products during the relevant compliance period.
7. Liberty Power sought to maximize its procurement of PCC 2 products, which were significantly less expensive than PCC 1 products.
8. Cost considerations led Liberty Power to reject various PCC 2 offers it received.
9. PCC 1 RECs offered to Liberty Power in 2013 were more expensive than PCC 2 RECs.
10. Liberty Power's fixed amount requirement made it harder to procure PCC 2 instruments than what would have been the case had it not had such a requirement.
11. On December 20, 2017, the Commission's Energy Division found Gexa out of compliance with the RPS program requirements and assessed a \$1,725,461 penalty.

12. Gexa did not have a long term contract during compliance period 1.
13. A full requirements contract is not the same as a long term contract.
14. Gexa characterized its requirements contract as a three-year contract in its 2014 RPS plan.
15. Gexa had a contract with NextEra Power Marketing for three years.
16. Gexa stated that its 2013 RPS procurement consisted of a “short term contract for hundred percent of associated RPS supply...” in its 2014 RPS procurement plan.
17. Gexa stated in its motion for a waiver that “Gexa may not have executed a long term contract as typically contemplated by retail sellers....”

Conclusions of Law

1. A waiver from RPS compliance requirements requires that the seller demonstrate the following elements: a) the condition justifying the waiver must be beyond the control of the retail seller; b) the condition must prevent compliance. At a minimum, the retail seller must demonstrate a connection between the condition it asserts and its deficiency; c) the seller took all reasonable actions under its control to achieve full compliance.
2. The party seeking a waiver of RPS compliance penalties bears the burden of proving that it meets the legal requirements for waiver.
3. Liberty Power did not demonstrate that the condition justifying the waiver was beyond its control, that the condition prevented compliance, or that it took all reasonable actions under its control to achieve compliance.
4. A seller seeking to comply with RPS requirements may procure products in the PCC 1 category, and is not limited to PCC 2 products.

5. Liberty Power could have complied with its RPS obligation by procuring PCC 1 products.

6. The RPS long term contracting requirement requires the entity with the RPS compliance obligation to have a contract of at least 10 years duration.

7. A seller that begins operation in the final year of a compliance period is required to comply with the long term contracting requirement.

8. When the Commission required Energy Division to work with sellers in the final year of a compliance period on how to calculate the long term contract percentage, it was not excusing such sellers from compliance with the long term contract requirements. Rather, it was simply acknowledging that a percentage calculation was more difficult when there was not a prior year's performance on which to base the calculation.

9. Liberty Power should be penalized \$431,014 for its failure to comply with RPS procurement requirements in the 2011-2013 compliance period.

10. Liberty Power's request for evidentiary hearings should be denied because its own admissions, and applicable law, established that the penalty is valid.

11. Gexa's Petition for Modification of D.12-06-038 should be denied.

12. In order to count procurement from short term contracts signed after June 1, 2010 for compliance purposes in RPS, the seller must meet the long term contract percentage requirement.

13. A seller's good faith, prudence or belief that it is in compliance does not warrant a waiver of RPS penalties.

14. The D.98-12-075 framework for determining penalty amounts does not apply to Liberty Power's or Gexa's RPS penalty waiver requests.

15. The RPS penalty amount has been \$50 per REC since the inception of the RPS program.

16. Because Gexa failed the long term contract portion of the RPS requirement, it may not count procurement from short term contracts of less than 10 years duration.

17. Gexa should be penalized \$1,725,461 for its failure to comply with the RPS procurement requirements in the 2011-2013 compliance period.

18. Gexa's request for evidentiary hearings should be denied because its own admissions, and applicable law, establish that the penalty is valid.

19. SB 350 requires RPS penalties to be paid into the EPIC fund.

20. All load serving entities must comply with all RPS requirements that apply to them, regardless of when in a compliance period they begin serving load.

O R D E R

IT IS ORDERED that:

1. The motion of Liberty Power Holdings, LLC for a waiver of the penalty imposed with regard to Renewables Portfolio Standard compliance period 1 is denied.

2. The motion of Gexa Energy California LLC for a waiver of the penalty imposed with regard to Renewables Portfolio Standard compliance period 1 is denied.

3. Liberty Power Holdings, LLC is penalized \$431,014 for its failure to comply with Renewable Portfolio Standard procurement requirements in the 2011-2013 compliance period.

4. Gexa Energy California LLC is penalized \$1,725,461 for its failure to comply with the Renewable Portfolio Standard procurement requirements in the 2011-2013 compliance period.

5. Gexa Energy California LLC's petition for modification of Commission Decision 12-06-038 is denied.

6. Within 30 days of the effective date of this order, Liberty Power Holdings, LLC must pay a fine of \$431,014 by check or money order payable to the California Energy Commission, 1516 Ninth Street, MS-2, Sacramento, CA 95814. Note on the check they are penalties for EPIC, in accordance with California Public Utilities Commission Decision 19-08-007. Upon paying the fine, Liberty Power Holdings shall send a letter confirming the payment to Edward Randolph, California Public Utilities Commission, Energy Division, 505 Van Ness Avenue, San Francisco, CA 94102, referencing this decision.

7. Within 30 days of the effective date of this order, Gexa Energy California LLC must pay a fine of \$1,725,461 by check or money order payable to the California Energy Commission, 1516 Ninth Street, MS-2, Sacramento, CA 95814. Note on the check they are penalties for EPIC, in accordance with California Public Utilities Commission Decision 19-08-007. Upon paying the fine, Gexa Energy California shall send a letter confirming the payment to Edward Randolph, California Public Utilities Commission, Energy Division, 505 Van Ness Avenue, San Francisco, CA 94102, referencing this decision.

8. All load serving entities shall comply with all Renewables Portfolio Standard requirements that apply to them, regardless of when in a compliance period they begin serving load.

9. Rulemaking 18-07-003 remains open.

This order is effective today.

Dated August 1, 2019, at San Francisco, California.

MICHAEL PICKER

President

LIANE M. RANDOLPH

MARTHA GUZMAN ACEVES

CLIFFORD RECHTSCHAFFEN

GENEVIEVE SHIROMA

Commissioners