

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3298

October 17, 2008

Agenda ID #8021

TO PARTIES OF RECORD IN DRAFT RESOLUTION ALJ-227

This draft resolution regarding the modification of Energy Division Resource Adequacy Filing Requirements Citation E-4017-0923-4 (3 Phases Renewables LLC) will be on the agenda at the November 21, 2008 Commission meeting. The Commission may then vote on this draft resolution, or it may postpone a vote.

When the Commission acts on the draft resolution, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own order. Only when the Commission acts does the resolution become binding on the parties.

You may serve comments on the draft resolution. Comments shall be served no later than November 7, 2008. Service is required on all persons on the attached service list. Comments shall be served consistent with the requirements of Pub. Util. Code § 311(g) and Rule 14.5 of the Rules of Practice and Procedure.

Finally, comments must be served separately on Administrative Law Judge McKenzie at mck@cpuc.ca.gov, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ ANGELA K. MINKIN

Angela K. Minkin, Chief
Administrative Law Judge

ANG:k47

Attachment

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-227
Administrative Law Judge Division
November 21, 2008

R E S O L U T I O N

RESOLUTION ALJ-227. Modifying Energy Division Resource Adequacy Filing Requirements Citation E-4017-0923-4 (3 Phases Renewables LLC)

In this Resolution, the Commission considers the appeal by 3 Phases Renewables LLC (Respondent or 3 Phases) of CPUC Resource Adequacy Citation E-4017-0923-4 issued by the Energy Division pursuant to Resolution E-4017. The Citation alleges that the Respondent's Month-Ahead Resource Adequacy filing for May 2008, which was due on April 1, 2008, was not received at the Commission until April 4, 2008, and that on account of this tardiness, Respondent should be fined \$2,500 in accordance with the schedule of penalties set forth in Appendix A to Resolution E-4017.

Background of the Citation Program

The Month-Ahead Resource Adequacy (RA) filing that is the subject of the citation here was required by the Commission in Decision (D.) 05-10-042. In that decision, the Commission implemented a program of resource adequacy requirements applicable to California's three largest investor-owned utilities (IOUs) and all other Load Serving Entities (LSEs).¹ D.05-10-042 noted that the LSEs would be "required to demonstrate that they have acquired the capacity needed to serve their forecast retail customer load and a 15-17% reserve margin

¹ The term LSEs is applied collectively to the IOUs, electric service providers (ESPs) and community choice aggregators.

beginning in June 2006.” (*Mimeo.* at 2.) The Commission also emphasized that the RA filings it would require were not a mere planning exercise, but were designed to assist the California Independent System Operator (CAISO) in meeting operational needs:

Notwithstanding the distinction between planning and operational concerns, however, it is pointless to design a regulatory system that encourages investment in order to create capacity unless that capacity is *actually available* to the grid operator to serve load where it exists in day-ahead, hour-ahead, and real-time circumstances. Because our resource adequacy policy includes this availability dimension, we will not attempt to draw a bright line between planning and operational concerns. We will instead take a pragmatic approach to translating resource adequacy and availability into the operational needs of the CAISO. (*Id.* at 10; emphasis supplied.)

In keeping with this practical approach, D.05-10-042 required each LSE to make a series of RA filings. The annual filing, for example, requires an LSE to show that “it has acquired sufficient resources to satisfy the 90% forward commitment obligation for loads plus reserve requirements for each of the five summer months May-September.” (*Id.* at 87.)

As for the month-ahead RA filing, D.05-10-042 noted that one of its principal benefits would be to allow the Commission, CAISO and the California Energy Commission (CEC) to track migration of existing direct access load from one LSE to another, since “there can be considerable migration of existing [direct access] load among ESPs.” (*Id.* at 91.) To account for such migration, which can increase or decrease the amount of resources that an LSE is required to procure, D.05-10-042 required the month-ahead filings to “include adjustments for positive and negative load growth due to migration. Apart from load changes due to load migration, load forecasts should not be updated from the LSE’s year-ahead filing.” (*Id.*) D.05-10-042 also required the month-ahead submissions to be made by advice letter, and to be served on the CAISO and the CEC. (*Id.* at 93.) D.05-10-042 also agreed with the CAISO that since “there are market power mitigation as well as operational benefits to a confirmation that LSEs are resource adequate a month ahead,” the monthly filings should be due a month in advance of the month to which they pertained. (*Id.* at 91.)

