

ALJ/ML2/CS8/smt

Date of Issuance 2/1/2022

Decision 22-01-025 January 27, 2022

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 GEXA ENERGY CALIFORNIA LLC'S COMPLIANCE
WITH THE CALIFORNIA RENEWABLES PORTFOLIO
STANDARD PROGRAM**

TABLE OF CONTENTS

Title	Page
DECISION ON GEXA ENERGY CALIFORNIA LLC’S COMPLIANCE WITH THE CALIFORNIA RENEWABLES PORTFOLIO STANDARD PROGRAM	
Summary	2
1. Background	2
2. RPS Compliance Requirements.....	4
3. Issues before the Commission.....	6
4. Summary of Parties’ Position.	6
4.1. GEXA.....	6
4.2. CalWEA, CUE, and TURN.....	8
5. Discussion	10
5.1. Standard Terms and Conditions (STC)	11
5.2. Long-Term Contracting Requirement and Contract Amendments.....	14
5.3. Waiver Request and Penalty	18
5. Payment of Penalty	21
6. Categorization and Need for Hearing.....	22
7. Comments on Proposed Decision.....	22
8. Assignment of Proceeding.....	22
Findings of Fact.....	22
Conclusions of Law	24
ORDER	25

**DECISION ON GEXA ENERGY CALIFORNIA LLC'S COMPLIANCE
WITH THE CALIFORNIA RENEWABLES PORTFOLIO
STANDARD PROGRAM**

Summary

This decision enforces California's Renewables Portfolio Standard (RPS)¹ program compliance rules against Gexa Energy California LLC's (Gexa) non-compliance with mandatory reporting requirements of its contract's standard terms and conditions. Gexa shall pay a penalty of \$352,500. The California Public Utilities Commission (Commission) finds that Gexa has complied with the procurement quantity requirement (PQR) for Compliance Period 2014-2016. Therefore, its waiver request is moot and does not require further resolution.

This proceeding remains open.

1. Background

In December 2018, Gexa filed its Final Renewables Portfolio Standard (RPS) Compliance report for Compliance Period 2014-2016 (Compliance Period 2).

On October 4, 2019, Energy Division issued a Compliance Determination Notice informing Gexa that it is out of compliance with the RPS program rules. Energy Division found that Gexa had failed to meet its long-term contracting requirement. The Compliance Determination Notice disallowed 148,187 renewable energy credits (RECs) and assessed a \$3,704,675 penalty.²

¹ Established by Senate Bill (SB) 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 Public Utility (Pub. Util.) Code §§ 399.11-399.33.

² See Exhibit B to Gexa Supplemental Filing in Response to Administrative Law Judge (ALJ) Ruling at 2.

On December 6, 2019, Gexa filed a Motion for a Waiver (Gexa Waiver Motion or waiver request), stating that “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 that the Gexa REC Agreement is a long-term contract executed in accordance with Decision (D.) 12-06-038.”

Concurrent with the Gexa Waiver Motion, Gexa submitted a letter to the Commission’s Executive Director and Deputy Executive Director for Energy and Climate Policy on December 6, 2019, for reconsideration and reversal of the conclusions of the Compliance Determination Notice.

On December 6, 2019, Gexa amended its RPS procurement contract with NextEra Energy Marketing, LLC, and its changes were made effective retroactively on December 22, 2015 (Gexa's original execution date of its REC Agreement).³

On January 24, 2020, The Utility Reform Network (TURN) and the Coalition of California Utility Employees (CUE) filed a joint motion to submit a late-filed response to Gexa’s Waiver Motion.

On February 10, 2020, Gexa filed a response to TURN/CUE’s Joint Motion. Gexa opposed TURN/CUE’s request to accept their late-filed response and requested permission to file a reply to the TURN/CUE’s response.

³ See Gexa’s March 3, 2020, Supplemental Filing in response to ALJ Ruling seeking additional information, Exhibit C, Attachment 3 First Amendment to Renewable Energy Credit Purchase and Sale Master Agreement and Confirmation Agreement of a REC Transaction dated December 6, 2019 by and between NextEra Energy Marketing, LLC.

On February 18, 2020, we issued an ALJ Ruling to consider the Waiver Motion and formally review its Reconsideration Request in this proceeding. We also directed Gexa to file additional documents and information and denied TURN and CUE's late-filed response, stating they may file responses to GEXA's reply to ALJ Ruling.

On March 3, 2020, Gexa filed a supplemental filing in response to the ALJ Ruling (Supplemental Filing).

On April 2, 2020, California Wind Energy Association (CalWEA) filed comments, and CUE and TURN filed joint comments on Gexa's Supplemental Filing. Gexa submitted its replies on April 17, 2020.

