

Decision 07-11-025 November 16, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

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

**OPINION ON AMENDED PETITION FOR MODIFICATION OF
DECISION 04-06-014 REGARDING STANDARD TERMS AND CONDITIONS**

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ATTACHMENT A – Adopted Language for Standard Terms and Conditions

**OPINION ON AMENDED PETITION FOR MODIFICATION OF
DECISION 04-06-014 REGARDING STANDARD TERMS AND CONDITIONS**

1. Summary

In 2004, the Commission adopted 14 standard terms and conditions (STCs) to be used in contracts executed to procure electricity pursuant to the California Renewables Portfolio Standard (RPS) Program. (Decision (D.) 04-06-014.) We specified that the adopted language with respect to five STCs may be modified by parties, but the adopted language with respect to nine STCs may not be modified by parties, or may be modified only in part.

Two parties jointly file a petition for modification of D.04-06-014, and a subsequent amended petition for modification. As amended, petitioners seek: (a) reduction in the number of non-modifiable STCs, (b) elimination of all other STCs or, in the alternative, elimination of the current modifiable STCs and conversion of the remaining non-modifiable STCs to modifiable STCs, and (c) a clear and expedited process for reviewing subsequent changes to the remaining STCs.

The relief requested in the amended petition is granted in substantial part, and denied in all other respects. In particular: (a) the number of STCs which are non-modifiable is reduced, (b) remaining non-modifiable STCs are converted to modifiable STCs but current modifiable STCs are not eliminated, and (c) the expedited process for review of subsequent changes to STCs is adopted as recommended by parties, with some clarification regarding the preferred approach in the limited case of universal changes to non-modifiable STCs.

2. Procedural Background

On June 9, 2004, we adopted STCs for contracts pursuant to the RPS Program. (D.04-06-014.) On February 1, 2007, Pacific Gas and Electric Company (PG&E) and Southern California Edison Company (SCE) jointly filed a petition for modification of D.04-06-014. On February 28, 2007, responses to the petition were filed by Independent Energy Producers Association (IEP) and the Center for Energy Efficiency and Renewable Technologies (CEERT). On May 17, 2006, petitioners requested permission to reply to the responses. On May 18, 2007, the request was denied given that a proposed decision (PD) was ready to be filed within days.

On May 22, 2007, a PD was filed and served. The PD granted the petition in part, and denied the petition in all other respects. On June 8, 2007, comments were filed by CEERT, and on June 11, 2007 by San Diego Gas & Electric Company (SDG&E) and petitioners. On June 18, 2007, IEP and petitioners filed reply comments.

On June 15, 2007, petitioners jointly filed an amended petition for modification. On June 19, 2007, SCE filed supplemental comments in support of the amended petition. Responses in support of the amended petition were filed on June 29, 2007 by CEERT, and on July 2, 2007 by IEP and SDG&E. On July 9, 2007, petitioners filed reply comments in further support of the amended petition.

3. Timeliness of Petition

A petition for modification must be filed within one year of the effective date of the decision proposed to be modified. If filed later, the petition must explain why it could not have been presented within one year. The petition may

be summarily denied if the late submission is not justified. (Rule 16.4(d) of the Commission's Rules of Practice and Procedure (Rules).)

Even though the petition was filed more than two and one-half years after the decision on STCs, we find the petition to be timely for the following reasons. Petitioners persuasively explain that the items on which they now seek modification have developed over time through experience with the RPS Program. They correctly point out that we anticipated the possibility of later refining initial contract language as parties and the Commission gained experience. (D.04-06-014, p. 6.) The experience within the first year had not ripened the issues sufficiently, in contrast to the situation more than two and one-half years later.

Moreover, CEERT correctly points out that related issues were presented during review of the 2007 RPS procurement plans. Given that the petition for modification had been filed, we deferred consideration to our decision here. Thus, the petition, as amended, is timely.

4. Development of STCs and Changes to STCs

The RPS legislation requires that the Commission shall adopt STCs to be used by all electrical corporations in contracting for eligible renewable energy resources. (§ 399.14(a)(2)(D).¹) The development of these STCs has been the subject of extensive work. The work began in 2003, and has continued into 2007. A brief description of that process will provide useful background in which to understand the amended petition.

¹ All statutory references are to the Pub. Util. Code unless noted otherwise.

4.1. Initial Work in 2003 and 2004

In July 2003, we declined to adopt an interpretation of the legislation that would have required a complete, comprehensive, standardized contract. Rather, we adopted a more limited interpretation and application of STCs. We granted the request of CEERT and SCE for parties to have further opportunity to negotiate particular STCs and language. (D.03-07-061, pp. 55-59, Ordering Paragraphs (OPs) 27 and 28.)

In September 2003, Energy Division conducted workshops in an effort to facilitate negotiations among parties. Parties did not reach agreement. In October 2003, the Administrative Law Judge (ALJ) ordered that parties file briefs to identify terms and conditions to be standardized.

By joint ruling dated March 8, 2004, the assigned Commissioner and ALJ identified 26 terms and conditions to be standardized, proposed some as “may be modified” and some as “may not be modified,” and ordered a further round of briefs to propose specific language for each of the 26 STCs. A settlement conference was held on April 21, 2004, but parties were unable to reach agreement.

A PD was issued in May 2004, on which parties filed comments and reply comments. In June 2004, we adopted 14 STCs in D.04-06-014, some being modifiable by parties and others not, as summarized below:

**LIST OF STANDARD TERMS AND CONDITIONS
(D.04-06-014, Appendix A)**

LINE No.	STC No.	ITEM	MODIFIABLE	
			Yes	No
1	1	CPUC Approval		X
2	2	Definition and Ownership of RECs		X
3	3	SEP Awards, Contingencies		X
4	4	Confidentiality		X [1]
5	5	Contract Term		X
6	6	Eligibility		X
7	7	Performance Standards/Requirements	X	
8	8	Product Definitions	X	
9	9	Non-Performance or Termination Penalties and Default Provisions	X	
10	12	Credit Terms	X	
11	15	Contract Modifications		X [2]
12	16	Assignment		X
13	17	Applicable Law		X
14	18	Application of Prevailing Wages	X	

[1] Modification is limited to permitting additional disclosure only.