In addition to discussing the informational filings LSEs were required to make, D.05-10-042 also considered the penalties that would be appropriate for non-compliance with these requirements. For example, in the case of a failure to procure enough resources to meet the load forecast in the LSE's Year-Ahead compliance filing, D.05-10-042 declared that a penalty equal to three times the cost of new monthly capacity would be imposed beginning in 2007.² However, the decision recognized that a penalty based on capacity costs would not be appropriate for other forms of non-compliance, such as failure to submit reports on time. To account for such situations, the Commission stated that it would look to the factors for assessing fines laid out in D.98-12-075. (*Id.* at 94.)

Resolution E-4017, under which the citation at issue here was issued, was designed to implement a sanctions program for violations of the reporting requirements set forth in D.05-10-042. The resolution stated that "Staff will be delegated authority to draft and issue citations for specific violations and levy penalties in specified amounts as set forth in Appendix A." The Resolution also set forth a description of the six types of compliance filings that are currently required under the RA program, including the month-ahead compliance filing.³ The resolution noted that one of the justifications for issuing a citation would be "failure to submit load data, forecasts and other compliance filings . . . in the time

² For 2006, the first year for which the filing requirements were applicable, the penalty was set at one and one-half times the cost of new monthly capacity.

³ Resolution E-4017 describes the month-ahead RA adequacy filing as follows:

"Month-Ahead System Resource Adequacy Compliance Filings": (1) a monthly advice letter filing with Energy Division using an approved template which demonstrates: (a) acquisition of 100% of the qualifying system capacity obligation (adjusted forecast plus reserve margin) for a "compliance month" from the qualifying capacity providers maintained by the CAISO and the amount of capacity from each provider; and (b) the sale of any qualifying capacity previously identified in a resource adequacy compliance filing for system resource adequacy requirements, and that the capacity remains fully available to the CAISO; and (2) a monthly load forecast submitted to the CEC demonstrating adjustments to the Preliminary Load Forecast for positive and negative load growth due to load migration.

required.” (Resolution, p. 1.) The Resolution also pointed out that the Commission has authority to impose and collect penalties from public utilities pursuant to Pub. Util. Code §§ 2101-2105, 2107-2108 and 2114, and that under § 394.25 of the Code,⁴ ESPs are subject to enforcement action as if they were public utilities. The Resolution also noted that in 2006 the Legislature enacted § 380, which “directs the Commission to exercise its enforcement powers to ensure compliance with resource adequacy requirements” in a non-discriminatory and cost-effective manner. (*Id.* at 3.)

In addition to establishing the citation program, Resolution E-4017 provides a procedure for appeal. Under this procedure, which is set forth in Section 2.7 of the citation program, an LSE choosing to contest a citation is required to file a notice of appeal within 30 days. The matter is then assigned to an Administrative Law Judge (ALJ), who is directed to set the matter for hearing promptly in San Francisco. The respondent is entitled to be represented by an attorney or other representative at the hearing. The resolution also directs the ALJ to issue a draft resolution resolving the appeal within 30 days after the submission date, which is normally the date on which the hearing concludes. (Resolution, pp. 6-7.)

In this case, the citation was sent to the Respondent via electronic and first class mail on July 25, 2008. On August 13, Respondent stated that it wished to appeal and requested a hearing on the matter. On September 2, 2008, the matter was assigned to ALJ McKenzie. After an exchange of e-mail messages about possible hearing dates, the ALJ sent the parties a message on September 9, 2008 scheduling the hearing for September 18, 2008. The hearing took place as scheduled.