Gexa discontinued retail electricity sales after the second quarter of 2016.

2. RPS Compliance Requirements

The Commission has adopted rules to review 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 sold to retail end-user customers from RPS-eligible generation by the end of 2017. SB 350 adopted interim annual RPS targets with three-year compliance periods and requires 65 percent of RPS procurement to be derived from long-term contracts of 10 or more years. The Legislature increased the RPS percentage over several years, culminating in the latest statute, SB 100,⁴ which requires that 60 percent of California's electricity comes from renewables by 2030, and a goal of 100 percent carbon-free energy supply by 2045.

The Commission is authorized to enforce compliance rules with RPS mandates in multi-year compliance periods established by Pub. Util. Code

⁴ Stats. 2018, Ch. 313 (de Leon).

Section 399.15(b)(1). The period at issue here is from 2014 to 2016 and is deemed Compliance Period 2014-2016 or Compliance Period 2. During that period, retail sellers were subject to D.08-04-009, D.10-03-021, and D.11-01-025 on the use of standard terms and conditions, PQRs, and enforcement rules adopted in D.11-12-052, D.12-06-038, and D.14-12-023 and enforcement rules under Resolution (Res) E-4720.

Under the then-applicable rules, we authorized the use of contracts of less than 10 years' duration (short term contracts) to count for RPS compliance once a minimum quantity of procurement from contracts of 10 years or longer (long term contracts) was established.⁵ In D.12-06-038, we adopted a long-term contracting requirement of 0.25 percent of Total Retail Sales in 2014-2016.⁶

For RPS Compliance Report filings due on August 1 each year, the Commission has adopted a citation program to enforce RPS reporting requirements. Failure to comply with a request for information or documentation from Commission staff that is related to the implementation of the RPS in the time or the format required within 10 business days of Commission staff's request results in \$500 per incident plus \$500 per day from the first business day after the filing is due and \$1000 per day every business day after that.⁷

Gexa is currently not serving retail load in California, but it has not deregistered either. Therefore, it must continue to file RPS Compliance Reports. Alternatively, to reduce administrative burdens, we encourage Gexa to consider seeking permission to withdraw its registration if it has no near-term plans to serve load in California.

⁵ D.12-06-038 at 7.

⁶ D.12-06-038 at 40.

⁷ Res E-4720 at 15-16.

3. Issues before the Commission

Based on Gexa's Waiver Motion and the Commission's authority to review compliance within the RPS program, the issues to be determined are:

1. Did Gexa comply with non-modifiable standard contracting terms and conditions?
2. Did Gexa execute a long-term contract?
3. Was it reasonable to amend the REC Agreement retroactively?
4. Is Gexa's waiver request reasonable?
5. What penalty amount should Gexa pay for any non-compliance with RPS Program rules?

4. Summary of Parties' Position.

4.1. GEXA

Gexa requests that the Commission reverse the Compliance Determination and find that Gexa complied with its long-term contracting requirement or grant a waiver of its PQR so that the penalty does not apply.

Gexa contends that it complied with D.12-06-038, as it executed a Compliance Period 2 (*i.e.*, during the years 2014, 2015, or 2016) contract with a term of 10 years or more while purchasing 863 RECs, which was equal to at least 0.25 percent of its Compliance Period 1 retail sales.⁸ Gexa claims that it executed retroactive amendments to the Gexa REC Agreement with NextEra Energy Power Marketing LLC (NEM or NextEra)⁹, stating that the contract will "remain in effect

⁸ Gexa's Reply to ALJ Ruling, April 17, 2020, at 17 and *Motion of Gexa Energy California, LLC for a Waiver of the Renewables Portfolio Standard Procurement Quantity Requirement for Compliance Period 2* (Rulemaking 18-07-003), December 6, 2019 (Gexa Waiver Motion) at 6-12 and 29-30.

⁹ Exhibit D, *Supplemental Filing of Gexa Energy California, LLC Pursuant to ALJ's Ruling to Review Compliance Determination Request as Part of the Motion for Waiver Request, Seeking Evidence as Part of Record, and Denying the Joint Motion for Late Filed Response.*

for at least 10 years.”¹⁰ Gexa further contends that any deviations from the required RPS standard terms and conditions do not impact the terms that make the Gexa REC Agreement a long-term contract and asserts that it retroactively corrected the oversight through an amended contract.¹¹

Regarding its waiver request, Gexa seeks a waiver of its PQR for Compliance Period 2 if the Commission does not reverse the Compliance Determination. Gexa claims it needs a waiver because the Compliance Determination found that Gexa cannot count any of its procured and retired RECs toward meeting its PQR.¹² Gexa states that there must be some avenue for correcting an incorrect non-compliance determination and penalty assessment.¹³