[2] Modification is limited to terms that are modifiable.

Thus, rather than adopt an entire, complete, standardized contract, and rather than adopt potentially hundreds or dozens of individual STCs, we narrowed the number from 26 identified by the assigned Commissioner and ALJ to a more limited set of 14. With minor modifications, we adopted the proposal of CEERT Parties,² which we described as:

² CEERT Parties were CEERT, PG&E, IEP, SDG&E, and The Utility Reform Network.

“...an integrated one, where the contract terms and conditions are intended to work together. In general, such an approach is preferable to an agglomeration of disparate terms and conditions selected in a mix-and-match fashion from a range of parties, which can sometimes result in confusion and inconsistency.” (D.04-06-014, p. 5.)

The May 2004 PD did not identify which STCs could be modified by negotiation of parties, and which could not, even though the March 8, 2004 joint ruling had proposed this differentiation. CEERT Parties (which included PG&E), SCE and CalWEA Parties³ brought this to our attention in comments on the PD. As a result, our adopted decision specifically provided that some terms are non-modifiable. (D.04-06-014, p. 16.) In particular, five terms are modifiable by parties and nine are not modifiable by parties (or modifiable only in part).

Parties did not at the time clearly raise, and the decision did not specifically address, the issue of future changes. Our intention, however, was to adopt “year one” STCs in order to get the process moving. We were open to considering changes over time but, consistent with typical Commission practice, the items were adopted until specifically and knowingly modified. As discussed more below, we affirmed this view in a subsequent decision.

4.2. Extending STCs to All Contracts

We gave further consideration to STCs in 2006, and adopted four non-modifiable STCs for contracts between RPS projects on the one hand and either energy service providers (ESPs) or community choice aggregators (CCAs)

³ CalWEA Parties were the California Wind Energy Association (CalWEA), the California Biomass Energy Alliance, and Vulcan Power Company. (D.04-06-014, pp. 1 and 3.)

on the other. (D.06-10-019, OP 20.) In doing so, we said that it is obvious all contracts for RPS-eligible generation must have some standard terms:

“We think it is obvious, however, that all contracts for RPS-eligible generation (whether with large utilities, small utilities, multi-jurisdictional utilities, ESPs, or CCAs, and no matter what their duration) must ensure that RPS buyers and sellers are buying and selling the same thing, with the same environmental attributes, for approved contractual periods, with the same legal requirements related to basic contractual elements. The non-modifiable terms and conditions were originally adopted to encourage statewide consistency and transparency of contracts that were the result of utilities’ solicitations for RPS procurement. These goals remain valid for contracts for RPS procurement that are not the result of utility solicitations or bilateral utility contracts.[54] We therefore will require, until further notice, that all RPS contracts of non-utility LSEs [load serving entities] include the following sections from Appendix A to D.04-06-014 :

- a. Definition of ownership of RECs [renewable energy credits];
- b. Eligibility;
- c. Assignment;
- d. Applicable law.

[54] Utilities’ RPS contracts remain subject to D.04-06-014, unless and until revisions to the standard terms and conditions are made.”

(D.06-10-019, pp. 32-33.)

In reaching this order with respect to LSEs other than utilities, we narrowed the number of required STCs from the six determined necessary by the ALJ to four. Nonetheless, we expressly decided that certain STCs must apply not only to utility contracts but all RPS contracts. And importantly, we specifically

said the STCs in D.04-06-014 apply for utility RPS contracts unless and until revisions are made.

4.3. Changes to STCs Due to Senate Bill 107

In September 2006, the three large investor-owned utilities (IOUs) submitted model procurement contracts within their 2007 procurement plans for our review. Also in September 2006, Senate Bill (SB) 107 was signed by the Governor (to become effective January 1, 2007). (Stats. 2006, Ch. 464.) In November 2006, the ALJ directed parties to address what changes, if any, would be required in the model contracts as a result of SB 107.

Based on proposals and comments, in February 2007 we ordered that certain changes be made in the model contracts to conform with provisions of SB 107. These included a specific definition for REC, a modified STC 2 (regarding "Definition and Ownership of RECs," with the term "Environmental Attributes" changed to "Green Attributes"), and modified contract language on release of certain project information. (D.07-02-011, pp. 38-45, OP 2.) In May 2007, based on a petition for modification, we further modified the term Green Attributes. (D.07-05-057.)

4.4. Future Modifications to STCs

The issue of the time and method to change STCs, including changes (if any) to non-modifiable STCs, became more focused in late 2006 with the filing of certain advice letters (ALs) for Commission consideration and approval. These ALs concerned specific RPS contracts for individual projects with developers. The contracts in a few cases contained changes to non-modifiable STCs. Energy Division recommended that some ALs be converted to applications for more formal consideration. (See, for example, Application (A.) 07-01-002 and A.07-01-003.)

As noted above, the issue was also presented by large IOUs in late 2006 during review of the IOUs' 2007 RPS procurement plans. PG&E proposed that changes to non-modifiable STC be permitted through the AL process. SCE proposed adoption of changes to both modifiable and non-modifiable STCs in its 2007 procurement plan model contract. SCE stated that if such changes were not allowed, it would need to publicly state it would be unable to enter into its own model contract. The issue was also brought into focus by SB 107, as well as the February 1, 2007 joint petition for modification of D.04-06-014.

5. Requested Relief

Petitioner initially sought three forms of relief:

- a. Clarification that RPS-obligated entities may propose changes in STCs as part of the review of their annual RPS Procurement Plans,
- b. Lifting of all current restrictions on negotiation of designated STCs, and
- c. Clarification that all RPS contracts should be submitted by AL for approval through Commission resolution.

As amended, petitioners now seek:

- a. Reducing the non-modifiable STCs to: the definitions of Green Attributes, RECs, and CPUC Approval,
- b. Elimination of all other STCs or, in the alternative, conversion of remaining non-modifiable STCs to modifiable STC and elimination of current modifiable STCs, and
- c. Clear, expedited processes for reviewing subsequent changes to STCs.