Respondent’s Contentions on Appeal

The facts underlying the citation are simple. The Summary of Evidence set forth in the citation states in full:

Late arrival of May 2008 Month Ahead RA Filing. Late arrival is confirmed by a tracking slip linked to DHL tracking number

⁴ Unless otherwise specified, all further section references are to the Public Utilities Code.

26670430953. Filing arrived April 4th instead of April 1st as required.

In its written Notice of Appeal dated August 13, 2008, 3 Phases does not contest these facts. Instead, it attributes its filing difficulties to understaffing that resulted from being spun off by its former corporate parent, and argues that because it has now addressed these staffing problems, no fine should be imposed:

3 Phases Renewables has in the past year gone through significant business and personnel changes as a result of the spin-off from our former corporate [parent.] Our new corporate entity . . . was, for the aforesaid reasons, understaffed for a time, and personnel losses made it extremely difficult to complete the regulatory compliance filings required of 3 Phases Renewables within the strict timeframes called for by the Commission's rules and regulations. In the past year, 3 Phases Renewables has on occasion[], missed compliance filing deadlines (though only by a day or two). Recognizing the problems that even these minor rule transgressions can create for CPUC staff, 3 Phases Renewables has upstaffed, and with the help of outside legal counsel . . . has established a compliance filing [regime] to ensure that required regulatory submissions are not overlooked or filed in an untimely manner. Given these diligent efforts to correct previous compliance deficiencies, 3 Phases Renewables respectfully requests that the Commission not impose a penalty for the citation which is the subject of this appeal.

The September 18 hearing (and archived e-mails that were subsequently served on all parties on September 19 and October 3) shed further light on why Respondent's month-ahead filing due on April 1, 2008 was late. The office manager of 3 Phases, Melissa Cabrera, testified that she had been on vacation at the end of March, that Respondent's principal, Michael Mazur, apparently thought the monthly filing had been made, and that the matter therefore fell through the cracks. (Tr. 22-25.) Ms. Cabrera first became aware of the problem on April 2, 2008, when she received an e-mail message from the CAISO staff person who normally reviews month-ahead filings. The message stated that the CAISO had not received the filing due on April 1st. After checking, Ms. Cabrera prepared the filing on the appropriate template and sent it via e-mail to the CAISO and the CEC on April 3, 2008. The copy for the Commission, however,

was sent via DHL overnight courier service, because under D.05-10-042, the Commission's copy had to be sent in paper form as an advice letter.⁵ As stated in the citation, this advice letter was not physically received at the Commission's offices until April 4, 2008.

As noted above, Respondent does not dispute that such late filings can cause problems for the Commission's staff.⁶ However, Ms. Cabrera testified that Respondent has worked to eliminate the possibility of further late filings by preparing the templates for future months in advance, so that the filing due for each month can be updated and sent with a minimum amount of effort. She also noted that Respondent has not made any late filings in the months since these changes were implemented. (Tr. 25-26.)

Discussion

Although we appreciate Respondent's candor in describing the circumstances that led to the late filing at issue here, we cannot simply excuse this conduct, as the written appeal of 3 Phases requests. As Respondent concedes and the Energy Division's staff witness confirmed at the hearing, there are definite reasons why staff needs to have all of the month-ahead filings at the same time. Moreover, as indicated by the number assigned to this citation, this is the fourth time that 3 Phases has received a citation on account of a late filing.

⁵ D.05-10-042, *mimeo.* at 93.

⁶ During the hearing, Donald Brooks of the Energy Division gave the following example of why he needs to have all of the month-ahead RA filings at the same time:

[T]here are certain generators that companies buy from, and several companies buying off of one generator can mean that the generator ha[s] sold too much, . . . so I need to have all companies' filings [simultaneously] to know whether any one of them off of a particular generator, for example, is oversold. (Tr. pp. 34-35.)

Mr. Brooks' answer is consistent with D.05-10-042, which noted that one of the purposes of reviewing the year-ahead resource adequacy filings was to "determine that no double-counting of generator capacity by more than one LSE was submitted unless explicitly recognized and called out in documentation." (*Mimeo.* at 90.)