Gexa argues that a \$3,704,675 penalty that would result from not counting any of Gexa’s RPS-eligible procurement is excessive given the reasonable efforts it took to comply and the fact that it did meet its RPS procurement requirements for the compliance period.¹⁴ First, Gexa argues that the Commission should find that it did execute the required long-term contract, and therefore it met its compliance obligations. Alternatively, Gexa requests that the Commission not impose a penalty of \$3,704,675 based on equitable principles such as the severity of the offense, Gexa’s conduct, and its financial resources. In so doing, Gexa cites the Commission’s penalty decision interpreting the general penalty provision in the Pub. Util. Code Section 2107 rather than the RPS-specific penalty provisions

¹⁰ Gexa Waiver Motion at 13.

¹¹ Gexa Waiver Motion at 18-27.

¹² Gexa Waiver Motion at 2.

¹³ Gexa Waiver Motion at 4.

¹⁴ Gexa Waiver Motion at at 32.

in Pub. Util. Code Section 399.15.¹⁵ If the Commission denies the first two alternatives, Gexa requests a hearing and the opportunity to present evidence that the Gexa REC Agreement is a long-term contract executed in accordance with D.12-06-038.¹⁶

In its reply comments to CalWEA's and TURN/ CUE's opposition to the waiver motion, Gexa states that it procured a fixed quantity equal to 863 RECs and should not incur a penalty simply because it stopped serving customers during the compliance period.¹⁷ It argues that Gexa's long-term contract is not required to be tied to a facility or support capital investments in renewable generation facilities.¹⁸

4.2. CalWEA, CUE, and TURN

The CalWEA and joint comments filed by CUE and TURN support Energy Division's compliance determination and penalty imposition on Gexa.¹⁹ ²⁰ Their comments assert that the long-term contracting requirement is a key feature of the RPS program and a primary requirement for demonstrating compliance.

CalWEA states that Gexa's contract with NextEra does not constitute a "long-term contract" as required by statute and the Commission's rules and,

¹⁵ Gexa Waiver Motion at 32, *citing* D.98-12-075, (1998) 84 CPUC 2d 155, 182-183, 1998 Cal. PUC LEXIS 1016.

¹⁶ *Id.* at 35.

¹⁷ Gexa Reply Comments at 3.

¹⁸ Gexa Reply Comments at 3 and 4.

¹⁹ Comments of the California Wind Energy Association on Supplemental Filing of Gexa Energy California, LLC. Regarding Requested Waiver of the RPS Procurement Quantity Requirement for Compliance Period 2 at 1. (CalWEA Comments)

²⁰ Comments of The Utility Reform Network and the Coalition of California Utility Employees on the Motion of Gexa Energy for a Waiver of the RPS Procurement Requirements for Compliance Period 2 at 2. (TURN/CUE Comments)

therefore, it failed to meet its PQR for Compliance Period 2 (2014-2016).²¹ It contends that Gexa's contract did not establish known quantities of RECs to be delivered at known prices for at least 10 years because those quantities were conditioned on Gexa's sales, which could reduce to zero without violating contract terms. CalWEA further states that Gexa's sales were reduced to zero sales six months after it executed the contract in December 2015, as Gexa exited the market after the second quarter of 2016.²² CalWEA argues that Gexa's contract cannot be construed as a "long-term" contract because it did not provide any revenue certainty over a 10-year term, necessary to support major capital investments.²³

CalWEA opposes Gexa's waiver request and argues that Gexa did not take all reasonable actions under its control to achieve full compliance, such as signing a valid long-term contract.²⁴ CalWEA asserts that failing to enforce RPS compliance rules may encourage retail sellers to take greater compliance risks in the future, affecting the achievement of the state's RPS and greenhouse-gas-reduction goals.²⁵

In their joint comments, TURN/CUE state that Gexa did not establish an obligation to procure specific quantities of RPS-eligible resources over at least 10 years, and therefore it does not constitute a valid "long-term" commitment. TURN/ CUE argue that Gexa's contract is limited to the transfer of unbundled RECs, which are statutorily ineligible to satisfy 65 percent of Gexa's post-2020

²¹ See CalWEA Comments at 1.

²² CalWEA Comments at 3.

²³ *Id* at 3.

²⁴ CalWEA Comments at 3.

²⁵ *Id* at 4.