We address separately below each specific relief requested in the amended petition. In summary, first we reduce the number of STCs which may not be modified from nine to four. Second, we convert five remaining non-modifiable (or partly modifiable) STCs to modifiable STCs. We decline to eliminate currently modifiable STCs. We require that each contract address each of the ten modifiable STCs (where applicable), but the language may be negotiated by parties. Third, we affirm existing orders and protocols regarding a clear process for reviewing subsequent changes to STCs.

5.1. Reduce Non-Modifiable STCs

Petitioners' first request is the removal of the restriction on negotiations of all terms and conditions, with limited exceptions. Petitioners' proposed exceptions are retention of non-modifiable standard terms for (a) CPUC Approval, and (b) the definitions of Green Attributes and RECs. These exceptions are respectively relative to STC 1 and part of STC 2.

Petitioners' proposal is unopposed, and is affirmatively supported by several RPS project developers and entities.⁴ Both buyers and sellers desire greater flexibility to reach deals, and petitioners assert the:

“primary public interest served by the RPS program is the increase in renewable energy at the most reasonable cost. These goals must not be subsumed in the name of consistency that neither buyers nor sellers continue to want [footnote deleted], particularly when the Commission relied on those buyers and sellers to determine the level of consistency desirable to achieve the ends of the RPS program.” (Joint Amended Petition, p. 8.)

⁴ Supporters include Calpine Corporation; Caithness Corporation; PPM Energy Inc.; Horizon Wind Energy, LLC; enXco; IEP; CEERT and SDG&E.

We largely agree. We previously stated that the “level of detail that is required for fully developing standard terms and conditions is something that falls better within the abilities of the parties to determine, rather than the Commission.” (D.03-06-071, mimeo., p. 57.) This belief led us in 2003 to grant parties’ request for additional time to negotiate particular language, followed by workshops, briefs and a settlement conference. In 2004, we adopted STCs proposed by a group of parties, with little modification, and we have implemented non-modifiable specific language only sparingly. We continue to follow that approach here.

At the same time, we reaffirm that we do not blindly adopt proposals, even when they are broadly supported. Rather, we have an obligation to ensure that our decisions “are supported by the record and in the public interest.” (D.04-06-014, mimeo., p. 4.) We are persuaded by petitioners here that more flexibility generally has merit and is in the public interest as long as the fundamental principles behind those STCs are fulfilled.

Thus, we grant the first requested relief by removing restrictions on negotiations of STCs, with limited exceptions. As explained below, we agree with petitioners that the exceptions (i.e., terms not subject to modification) should be STC 1 (CPUC Approval) and STC 2 (definition and ownership of RECs), but including all (not just part) of STC 2. We also include STC 6 (Eligibility), and STC 17 (Applicable Law) as non-modifiable terms.

5.1.1. STC 1: CPUC Approval

This term defines what constitutes a final Commission order. Petitioners propose retaining the designation of this provision as “may not be modified.” We agree. This is an area wherein the Commission cannot, and does not, delegate its authority to parties. (D.04-06-014, pp. 5, 13.)

Parties propose improved language as part of the amended petition, which we adopt, as shown in Attachment A. Further, in comments on the PD, PG&E suggests deleting the entirety of subsection (c), pointing out that the Commission has eliminated the requirement to identify incremental and baseline procurement. (PG&E Comments at p. 7 citing D.06-10-050 at p. 3.) We adopt PG&E's recommendation. Subsection (b) adequately addresses procurement satisfying RPS Program obligations, including APT and the 1% annual growth in APT. This is consistent with the Commission's most recent treatment in D.06-10-050. No further differentiation is necessary.

We remain open to additional language improvements. As explained below with regard to the third requested relief, parties may propose further changes, when and as needed, using efficient and simple methods.

5.1.2. STC 2: RECS and Green Attributes

STC 2 is composed of two parts. The first part defines Green Attributes, including but not limited to RECs. It also states what else is and is not included in Green Attributes. The second part addresses conveyance of Green Attributes.⁵ Petitioners have separate recommendations for the two parts.

5.1.2.1. Part 1: Definition

Petitioners propose retaining the designation of "may not be modified" for the definitions of Green Attributes and RECs. We agree. It is in the public interest to have uniform definitions of critical terms, such as the term here. The

⁵ The second part is the last paragraph of STC 2 beginning with: "3.4 Green Attributes. Seller hereby provides and conveys..." (D.07-02-011, p. 43.)

language in this part of STC 2 is the same as adopted in D.07-02-011, as modified by D.07-05-057, and we do not repeat it here.

5.1.2.2. Part 2: REC Conveyance

Petitioners propose elimination of the Green Attributes conveyance provision in STC 2 or, in the alternative, that this provision be designated as modifiable and revised as shown in the amended petition. In support, petitioners state that this part of STC 2 now requires the seller to convey all project-related Green Attributes to the buyer. Petitioners argue that buyers may wish to separately procure energy, capacity and Green Attributes, while sellers may wish flexibility to optimize sales.

We are not persuaded that this part of STC 2 should be eliminated or made modifiable. The law requires that we adopt STCs to be used by all electrical corporations in contracting for RPS electricity, and that:

“A contract for the purchase of electricity generated by an eligible renewable energy resource shall, at a minimum, include the renewable energy credits associated with all electricity generation specified under the contract.” (§ 399.14(a)(2)(D).)

Petitioners do not reconcile the apparent inconsistency between their proposal and the law.

Even if the inconsistency is resolved, we do not want to here disrupt the process, nor prejudge the outcome, that we are pursuing in R.06-02-012. That is, pursuant to the provisions of § 399.16 we are currently working with stakeholders in R.06-02-012 to assess whether or not a market for the trading of RECs is a reasonable approach to assist the state reach energy, greenhouse gas and other goals. We are also assessing whether a REC market is in the best interests of all concerned, including ratepayers and the public. To the extent it may be, we are assessing a range of policies regarding how to make a market in

tradable RECs reasonably viable, efficient and equitable. Even if permissible under the law, it is premature to unbundle the REC in STC 2 until decisions are made in R.06-02-012.