However, the evidence at the hearing established that there are two factors that justify a small reduction of the \$2,500 fine the Energy Division has imposed. The first factor is that, not long after the due date for the month-ahead filing at issue here, the Commission issued D.08-06-031. That decision adopted the Energy Division's proposal to implement electronic filing for required resource adequacy filings through the Commission's File Transfer Protocol (FTP) computer application. In accepting this proposal, the Commission noted that two types of "complexities and difficulties" had been encountered with the advice letter process established by D.05-10-042. First, allocations of certain types of capacity credits had to be sent to LSEs in individual computer files, and these allocations in turn had to be manually input to the relevant compliance templates. This, the Commission noted, "creates the possibility for incorrect typing." (D.08-06-031, *mimeo.* at 18.) Second, the advice letter process used for RA filings does not "provide an easy means for tracking arrival and inputting values from the filings or submission of revisions." (*Id.*) Accordingly, D.08-06-031 granted the Energy Division authority, after a suitable period of testing, to begin requiring use of the FTP application for RA filings.

It seems clear that if electronic filing for month-ahead RA filings had been in effect in April 2008, Respondent's admittedly late filing would have been received by the Commission one day sooner, on April 3. The archived e-mails that were sent to the service list on September 19 and October 3, 2008 indicate that both CAISO and the CEC received Respondent's late filing on April 3, 2008. There is no reason to think that 3 Phases would not also have e-mailed this information to the Commission on April 3 if it had thought the e-mail would be accepted. Under the schedule of fines set forth in Appendix A to Resolution E-4017, if Respondent's filing had been received one day earlier, on April 3, the fine would have been \$500 less.

The second factor favoring a reduction of the fine here is that, as Mr. Mazur of 3 Phases pointed out, the description within the citation of the circumstances justifying the fine is not consistent. On the first page, the block entitled "summary of evidence supporting citation" refers to "late arrival of May 2008 Month Ahead RA Filing." On the second page, the block entitled "specified violation" refers to "failure to file a year-ahead system resource adequacy compliance filing at the time or in the manner required." As Mr. Mazur pointed out at the hearing, this inconsistency shows that even the Energy Division can

sometimes make errors in the substantial amount of paperwork required by the resource adequacy reporting program. (Tr. 11-12.)⁷

For both of the reasons set forth above, we conclude that it is appropriate to reduce the fine in this case from \$2,500 to \$2,000. However, if there are further late filings by 3 Phases, we will not be inclined to look with favor upon appeals of citations issued on account of such behavior.

Comments

Public Utilities Code Section 311(g)(1) requires that a draft resolution be served on all parties, and be subject to a public review and comment period of 30 days or more, prior to a vote of the Commission on the resolution. A draft of today's resolution was distributed for comment to the attached service list. Comments were received on _____.

Findings of Fact

1. On July 25, 2008, the Energy Division issued Citation No. E-4017-0923-4 to Respondent for failure to submit its May 2008 Month Ahead Resource Adequacy filing on time. The citation states that the aforesaid filing was due on April 1, 2008, but was not physically received at the Commission until April 4, 2008.

⁷ Other arguments made by Mr. Mazur at the hearing were less persuasive. For example, he argued that Resolution E-4017 does not require the issuance of citations for non-compliance with the resource adequacy reporting program. (Tr., p. 16.) However, when read in context, it is clear that the passage on which Mr. Mazur relied (which also appears as Ordering Paragraph 3 of the resolution) leaves the choice of a sanction vehicle up to the Commission; it does not suggest that non-compliance should simply be excused:

The issuance of a citation for a specified violation is not mandatory. In enforcing compliance with Resource Adequacy filing requirements, or in response to any Specified Violation, the Commission may initiate any authorized formal proceeding or pursue any other remedy authorized by the California Constitution, the Public Utilities Code, other state or federal statutes, court decisions or decrees, or otherwise by law or in equity. (Resolution, p. 4.)