RPS compliance obligations. They state that the contract included an early termination provision that allowed Gexa to exit during Compliance Periods 2 and 3 without penalty. In opposition to the penalty waiver, TURN/ CUE states that it would be inappropriate to permit retail sellers to avoid non-compliance penalties through “retroactive” modifications to existing contracts.²⁶

5. Discussion

We have reviewed all evidence and argument submitted by Gexa, comments filed by CalWEA, TURN/ CUE, and Gexa’s reply comments. The Commission finds that Gexa met its procurement quantity requirement for the Compliance Period 2014-2016 and retired sufficient RECs. Energy Division staff reasonably found that the Gexa REC Agreement was unclear on the start and end date of the contract. However, we find that, although the terms are not as straightforward as they should be, the Gexa REC Agreement allows Gexa the right to procure the necessary quantity of RECs for a period over at least 10 years, and we accept it as a long term contract for Compliance Period 2014-2016.

Our rules do not authorize retroactive amendments to contract language during the compliance period and/or after the compliance filing. Accordingly, the Commission finds that by excluding non-modifiable standard terms and conditions, Gexa was out of compliance with the requirement to include the non-modifiable standard terms and conditions in its contract.²⁷

We impose a fine for the period that the REC Agreement underlying Gexa’s Compliance Report was out of compliance with the applicable RPS

²⁶ TURN/CUE Comments at 1.

²⁷ D.11-01-025 states that the non-modifiable standard terms and conditions shall be included in all contracts for procurement for compliance with the California RPS program.

program rules. We do not see a need to conduct hearings on this matter and deny Gexa's request.

5.1. Standard Terms and Conditions (STC)

Pursuant to D.08-04-009, D.10-03-021, D.11-01-025, and D.13-11-024, regardless of whether the procurement is from short-term or long-term contracts, retail sellers are required to include the applicable non-modifiable standard terms and conditions during contract execution. Gexa retroactively added the non-modifiable and the modifiable standard terms and conditions to its contract after the Compliance Period had closed.²⁸

Our rules require the model contract initially used by each load-serving entity to solicit bids or seek projects for RPS compliance to contain all standard terms and conditions.²⁹ The rules further state that a buyer and seller may not modify the non-modifiable standard terms and conditions but may negotiate and modify the modifiable standard terms and conditions (or delete modifiable standard terms and conditions when they are not applicable).³⁰ Any changes to the modifiable terms still have to comply with all applicable laws.

Table 1 lists the applicable non-modifiable standard terms and conditions omitted in Gexa's REC Agreement, the relevant section, and the amendment date.

²⁸ Gexa's Supplemental Filing in response to ALJ Ruling at 17-18.

²⁹ See D.08-04-009 at 3.

³⁰ See D.08-04-009 at 4.

Table 1: Amendments to Non-Modifiable Terms and Conditions in Gexa's REC Agreement

Non-Modifiable Standard Terms and Conditions	Amended on 6/12/2019 & Section of Gexa Contract³¹
STC 1. Transfer of RECs	Section 9(b) of the Master Agreement, as added in the First Amendment.
STC 2. Tracking of RECs in WREGIS	Section 9(c) of the Master Agreement, as added in the First Amendment.
STC 17. Applicable Law	Section 11 of the Master Agreement, as replaced in the First Amendment.

RPS contracts of any length must consist of the sub-set of non-modifiable standard terms and conditions listed above for compliance with the California RPS program. Gexa acknowledges that its original contract did not include these non-modifiable standard terms and conditions. Gexa argues that even without the amendments, any deviations from the non-modifiable standard terms and conditions are immaterial because they do not affect the long-term nature of the contract.

Table 2 illustrates the modifiable terms that Gexa added after the Compliance Period had closed. The modifiable terms and conditions are important for compliance from a regulatory perspective. Gexa submitted incomplete information about its contracts by omitting some of these terms, making it difficult for Commission Staff to assess compliance regarding the delivery term.

³¹ See Gexa Exhibit C, Attachment 3 and redline of the Master Agreement in Exhibit D to Gexa Supplemental Filing in response to ALJ Ruling.

Modifiable Standard Terms and Conditions	Amended on 6/12/2019 & Section of Gexa Contract³²
STC 5. Contract Term	“DELIVERY TERM” provision of the Confirmation, as added in the First Amendment (ensuring minimum delivery term of 10 years), and a table in the Confirmation specifying the required delivery dates for the specified Contract Quantities of the Commodity.
STC 8. Product Definitions	The product definitions in STC 8 do not apply to the Gexa REC Agreement because they specify definitions for products associated with deliveries of physical power products, whereas the Gexa REC Agreement is for PCC 3 RECs. The Gexa REC Agreement specifies product definitions for the purchase of PCC 3 RECs in the Master Agreement in Section 9(a)-(d) (Warranties of Seller), as added in the First Amendment and in the Confirmation in the “COMMODITY”, “RIGHTS TO ERRS,” “PROJECT,” “TRACKING SYSTEM,” “VINTAGE”, and “ELIGIBLE RENEWABLE ENERGY RESOURCE” provisions.