As a result, we neither eliminate the Green Attributes conveyance provision in STC 2, nor make it subject to parties' negotiation. Parties may make proposals as appropriate in R.06-02-012. Parties may also propose changes to STC 2 using the methods to change non-modifiable STCs described below (e.g., petition for modification).

Nonetheless, petitioners propose some limited modifications in the language (e.g., deleting unnecessary words which reference a transaction confirmation, and changing "unit" to "project"). We adopt the revisions for this part of STC 2, as shown in Attachment A, along with a clarification regarding conveyance of all such attributes from the project as directed by statute.

We recognize that certain words in STC 2 have differing effect depending on the type of project to which they are applied. This is an unavoidable reality of standardized contract terms. Furthermore, both the Commission's and the parties' understanding of how certain phrases and words contained in the Green Attribute term function will likely evolve over time. Nonetheless, it would be imprudent at this time to allow parties to tailor this term to meet specific project characteristics. If we decide to establish a tradable REC market, consistency in this term will be of the utmost importance. Accordingly, we order Energy Division to ensure that all outstanding contracts comply with this decision.

5.1.3. STC 6: Eligibility

This term addresses qualification of the project as an Eligible Renewable Energy Resource (ERR) certified by the California Energy Commission (CEC),⁶ and qualification of the project's output under the requirements of the California RPS Program. Petitioners propose elimination of this item as an STC or, in the alternative, that it be designated as modifiable and revised as shown in the amended petition. We decline to adopt this recommendation or the alternative.

Petitioners argue that this term "has caused substantial confusion among RPS sellers regarding the standards that apply to representations with respect to maintaining eligibility." Further, they state that the "concept of eligibility remains important and must be included in RPS contracts, but requiring the precise language needed to do so is unnecessarily restrictive." (Amended Petition, Attachment C, pp. 8-9.)

We agree that the concept remains important and therefore decline to eliminate it as an STC or to permit modification of it going forward. We agree, however, that the original term's language was confusing and adopt modifications in hope of resolving any misunderstanding.

The revised language proposed in the PD helped clarify the issue but could be read to have shifted the change in law risk entirely onto the seller. In comments on the PD, parties expressed concern. IEP, for example, characterized this as a "sea change in the regulatory compact that will likely permeate and chill development and investment ..." (Comments on PD, p. 3.) It was not our intent

⁶ The CEC is responsible for certifying ERRs. (§ 399.13.(a).)

to shift the change in law risk entirely onto the seller and therefore we decline to adopt the revisions proposed in the PD.

PG&E, IEP and others seek revised language that would only apply “eligibility criteria in existence at the time of the initial energy delivery date.” (PG&E comments on PD, p. 4.) We cannot foresee how or why eligibility criteria may be modified or updated overtime and believe PG&E and IEP’s suggested language goes too far in insulating sellers from what may be very reasonable and minor updates to the eligibility criteria. We prefer SDG&E’s approach discussed below.

SDG&E proposes the removal of the risk of contract default as a result of change in law. We believe this change would resolve the confusion created by the original language. Therefore, we adopt SDG&E’s proposal to include the following as the last sentence of STC 6:

“To the extent a change in law occurs after execution of this Agreement that causes this representation and warranty to be materially false or misleading, it shall not be an event of Default if Seller has used commercially reasonable efforts to comply with such change in law.”

We believe this language clarifies the effect of the original language while respecting that it is the CEC’s statutory responsibility to determine eligibility. This modification mitigates the seller’s change in law risk while leaving to the CEC determinations of whether specific projects should be grandfathered for RPS purposes.

Petitioners also proposed some minor wording improvements (e.g., change “unit” to “project;” delete needless reference to “party;” delete reference to undefined capitalized term “Transaction”). The PD proposed that these more minor changes be adopted, and we do so, as shown in Attachment A.

5.1.4. STC 17: Applicable Law

This term provides that the agreement is governed by California law, and that each party waives its rights to a jury trial. Petitioners propose elimination of this item as an STC or, in the alternative, that it be designated as modifiable and revised as shown in the amended petition. We decline to adopt this recommendation or the alternative.

In support, petitioners argue that buyers and sellers must ensure that they can revise and update this provision without the need for a Commission proceeding. Petitioners say, for example, that the California Supreme Court has found pre-dispute waivers of jury trials to be unenforceable under California law. Counterparties should, according to petitioners, have the flexibility to acknowledge this and other changes in law.

Petitioners correctly argue that changes in law are inevitable. We disagree, however, that changes in law merit eliminating this term entirely, or making it modifiable at the discretion of the parties. Rather, it is reasonable to require that the contract contain a term clearly stating what is understood to be the applicable governing law.

The issue appears to be whether existing and proposed RPS procurement contracts adequately address how parties will treat changes in law. We recently discussed this, encouraged IOUs to consider including a change in law clause, and provided an example. (D.07-02-011, pp. 32-33 and Appendix C.) To the extent petitioners' concern is how to treat changes in law, we renew our encouragement for IOUs to address "such situations directly in model contracts." (*Id.*, p. 32.) We are not convinced that the solution is to eliminate governing law as an STC, or to make it modifiable.

Petitioners also contend that no reason exists for the exact language of this provision to be standardized. To the contrary, this provision is necessary because we have been presented with at least one proposal for a contract to be subject to the laws of a state other than California.

As a general matter, these contracts should be subject to California law. This is a California program under California statutes (e.g., § 399.11 of the Pub. Util. Code). It is implemented by electrical corporations doing business in California, is overseen by California government, and is for the benefit of California citizens and ratepayers. No party persuasively argues to the contrary.

Accordingly, it is reasonable to require this term as an STC. Moreover, this item is not so volatile, nor the words so hard to craft, that the term needs be eliminated or made modifiable. Nonetheless, we agree with petitioners that the language may be improved by including the introductory phrase: “to the extent enforceable at such time” before the phrase dealing with waiver of jury trials. We adopt this recommendation, as shown in Attachment A.