2. In accordance with the procedures set forth in Resolution E-4017 and summarized in the citation, Respondent properly served notice of its appeal of the citation on August 13, 2008.

3. Under Resolution E-4017, a Load Serving Entity that appeals a citation issued pursuant to the resolution has a right to a hearing before an ALJ.

4. The hearing on Respondent's appeal of Citation No. E-4017-0923-4 was held in San Francisco on September 18, 2008. A transcript of the hearing was prepared.

5. The evidentiary record in this case consists of the aforesaid transcript, copies of archived e-mail messages that the ALJ requested at the hearing and that were served on September 19 and October 3, 2008, and Citation E-4017-0923-4 itself.

6. At the hearing, Respondent's office manager testified that the Month-Ahead RA filing for May 2008, which was due on April 1, 2008, was overlooked because she was on vacation. When she learned of the oversight upon her return on April 2, 2008, the office manager prepared the necessary filing and e-mailed it to the CAISO and the CEC on April 3, 2008.

7. At the time the Month-Ahead RA filing for May 2008 was due, the Commission did not accept such filings by e-mail.

8. In D.08-06-031, the Commission authorized the Energy Division to begin accepting resource adequacy submissions by e-mail using the FTP computer application, rather than requiring advice letters in paper format, as had been required since D.05-10-042.

9. If the new policy announced in D.08-06-031 had been in effect in April 2008, it is likely that Respondent's Month-Ahead filing for May 2008 would have been received at the Commission one day earlier, on April 3, 2008.

10. There is an inconsistency in the description on pages 1 and 2 of Citation E-4017-0923-4 as to the conduct on account of which the citation was issued.

Conclusions of Law

1. Based on the evidentiary record, we find that Respondent failed to submit its required Month-Ahead RA filing on the April 1, 2008 due date.

2. Based on Finding of Fact Nos. 7, 8 and 9 and the inconsistency in Citation E-4017-0923-4 as to the nature of the filing that was late, it is appropriate to

reduce the fine imposed on Respondent from \$2,500 to \$2,000. As so modified, Citation E-4017-0923-4 is upheld.

3. Respondent must submit full payment of the fine within 30 days to the Commission's Fiscal Office. Payment shall be in the form of a certified check made payable to the State Treasury for the credit of the State's General Fund.

4. If timely payment is not made, then Respondent shall be considered in default. Upon default, any unpaid balance of the fine imposed herein shall accrue interest at the legal rate of interest for judgments, and the Energy Division and the Commission may take any action provided by law to recover unpaid penalties and to ensure compliance with applicable statutes and Commission orders, decisions, rules, directions, demands or requirements.

5. In compliance with Section 311(g) and paragraph 2.7.9 of Resolution E-4017, the draft resolution on this appeal was served October __, 2008 on the Energy Division and on Respondent.

6. If the Respondent is unsatisfied with the resolution of this appeal, Respondent may file an application for rehearing of this resolution under § 1731 and pursue further appeal rights under § 1756.

7. For purposes of *ex parte* communications, this matter is designated as adjudicatory under Rule 8.1 of the Commission's Rules of Practice and Procedure.

IT IS ORDERED that:

1. Pursuant to Resolution E-4017 and the discussion herein, Citation E-4017-0923-4 is upheld as modified.

2. Respondent is ordered to pay the fine of \$2,000 to the Commission's Fiscal Office, 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102, within 30 days of the effective date of this order. Payment must be in the form of a certified check, made payable to the State Treasury for the credit of the State's General Fund. The number of this resolution shall be included on the face of the check.

3. The appeal process for this citation is closed.

4. This resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on _____, the following Commissioners voting favorably thereon:

PAUL CLANON
Executive Director

INFORMATION REGARDING SERVICE

I have provided notification of the foregoing Draft Resolution ALJ-227 to the electronic mail addresses on the attached service lists, as well as a Notice of Availability by U.S. mail

Dated October 17, 2008, at San Francisco, California.

/s/KRIS KELLER

Kris Keller

Energy Citation Number E-4017-0923-4

The Service List will be as follows:

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