³² See Gexa Exhibit C, Attachment 3 and redline of the Master Agreement in Exhibit D to Gexa Supplemental Filing in response to ALJ Ruling.

STC 16. Assignment	Section 13 of the Master Agreement, as replaced in the First Amendment.
--------------------	---

Gexa states that it should have an opportunity to correct identified deficiencies in its compliance showings, and indeed should be encouraged to do so. We find that the contract amendments made in 2019 did not have any material impact on Gexa's RPS procurement obligations because it had stopped serving retail load after mid-2016. Nevertheless, we do not accept retroactive contract amendments as a basis for establishing that a contract complies with applicable requirements. Between contract execution in 2015 and the retroactive amendments on December 6, 2019, the Gexa REC Agreement failed to contain the required contract terms. Likewise, the Gexa REC Agreement failed to contain the required contract terms when Gexa filed the Final 2014-2016 Compliance Report in December 2018. These are violations of our regulatory requirements. Pursuant to D.08-04-009, Gexa's REC Agreement did not comply with the Commission's RPS program rules for including certain non-modifiable standard terms and conditions.

5.2. Long-Term Contracting Requirement and Contract Amendments

Pursuant to Section 399.15(b) and D.12-06-038,³³ a retail seller is required to procure a minimum quantity of expected generation from long-term contracts in the compliance period in which the short-term contracts are signed.

Gexa explains that its REC Agreement with NextEra (referred to Gexa REC Agreement hereafter), signed on December 22, 2015, had a term of 13 years, three months, and ten days.³⁴ Gexa's REC Agreement, before amendments, allows

³³ See D.12-06-038 at 39 and 40.

³⁴ Gexa Response to ALJ Ruling at 14 and 15.

Gexa to procure 0.25 percent of Gexa's total retail sales in 2013 as portfolio content category 3 RECs with a "delivery no later than April 1, 2017" for Compliance Period 2. On October 4, 2019, Energy Division issued a Compliance Determination Notice on Gexa's non-compliance with the RPS long-term procurement requirements and applicable penalties. After receiving the Compliance Determination Notice, Gexa amended its contract to expressly state that its delivery term was for at least ten years.³⁵

We find that Gexa purchased, took delivery of, and retired the entire quantity of RECs needed to meet its RPS PQR for Compliance Period 2, including the entire 863 RECs required under a long-term contract for Compliance Period 2.³⁶ In these limited factual circumstances, and upon closer evaluation, we find that the Gexa REC Agreement allows for REC procurements over a ten-year period, and therefore we accept it as a long-term contract. The Table in the Confirmation Agreement that is a sub-contract to the Gexa REC Agreement indicates the first REC delivery date is no later than April 4, 2017, while the latest delivery date in the Table is for the period 2021 – 2028, and is: "No later than April 1st following the end of the applicable Compliance Period."³⁷ During this period, the Compliance Period ends December 31, 2027; therefore, RECs must be delivered no later than April 1, 2028. Thus, the deliveries will occur over a ten-year period. This determination is limited to this case, and in the future, we shall not accept any long-term contract that fails to demonstrate the required term of at least ten years.

³⁵ Gexa Response to ALJ Ruling at 15.

³⁶ Gexa Reply Comments at 13 and 14.

³⁷ See Exhibit D (PUBLIC VERSION) to Gexa Supplemental Filing in Response to ALJ Ruling at 14.

The Opening Comments of CalWEA on the Proposed Decision state that Gexa's contract does not meet the legislative intent of the statutory RPS long-term contracting requirement, and should the Commission wish to make a onetime exception to this policy, it should clarify that, in the future, it will require all contracts to assure purchases over a term of at least ten years. In their joint Opening Comments, TURN/ CUE also object to the Proposed Decision and assert that the cited contract is not a valid "long-term" agreement because it fails to establish an obligation for Gexa to procure any specific quantities of RPS-eligible resources over a term of at least 10 years.

In its reply comments, Gexa disagrees with these opposing arguments and contends that its long-term contract obligated it to purchase a known fixed quantity equal to 863 RECs.³⁸ Gexa asserts that the contract term cannot terminate until June 29, 2026, after the end of the 10-year term, and Gexa remains obligated under the contract for the duration of its term to make future purchases in proportion to its retail sales.³⁹ Gexa adds that the long-term contracting requirement in D.12-06-038 was structured as a percentage of retail sales in the prior compliance period, and the Contract Quantity in the Gexa contract follows that structure for Compliance Period 2.⁴⁰

We find that Gexa frontloaded its REC purchases during Compliance Period 2, then retired the correct amount of RECs to meet its RPS procurement obligations before stopping retail service in California, thus releasing itself from further RPS obligations. Contracts such as the cited contract agreed to by Gexa and NextEra may not be model long-term contracts from a project financing

³⁸ See Gexa Reply Comments at p. 5.