5.2. Convert Remaining Non-Modifiable STCs to Modifiable

Petitioners’ second request is the elimination of all other STCs. In the alternative, petitioners request conversion of remaining non-modifiable STCs to modifiable STC and elimination of current modifiable STC. We adopt the alternative in part. The result is summarized in the following table, and explained below.

ADOPTED LIST OF STANDARD TERMS AND CONDITIONS

LINE No.	STCs No.	ITEM	MODIFIABLE	
			Yes	No
1	1	CPUC Approval		X
2	2	RECs and Green Attributes		X
3	3	SEP Awards, Contingencies	X	
4	4	Confidentiality	X	
5	5	Contract Term	X	
6	6	Eligibility		X
7	7	Performance Standards/Requirements	X	
8	8	Product Definitions	X	
9	9	Non-Performance or Termination Penalties and Default Provisions	X	
10	12	Credit Terms	X	
11	15	Contract Modifications	X	
12	16	Assignment	X	
13	17	Applicable Law		X
14	18	Application of Prevailing Wages	X	

5.2.1. Decline Elimination of All Other STCs

We retain four terms as non-modifiable (CPUC Approval, RECs and Green Attribute, Eligibility, Applicable Law). Petitioners request the elimination of the remaining ten modifiable STCs. We decline to do so.

Each of the ten remaining terms is important, and each contract should contain something on each item, to the extent applicable. Each contract, for example, should address important matters such as contract duration (STC 5: Contract Term), certain expectations (STC 7: Performance Standards), applicable definitions (STC 8: Product Definitions), and consequences of failure (STC 9: Non-Performance or Termination Penalties and Default Provisions). The desire for flexibility does not outweigh the state's interest in each contract containing something on a minimum number of important terms. In fact, STCs must include "performance requirements for renewable generators."

(§ 399.14(a)(2)(D).) Even if we desired to grant this part of petitioners' request, we could not do so.

We do not require a term to be included if it is not applicable, however. For example, a term on supplemental energy payments (SEPs) need not be included if the seller is not seeking SEPs. Nonetheless, unless specifically not applicable, each of the ten modifiable terms should be included in some manner.

5.2.2. Convert Remaining Non-Modifiable to Modifiable STC

In the alternative, petitioners recommend conversion of remaining non-modifiable STCs to modifiable STCs, and elimination of current modifiable STCs. We adopt this recommendation in part.

First, we convert the five remaining non-modifiable STCs to modifiable STCs. We state these five terms to be clear, and convert them from non-modifiable (or partly modifiable) to modifiable: STC 3 (SEPs), STC 4 (Confidentiality), STC 5 (Contract Term), STC 15 (Contract Modifications), and STC 16 (Assignment). We do this because we are persuaded by petitioners that greater flexibility will improve parties' ability to complete deals, and that strict uniformity in these five terms is unnecessary.

For example, we initially required contracts to be for 10, 15 or 20 years, or, if different, to state that Commission approval was required. We recently relaxed this condition in response to SB 107. (D.06-10-019, D.07-05-028.) While we could adopt non-modifiable replacement language, we find it reasonable in the current context to allow parties to agree upon their own language, as long as the term of the contract (its duration) is stated. This is similarly true for the other items.

In comments on the PD, PG&E recommends elimination of STC 3 (SEPs). In support, PG&E cites passage of Senate Bill 1036 (signed into law on October 14, 2007) which, according to PG&E discontinues the current SEP process.

PG&E is correct that SB 1036 changes the SEP process. Nonetheless, we decline to adopt PG&E's proposal at this time. We already permit parties to exclude STC 3 from a contract if it is not applicable (e.g., the project does not seek SEPs). This permits PG&E's result, where applicable. For model contracts, however, STC 3 should continue to be included for now. SB 1036 does not become effective immediately. There may be situations in which STC 3 has relevance, particularly to the extent it addresses how to treat above market costs. Moreover, STC 3 is modifiable. We expect parties to modify STC 3 to address relevant matters as necessary. As SB 1036 is implemented in 2008, PG&E and/or other parties may propose more specific wording changes to STC 3, or eventual elimination, but we will not prejudge that result today.

Second, we decline to eliminate the remaining currently modifiable STCs. That is, we do not eliminate but keep the five remaining terms as modifiable. These are: STC 7 (Performance Standards), STC 8 (Product Definitions), STC 9 (Non-Performance Penalties), STC 12 (Credit Terms), and STC 18 (Prevailing Wages). We do this, as stated above, because we believe every contract should contain something on each of these minimal but important items, and in the case of performance requirements, the contract must contain this term.

We point out regarding parties' modifications to any of the ten modifiable STC that such modifications, if any, must continue to be consistent with law and government regulation. For example, parties may modify the STC regarding

confidentiality, but the modified term must still comply with all applicable laws regarding confidentiality, including all Commission orders (e.g., D.06-06-066.)

We grant petitioners' request for more flexibility because we are comfortable with parties in specific contracts crafting their own language for these ten terms. At the same time, we generally expect the principles behind each STC to be honored.

For example, the current STC for contract modification (STC 15) essentially does no more than (a) require any amendment or modification to be executed by both parties in writing and (b) not permit parties to change a non-modifiable term (e.g., change Assignment or Applicable Law). By granting petitioners' request, parties may agree to employ their own language. We expect parties to make clear to Energy Division and the Commission which changes, if any, are substantive. (D.07-02-011, Conclusion of Law 11, p. 68.) This will help facilitate a timely and efficient Commission review.

Similarly, the current STC for assignment (STC 16) essentially requires prior written consent of both parties before assignment of the agreement or, if assigned without consent of the buyer, that the assignee assumes all burdens (so that the buyer is no worse off). While we agree that the parties should have flexibility in crafting the terms of an assignment clause, at the same time, we expect that as buyers the utilities will agree to terms that afford the greatest protection to their ratepayers. For example, in the event of a seller default and assignment of the purchase power agreement, we would expect the utility to take any and all reasonable steps to minimize any costs incurred by its ratepayers that are in addition to those incurred under the contract absent a default. These steps may include utility action against the seller to recoup financial costs the utility's ratepayers may have incurred that are above and beyond the contract costs.