³⁹ *Id.*

⁴⁰ See Gexa Reply Comments at p. 6.

perspective . However, we agree with Gexa that D.12-06-038 does not require ESPs to show that their RPS contracts can support project financing or capital investments in a renewable facility. Of course, sellers may decline to accept contract terms that they determine are a barrier to financing.

Regarding adopting a specific requirement that all contracts assure purchases over a term of at least ten years, we believe the current statutory requirements address the issue. Beginning January 1, 2021, at least 65 percent of the procurement a retail seller counts [towards its compliance with](#) renewables portfolio standard requirement in the compliance period shall be from its contracts of 10 years or more in duration, which will alleviate the opposing parties concerns regarding the procurement of specific quantities of RPS-eligible resources over the term of the contract.⁴¹ Moreover, as explained above, we find that the Gexa contract did provide for purchases over a term of at least ten years. This decision declines to adopt new rules for future contracts as it is not within our scope here.

Regarding TURN/ CUE's argument that Gexa's REC Agreement is tied entirely to Gexa's retail sales during various periods, and if Gexa's retail sales dramatically decline, or if Gexa exits the market, the quantities to be purchased would decline or amount to zero is accurate.⁴² This reflects how procurement requirements are calculated under the applicable RPS rules, which provide that if an Electric Service Provider (ESP) stops serving retail load, it will have no obligation to procure renewable generation. Moreover, the Commission has not adopted a decision or order that prohibits this contract term. TURN/ CUE argue

⁴¹ See D.17-06-026 OP 1.

⁴² TURN/CUE Comments at 4.

that Gexa's penalty-free early termination without liability for any performance for the rest of the Compliance Periods results in a defective contract. Our current rules do not address the early termination clause for long-term contracts. TURN/CUE's Opening Comments on the Proposed Decision state that the California Energy Commission has recently adopted revised enforcement rules and prohibited long-term contracts from including "no-cost, early termination" provisions that can be unilaterally exercised by one party.⁴³ Gexa's reply comments correctly note that the California Code of Regulations, Title 20, Division 2, Chapter 13, Section 3204(d)(2)(A) – applies to publicly owned utilities only and does not apply to the load serving entities under the CPUC jurisdiction unless adopted by the CPUC via a decision.

5.3. Waiver Request and Penalty

Gexa's waiver request is based on its submission that its retired RECs should not have been disallowed.⁴⁴ Since we are not disallowing Gexa's procurement amounts, the waiver request is moot and requires no further discussion. However, this does not release Gexa from its RPS compliance responsibility, including the use of correct standard terms and conditions and penalties for non-compliance.

We find that while Gexa met its PQR when it retired 863 RECs at the end of Compliance Period 2, it did not meet the narrative reporting elements in its compliance report. Gexa's REC Agreement excluded the required standard contract language in numerous respects identified above. Therefore, until it amended the contract, Gexa was out of compliance with the mandatory

⁴³ See TURN/CUE Opening Comments on the PD at p. 3-4.

⁴⁴ Gexa Waiver Motion at 31-32.

contractual and reporting requirements of the RPS program rules. Pub. Util. Code Sections 399.13(e), 2102-2105, 2107, 2108, and 2114 authorize the Commission to enforce compliance with orders and decisions issued in the RPS program.

We disagree with Gexa that even without amending the contract, the deviations in the Gexa REC Agreement from the standard terms and conditions are not material because they do not affect the key terms of the Gexa REC Agreement that make it a long-term contract. Gexa acknowledges it did not use the exact language of the standard terms and conditions, and it regrets the oversight and ensures that its RPS contracts contain the standard terms and conditions in the future.⁴⁵

As a general matter, investor owned utilities, ESPs, and Community Choice Aggregators must provide relevant and complete compliance documentation to Energy Division staff.⁴⁶ In making its compliance determinations, Commission staff should review the entire course of an RPS procurement transaction.⁴⁷ According to citation authority under Res E-4720, Gexa did not file its Final RPS Compliance Report in the manner required.⁴⁸ The citation program sanctions retail sellers that fail to file complete and accurate reports on their RPS procurement and compliance. The compliance report includes the underlying contracts, and if the contracts are non-compliant, the Compliance Report is deficient and non-compliant. Gexa amended the Gexa REC

⁴⁵ Exhibit C, Attachment 3, Gexa Supplemental Filing in Response to ALJ Ruling at 19.

⁴⁶ D.06-10-019, D.06-10-050, D.11-01-026.

⁴⁷ See D.11-12-052 Implementing Portfolio Content Categories for the Renewables Portfolio Standard Program at 13.

⁴⁸ Res E-5143 (issued June 25, 2021) updates and replaces Res E-4720.

Agreement and complied with the RPS Program rules only after receiving the Compliance Determination Notice from Commission Staff.

It is reasonable in this instance to assess a penalty for Gexa's actions from the date it submitted a deficient Final Compliance Report to the Commission on December 13, 2018, until it provided compliant documents. Commission Staff notified Gexa on October 4, 2019, of its deficient compliance filing. Gexa did not correct the deficiency on the use of correct terminology and missing standard terms and conditions within 10-days of notification and instead filed a waiver motion on December 6, 2019, notifying the Commission of the retroactive amendments to its contract, which took effect on December 6, 2019.⁴⁹ Therefore, Gexa was out of compliance for 357 days from December 14, 2018 (the first business day after the filing was due), through December 6, 2019. Based on the penalty rules in Resolution E-4720, Gexa shall pay \$500 per incident⁵⁰ plus \$500 per day for the first ten days and \$1,000 for the remaining 347 days that it was out of compliance.⁵¹ The total penalty amount is \$352,500.⁵² We disagree with Gexa's assertion that its non-compliance is a misunderstanding of the terms and

⁴⁹ Exhibit C (PUBLIC_VERSION), Attachment 3, Gexa Supplemental Filing in Response to ALJ Ruling.

⁵⁰ The non-modifiable standard terms and conditions that Gexa omitted is considered an incident.

⁵¹ Gexa submitted its Final Compliance Period 2 report and documents – December 13, 2018; ED staff found Gexa out of compliance – October 4, 2019; Gexa filed its Motion for Waiver Request, mentioning an amendment– December 6, 2019; ALJ ruling requesting Gexa to submit its contracts into the record – February 18, 2020; Gexa filed its response to Ruling, including its contract and amendment to the contract in the response (Exhibit D) – March 3, 2020

⁵² Penalty for 357 non-compliant days is calculated from the first business day after the filing is due and every business day thereafter. RPS Compliance Report was due on December 13, 2018, therefore the penalty is calculated from December 14, 2018 through December 6, 2019. [\$500 for the incident + (\$500 * first 10 days) + (\$1,000 * remaining 347)] = \$352,500.

conditions.⁵³ Gexa had opportunities to use the correct standard terms and conditions when it signed the contract in 2015, when it retired its RECs, and when it filed its compliance report, but it failed to use the correct terms as required under the RPS Program rules.

Gexa knew its obligations, and yet it submitted non-compliant contract language. Therefore, we impose the penalty, which should deter Gexa and other market participants from violating Commission rules.

TURN/CUE's Opening Comments on the Proposed Decision state that the penalty should be assessed at \$1,441,500 based on the day the Gexa's contract was executed in 2015, or at \$975,500 based on the first day that RECs were delivered under the contract.⁵⁴ In its reply comments, Gexa states that TURN/CUE's argument is contrary to Resolutions E-4720 and E-5143, which each specify a scheduled penalty from the first business day after the filing is due and every business day thereafter.⁵⁵ Gexa further states that the penalty amount should be calculated for 244 days instead but does not support its rationale for the reduced number of days. While we agree with Gexa's reply that the penalty should be based on the first business day after the filing is due and every business day thereafter, we disagree with Gexa's calculations based on 244 days. Therefore, Gexa shall pay a penalty of \$352,500.

5. Payment of Penalty

Payment of Scheduled Penalties shall be submitted to the Commission's Fiscal Office, 505 Van Ness Avenue San Francisco, CA 94102, in the form of a

⁵³ Exhibit C (PUBLIC_VERSION), Gexa Supplemental Filing in Response to ALJ Ruling on March 3, 2020 at 27.

⁵⁴ See TURN/CUE Opening Comments on the PD at p.5-7.

⁵⁵ See Gexa's reply comments at p. 7.

certified check, payable to the 'California Public Utilities Commission for credit to the State General Fund.'⁵⁶

6. 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.

7. Comments on Proposed Decision

The proposed decision of Administrative Law Judges Lakhanpal and Sisto in this matter was mailed to the parties in accordance with Section 311 of the Pub. Util. Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on January 11, 2022 by CalWEA and jointly by TURN and CUE, and reply comments were filed on January 18, 2022 by Gexa.

We have reviewed Opening Comments on the Proposed Decision and replies and addressed them accordingly in this decision.