Finally, as explained more below, the “initial” language for each modifiable STCs may be proposed by each electrical corporation with its Procurement Plan, and vetted in the Commission’s process leading to the acceptance, rejection or modification of the applicable Procurement Plan. (§ 399.14(c).) The expectation is that the initial language proposed for inclusion in the model contract must, and the language accepted by the Commission will, incorporate the principles behind each STC, as adopted in previous Commission decisions.

For example, STC 15 on contract modification essentially requires that no amendments or modifications are enforceable unless entered into in writing by both parties. STC 18 on prevailing wages essentially requires that, to the extent applicable, seller shall comply with prevailing wage requirements of § 399.14(h), wherein projects which receive SEPs are defined as “public works” for purposes of the Labor Code. Any initial language proposed by the electrical corporation for its model contract should be consistent with these principles.

5.3. Process for Reviewing Changes to STCs

Third, and lastly, petitioners propose Commission adoption of a clear, expedited process for review of subsequent changes to STCs. Petitioners frame this in three contexts, and we discuss each in sequence.

5.3.1. Universal Changes in Non-Modifiable STCs

Petitioners point out that changes will occur that affect RPS contracting issues, whether by a Commission decision on greenhouse gas matters, a statutory change to the RPS Program, or a court decision on contracting. RPS contract formation may be affected immediately, according to petitioners.

To promptly address necessary changes, if any, petitioners propose a standing item in the Scoping Memo of the RPS implementation proceeding. The

standing item would be to review emerging issues affecting non-modifiable STCs. Petitioners say parties could file a motion to identify the need for a change, with responses due in 20 days. The ALJ may hold a workshop, according to petitioners, to discuss issues in the motion or responses. Petitioners say a PD should be issued within 30 days after responses or a workshop.

We think an even more efficient and timely method is available by using other existing Commission procedures. For example, immediately upon the occurrence of a triggering event (e.g., statutory change, court decision) a petitioner may file a petition for modification. (Rule 16.4.) Responses are due in 30 days, but a petitioner may move for a reduction in the response time if the matter is urgent. (Rules 16.4(f) and 9.1.) The ALJ can direct the filing of briefs, hold a workshop, conduct evidentiary hearing, or proceed in whatever manner might be recommended by parties that moves the matter along quickly while being efficient and equitable within the scope of all matters before the Commission. A PD can be filed as soon as possible. The comment period can be reduced or waived in appropriate circumstances. (Rule 14.6.)

We do not foreclose the use of a Scoping Memo with inclusion of a standing item for review of emerging issues affecting non-modifiable STCs, as recommended by petitioners, when it would otherwise be timely and efficient. There may or may not, however, at any particular time be an open RPS implementation proceeding. That proceeding may or may not include all entities subject to a particular non-modifiable STC.⁷ If one is open, however, the Scoping

⁷ For example, implementation proceedings for RPS Procurement Plans may include PG&E, SCE and SDG&E, and may or may not include other utilities also subject to the

Footnote continued on next page

Memo may include such item, if recommended to the Assigned Commissioner by the ALJ or parties. Alternatively, parties may move to amend the Assigned Commissioner's Scoping Memo, as appropriate. On balance, however, the preferred approach is a petition for modification.⁸

The concern of petitioners and parties with process seemingly masks the real concern. We think the real concern is getting contracts done, so retail sellers can achieve 20% renewables by 2010.⁹

We have said many times, and say again here, that we are committed to making the process work so that all reasonable deals are completed timely. Our responsibility, however, also includes balancing many competing interests. This includes ensuring that ratepayers are protected to the extent feasible against unreasonable outcomes. We will continue to create the foundation, and administer the program, so that retail sellers have a reasonable ability to successfully achieve RPS state policy goals (e.g., 20% by 2010). Parties may

non-modifiable STCs (e.g., Sierra Pacific Power Company, PacifiCorp, Mountain Utilities, Golden State Water).

⁸ Even if a proceeding is open, filing a motion in a proceeding in response to a standing item in a Scoping Memo requires the filer to be a party. If not a party, the filer must also file a motion for party status. In contrast, any person (e.g., RPS developer, financier) may file a petition for modification. (Rule 16.4(e).) Moreover, broad service of a motion (beyond the service list of a particular open RPS proceeding) may be needed in order to provide reasonable notice and opportunity to comment to all affected parties (e.g., those who participated in the underlying proceeding leading to the adoption of an STC; See § 1708). This may require a separate order by the ALJ, with incremental service by the moving party, all at the cost of additional time. On balance, these factors make the petition a more flexible, available, timely and efficient device to address items, as needed.

⁹ In doing so, for example, retail sellers avoid the need to defend themselves from possible penalties.

continue to offer recommendations on how we may improve the process and our administration of the program. We strongly encourage parties, however, to fully employ existing rules and procedures when, as here, there are appropriate existing ways by which to bring concerns to the Commission in a timely fashion.

5.3.2. Updates and Changes to Modifiable STC

Petitioners propose that changes to modifiable STCs be part of the annual RPS Procurement Plan review process. We agree.

Each electrical corporation should propose the language it seeks to use in the ten modifiable STCs. The proposed language should be included in the model contracts submitted in the material presented to the Commission for Commission acceptance, modification or rejection of its RPS Procurement Plan. (§ 399.14(c).) The electrical corporation's proposal should incorporate lessons learned and be consistent with current statute. As necessary, the ALJ may seek additional changes relative to new legislation (as occurred in November 2006 with regard to SB 107), or parties may move for changes as appropriate.¹⁰

Absent reasons otherwise, we generally seek uniformity in the contracts among electrical corporations. We expect electrical corporations to use reasonable efforts to propose consistent and uniform model contract language over time, not only in their own contracts, but as they compare with other entities. These are ultimately modifiable terms, however, and each buyer and seller may negotiate language that differs from the "starting" language as necessary for a particular individual contract.