8. Assignment of Proceeding

Clifford Rechtschaffen is the assigned Commissioner, and Manisha Lakhanpal and Carolyn Sisto are the assigned Administrative Law Judges in this proceeding.

Findings of Fact

1. Gexa Energy California LLC (Gexa) filed its Final Renewables Portfolio Standard (RPS) Compliance report for Compliance Period 2014-2016 (Compliance Period 2) on December 13, 2018.

⁵⁶ See Res E-4720.

2. Energy Division found that Gexa's RPS contract with NextEra Power Marketing (NextEra) was out of compliance with long-term contracting requirements under the RPS program rules.

3. Energy Division's Compliance Determination Notice disallowed 148,187 renewable energy credits (RECs) that would count towards Gexa's procurement quantity requirement and assessed a \$3,704,675 penalty.

4. Gexa's contract with NextEra did not include all the required non-modifiable RPS standard terms and conditions.

5. Gexa's contract did not include specific language under the modifiable terms and conditions to demonstrate that it was at least a ten-year-long contract to qualify as an RPS long-term procurement contract.

6. In response to Energy Division's Compliance Determination Notice, Gexa did the following - (a) filed a waiver request for procurement quantity requirement for Compliance Period 2, (b) requested reversal of the Energy Division's assessment that its contract is not a long-term contract, and (c) retroactively amended the contract on December 6, 2019, to include the missing non-modifiable and modifiable standard terms and condition and specific delivery terms.

7. CalWEA's comments and CUE and TURN's joint comments supported Energy Division's Compliance Determination and opposed Gexa's waiver request.

8. A long-term contract is a key feature of the RPS program and a primary requirement for meeting compliance.

9. Gexa's sales were reduced to zero sales six months after it executed the contract with NextEra in December 2015, as Gexa stopped serving load after the second quarter of 2016.

10. We find that Gexa purchased, took delivery of, and retired 0.25 percent of Gexa's total retail sales in 2013 as portfolio content category 3 RECs, including the entire 863 RECs required under the applicable long-term contract requirement for Compliance Period 2.

11. Gexa's REC Agreement requires that the first REC delivery date was no later than April 1, 2017, while the latest delivery date is no later than April 1st following the end of the applicable Compliance Period, which would have ended on December 31, 2027.

12. Gexa's waiver request is based on its submission that its retired RECs should not have been disallowed.

13. Until Gexa corrected the underlying contract terms and conditions, it was out of compliance with the RPS program rules.

14. For non-compliance with the required use of non-modifiable standard terms and conditions, Gexa was out of compliance for 357 days from December 14, 2018 (the first business day after the RPS compliance filing was due), through December 6, 2019 (the day the corrected contract information was filed).

Conclusions of Law

1. RPS contracts of any length must include the non-modifiable standard terms and conditions for compliance with the California RPS program.

2. Commission rules do not authorize retroactive amendments to contract language during the compliance period and/or after the compliance reports are filed.

3. Given the totality of the circumstances, Gexa knew its obligations, and yet it submitted non-compliant contract language.

4. Gexa purchased and retired the entire quantity of RECs needed to meet its RPS obligation for Compliance Period 2, including the 863 RECs required under a long-term contract for Compliance Period 2.

5. Factual circumstances limited to Gexa's contract show that Gexa's REC Agreement grants Gexa the authority to procure RECs over ten years.

6. Since we are not disallowing Gexa's procurement amounts, the waiver request is moot and requires no further discussion.

7. Gexa's Final Compliance Report was out of compliance with our regulatory requirements as its REC Agreement with NextEra failed to contain all of the required standard terms and conditions in its contract terms.

8. Pursuant to Commission Res E-4720, it is reasonable for Gexa to pay a penalty of \$352,500 assessed at \$500 per incident plus \$500 per day for the first ten days and \$1,000 for each of the remaining 347 days that it was out of compliance.

9. No hearings were necessary on the issues addressed in this decision.

10. The proceeding remains open.

O R D E R

IT IS ORDERED that:

1. Gexa Energy California LLC is penalized \$352,500 for failing to comply with the Renewables Portfolio Standard reporting requirements.

2. Within 30 days of the effective date of this order, Gexa Energy California LLC shall make the payment of \$352,500 to the Commission's Fiscal Office, 505 Van Ness Avenue, San Francisco, CA 94102, in the form of a certified check, payable to the California Public Utilities Commission for credit to the State General Fund.

3. Rulemaking 18-07-003 remains open.

This order is effective today.

Dated January 27, 2022, at San Francisco, California.

ALICE REYNOLDS

President

CLIFFORD RECHTSCHAFFEN

GENEVIEVE SHIROMA

DARCIE HOUCK

Commissioners