¹⁰ For example, an electrical corporation may file an amendment to its Procurement Plan pleading to bring its proposal into conformance with new legislation, if and as necessary. (Rule 1.12.)

5.3.3. Continuing Effect of D.07-02-011

Finally, petitioners ask that we affirm statements in D.07-02-011 regarding submission of RPS contracts for Commission consideration. We do so. In particular, RPS contracts may continue, consistent with existing Commission orders, to be submitted for Commission consideration by advice letter.¹¹

5.4. No Retroactive Changes

In 2004, we adopted the proposal of CEERT Parties, with minor modifications. Petitioners now propose revised language for D.04-06-014. We decline to adopt petitioners' proposals. Rather, the changes we adopt here are a result of changes in law (e.g., SB 107) and experience over time with the RPS Program. STCs adopted in 2004 were applicable then, and no modification is necessary to D.04-06-014.

We also note that this order affects D.06-10-019, but that no modification of that order is necessary. That is, D.06-10-019 adopted four non-modifiable STCs for energy service providers and community choice aggregators. The adoption was "until further notice." (D.06-10-019, OP 20.) This order is the further notice regarding STC 2 (RECs and Green Attributes), STC 6 (Eligibility) and STC 16 (Assignment). To ensure notice, we will also serve this order on the service list for R.06-02-012.

Current advice letters with contracts which we have not yet approved, however, should be amended to conform to the decisions herein. That is, for

¹¹ See D.07-02-011, pp. 47-50 (regarding Commission review process). Also see D.05-01-032, pp. 8-13 (regarding advice letter review, disposition and treatment of "problematic" advice letters raising material factual issues or an underlying disagreement regarding interpretation of law or Commission order).

example, electric corporations with pending advice letters should file amendments to the advice letters, as necessary, showing that the contracts contain the language of the four non-modifiable STCs adopted herein. Further, all advice letters filed from today forward must contain the four non-modifiable STCs adopted herein, and be in conformance with all other STCs, as appropriate. Energy Division shall reject pending advice letters that are not in conformance.

5.5. Context of Changes

The modifications we adopt today reflect the fact that the RPS Program continues to evolve. In this context, we point out that substantially granting petitioners' request, as we do here, not only maintains but increases the responsibility of each electric corporation to reach its individual program targets and goals, along with helping the state achieve overall program success.

For example, flexible compliance provisions will in some cases permit an electric corporation to fail to reach program targets but avoid penalties. The increased contracting flexibility granted today, however, is adopted based on the understanding that it will facilitate buyers and sellers completing reasonable deals at just and equitable prices. This should, in turn, permit buyers to achieve RPS Program targets and goals, and reduce the need to rely on flexible compliance. Remaining flexible compliance claims, if any, may need to be more compelling in order to establish that the contracting flexibility permitted here was fully and reasonably utilized.

More specifically, insufficient response to a solicitation is one provision of flexible compliance. Insufficient response might include a buyer and seller being unable to sign a final contract due to unresolved disputes over contract terms. The increased flexibility granted herein, however, is based on the understanding that fewer unresolved disputes over contract language should result. Another

provision of flexible compliance is seller non-performance. The increased flexibility granted herein should permit reasonable contracts to be drafted so there should be fewer cases of seller non-performance. As a result, the need for buyers to rely on these or other flexible compliance provisions should decrease, and the remaining flexible compliance showings necessary to avoid penalties may need to be more compelling (e.g., that each reasonable contract was entered into that could be reasonably completed at a just and equitable price using the contracting flexibility granted in this order).

Thus, while the adopted changes largely reduce the role of the state in establishing a uniform program, they increase the role of buyers and sellers in reaching reasonable outcomes. We have said many times before, and repeat here, that each electric corporation ultimately remains responsible for reasonable RPS Program outcomes, including both the reasonable administration of its RPS contracts and responsible protection of ratepayer interests. (See, for example, D.07-02-011, OP 4.) The increased contracting flexibility authorized herein is in that context.

6. Comments on Proposed Decision

On October 1, 2007, the proposed decision of ALJ Mattson on the amended petition for modification was mailed to the parties in accordance with § 311 of the Pub. Util. Code and Rule 14.2(a) of the Commission's Rules of Practice and Procedure. Timely comments were filed on or about October 22, 2007 by SCE, PG&E, SDG&E, IEP, CEERT and Division of Ratepayer Advocates (DRA). Timely reply comments were filed on October 29, 2007 by SCE and PG&E.

We are persuaded to make certain changes to the proposed decision, and do so in the text above, including the following: STC 1 (CPUC Approval - delete subpart (c)), STC 6 (Eligibility - not include a proposal from the proposed

decision regarding change in law; remove contract default risk related to changes in law, as recommended by SDG&E) and STC 16 (Assignment – convert from non-modifiable to modifiable; clarify that utilities are expected to agree only to modifications that afford the greatest protection to ratepayers). We clarify that current advice letters with contracts which we have not yet approved should be amended to conform with the decisions herein, and Energy Division shall reject pending advice letters which are not in conformance. We include a new section on the context of the changes ordered herein, to clarify the responsibility of each electric corporation to meet RPS Program targets and goals, and the relationship of increasing contracting flexibility with provisions for flexible compliance to meet those targets and goals. We also do not require a verified statement that all changes to modifiable STCs are non-substantive unless otherwise specifically identified, as was included in the proposed decision.

7. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner, and Burton W. Mattson and Anne E. Simon are the assigned ALJs for this proceeding.

Findings of Fact

1. Even though filed more than one year after D.04-06-014, the petition, as amended, is timely.
2. Parties and the Commission have been continuously developing, considering and modifying STCs since 2003.
3. Existing Commission orders direct that, for utilities, five STCs are modifiable by parties, and nine are not modifiable (or modifiable only in part).
4. STC 1 (CPUC Approval) is an area wherein the Commission cannot, and does not, delegate its authority.

5. Petitioners recommend retaining the first part of STC 2 (definitions) as “may not be modified,” no party argues otherwise, and it is in the public interest to have uniform definitions for this item.

6. Stakeholders and the Commission are currently considering in R.06-02-012 whether or not a market for trading RECs is reasonable and, if so, a set of policies that would be optimal.

7. The concept of eligibility in STC 6 is important and must be included in RPS contracts.

8. It is obvious that all contracts for RPS-eligible generation must ensure that RPS buyers and sellers are buying and selling the same thing (STC 6 regarding eligibility).

9. It is reasonable to require that each contract contain a term clearly stating the applicable governing law (STC 17 regarding applicable law).

10. The solution to addressing changes in law is not to eliminate or make modifiable STC 17 (Applicable Law).

11. The RPS Program is implemented by electrical corporations and retail sellers doing business in California, is overseen by California government, and is for the benefit of California citizens and ratepayers.

12. Each of the ten modifiable STCs, where applicable, is an important term.

13. Greater flexibility with regard to five currently non-modifiable STCs (by converting them to modifiable STCs) will improve parties’ ability to complete deals, and strict uniformity for these five terms is unnecessary.

14. The procedural vehicle of a petition for modification of otherwise non-modifiable STCs is preferred over the use of a standing item in the Scoping Memo of an open RPS implementation proceeding.

15. The changes adopted here result from changes in law and experience over time with the RPS Program.

Conclusions of Law

1. The petition for modification, as amended, should be granted in part and denied in part, as set forth in this decision.

2. Modifications to modifiable STC agreed to between the buyer and seller must continue to be consistent with applicable law and government regulations (e.g., confidentiality).

3. No modification should be made to D.04-06-014, and none is needed with regard to D.06-10-019.

4. This order should be effective today to provide necessary changes, clarification and guidance, and to assist electrical corporations, retail sellers and the state continue to work toward achieving RPS program targets, without delay.

O R D E R

IT IS ORDERED that:

1. The February 1, 2007 petition for modification of Decision 04-06-014 jointly filed by Pacific Gas and Electric Company and Southern California Edison Company, as amended on June 15, 2007, is granted as provided in this order, and denied in all other respects. In particular:

- a. Of the total 14 standard terms and conditions (STCs), the number of non-modifiable STCs is reduced from nine to four. The four non-modifiable STCs are: STC 1 (CPUC Approval), STC 2 (RECs and Green Attributes), STC 6 (Eligibility), and STC 17 (Applicable Law). The contract language for these four STCs is modified in part, as shown in Attachment A.

- b. The remaining five non-modifiable STCs are converted to modifiable STCs, and the remaining five modifiable STCs are retained as modifiable STCs. Further:
 - 1. Each of the ten modifiable STCs must be included in each contract, to the extent applicable (e.g., a term for Supplement Energy Payments (SEPs) need not be included if seller is not seeking SEPs).
 - 2. Modifications to modifiable STCs agreed to between buyer and seller must continue to be consistent with law and government regulations (e.g., buyer and seller negotiated changes to confidentiality must still be consistent with law and Commission decisions).
 - c. The process for review of subsequent changes to STCs is consistent with existing Commission rules and orders, and is clarified as follows:
 - 1. A petition for modification is preferred for proposals of universal changes to non-modifiable STCs, but other procedural approaches are not prohibited.
 - 2. Updates and changes to the initial language of modifiable STCs may be proposed in the model contracts as part of the periodic review of Renewables Portfolio Standard Procurement Plans. Electrical corporations shall use reasonable efforts to propose uniform and consistent language in their model contracts over time and among electrical corporations.
2. This order shall also be served on the service list for Rulemaking 06-02-012.

This order is effective today.

Dated November 16, 2007, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN

RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners

ATTACHMENT A
ADOPTED LANGUAGE
FOR STANDARD TERMS AND CONDITIONS

Contracts between electrical corporations and projects selling electricity subject to the Renewables Portfolio Standard (RPS) shall contain non-modifiable language in four standard terms and conditions, as follows.

1. STC 1: CPUC Approval

“CPUC Approval” means a final and non-appealable order of the CPUC, without conditions or modifications unacceptable to the Parties, or either of them, which contains the following terms:

- (a) approves this Agreement in its entirety, including payments to be made by the Buyer, subject to CPUC review of the Buyer’s administration of the Agreement; and
- (b) finds that any procurement pursuant to this Agreement is procurement from an eligible renewable energy resource for purposes of determining Buyer’s compliance with any obligation that it may have to procure eligible renewable energy resources pursuant to the California Renewables Portfolio Standard (Public Utilities Code Section 399.11 *et seq.*), Decision 03-06-071, or other applicable law.

CPUC Approval will be deemed to have occurred on the date that a CPUC decision containing such findings becomes final and non-appealable.

2. STC 2: RECs and Green Attributes

[Note: The first part of STC 2 remains as is. (See D.07-02-011, as modified by D.07-05-057.)]

The second part of STC 2 is revised as follows:

- 3.2. Green Attributes. Seller hereby provides and conveys all Green Attributes associated with all electricity generation from the Project to Buyer as part of the Product being delivered. Seller represents

and warrants that Seller holds the rights to all Green Attributes from the Project, and Seller agrees to convey and hereby conveys all such Green Attributes to Buyer as included in the delivery of the Product from the Project.

3. STC 6: Eligibility

Seller, and, if applicable, its successors, represents and warrants that throughout the Delivery Term of this Agreement that: (i) the Project qualifies and is certified by the CEC as an Eligible Renewable Energy Resource ("ERR") as such term is defined in Public Utilities Code Section 399.12 or Section 399.16; and (ii) the Project's output delivered to Buyer qualifies under the requirements of the California Renewables Portfolio Standard. To the extent a change in law occurs after execution of this Agreement that causes this representation and warranty to be materially false or misleading, it shall not be an Event of Default if Seller has used commercially reasonable efforts to comply with such change in law.

4. STC 17: Applicable Law

Governing Law. This agreement and the rights and duties of the parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of California, without regard to principles of conflicts of law. To the extent enforceable at such time, each party waives its respective right to any jury trial with respect to any litigation arising under or in connection with this agreement.

(END OF ATTACHMENT A)