

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Order Instituting Rulemaking to Consider Annual
Revisions to Local Procurement Obligations and
Refinements to the Resource Adequacy Program.

R.08-01-025
(Filed January 21, 2008)

**MOTION OF THE CALIFORNIA WIND ENERGY ASSOCIATION, DIVISION OF
RATEPAYER ADVOCATES, AMERICAN WIND ENERGY ASSOCIATION, SOLAR
ALLIANCE, LARGE-SCALE SOLAR ASSOCIATION, AND CENTER FOR ENERGY
EFFICIENCY AND RENEWABLE TECHNOLOGIES
FOR EXPEDITED RECONSIDERATION OF MAY 27 ALJ'S RULING**

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Dated: June 1, 2009

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The California Wind Energy Association (CalWEA), Division of Ratepayer Advocates (DRA), American Wind Energy Association (AWEA), Solar Alliance (SA), Large-Scale Solar Association (LSA), and Center for Energy Efficiency and Renewable Technologies (CEERT) (“Joint Parties”) together move for expedited reconsideration of the Administrative Law Judge’s (ALJ) Ruling issued in this proceeding on May 27, 2009 (“May 27 ALJ’s Ruling”). That ruling denied CalWEA’s motion to reopen this phase of R.08-01-025 for the purpose of receiving the special report of the North American Electric Reliability Corporation (NERC) on “Accommodating High Levels of Variable Generation” (“NERC Special Report”) into the record. This Motion is filed and served pursuant to Rule 11.1 of the Commission’s Rules of Practice and Procedure.

**THE MAY 27 ALJ'S RULING ERRONEOUSLY DENIES CALWEA'S MOTION
AND MUST BE EXPEDITIOUSLY RECONSIDERED AND REVERSED.**

A. The May 27 ALJ's Ruling is in Conflict with Commission Rule 13.14.

Rule 13.14 of the Commission’s Rules of Practice and Procedure expressly provides for motions to “set aside submission and reopen the record for the taking of additional evidence.” Such a motion “shall specify the facts claimed to constitute grounds in justification thereof,

including material changes of fact or of law alleged to have occurred *since the conclusion of hearing*” and shall include a “brief statement of proposed additional evidence, and explain why such evidence was not previously adduced.”¹ If this demonstration is made, the timing of the motion is clearly *not* a reason to deny the request, but rather is the recognized basis of a motion that is *contemplated* to arise *after* hearings or the submission of the proceeding.

1. CalWEA’s Motion to Reopen Set Forth More Than Sufficient Grounds to Justify The Reopening of the Record.

On May 6, CalWEA filed its motion to reopen this phase of R.08-01-025 for purposes of receiving the NERC Special Report into the record (“CalWEA Motion to Reopen”). By that motion, CalWEA fully met the requirements of Rule 13.14 by demonstrating, as follows, why the NERC Special Report should be admitted into the record as highly relevant to Phase 2 of this proceeding and why that relief could not be sought prior to the filing of reply comments on Phase 2 issues:

- (a) The method for assessing the resource adequacy (RA) value of intermittent renewables is at issue in this proceeding. Specifically, the Commission, in Phase 2 of R.08-01-025, “is being asked ... to determine the methodology that the utilities will use to assess the RA value of the wind and solar generation that they purchase.”²
- (b) NERC is the organization (1) “charged with developing and enforcing the standards needed to assure the reliable operation of the electric grid in the U.S. and Canada,” (2) “conducts assessments of the adequacy of electric supplies to meet anticipated demand, monitors the bulk power system, and plays a central role in auditing, training, and certifying those who operate the electric grid in North America,” and (3) “is subject to the oversight of federal regulatory agencies in the U.S. and Canada.”³

¹ Commission Rules of Practice and Procedure, Rule 13.14; emphasis added.

² CalWEA Motion to Reopen the Record, at pp. 1-3. See also, R.08-01-025 Phase 2 Scoping Memo (September 15, 2008), at p. 4.

³ CalWEA Motion to Reopen to Reopen, at p. 2.

(c) On April 16, 2009, after the close of the record in this proceeding,⁴ NERC issued its Special Report on “Accommodating High Levels of Variable Generation.” In the “Resource Adequacy Planning” section of that report, NERC “directly addresses and provides a recommendation concerning the methods that utilities and control area operations should use to assess the RA value of intermittent renewable resources” and establishes what “will be considered ‘best practice’ and the industry standard for the assessment of the RA value of intermittent renewables.”⁵

(d) As such, CalWEA correctly acted to bring this report to the Commission’s attention as “highly relevant” to the assessment of the RA value of intermittent renewable resources at issue in Phase 2.⁶ While the Commission had conducted its workshop and received comments on the issue of the resource adequacy value of intermittent renewables as of February 27, 2009, the CalWEA Motion to Reopen the record to include the NERC Special Report was filed promptly after its issuance and prior to the scheduled issuance of a Proposed Decision that would, among other things, address the issue of the RA value of intermittent renewable resources.

2. CalWEA’s Motion to Reopen Should Not Have Been Denied on the Grounds That There Was a Lack of Time for Sufficient Review of the NERC Special Report.

Despite these circumstances that clearly warranted a reopening of the record in this phase of R.08-01-025 to include the NERC Special Report, the May 27 ALJ’s Ruling takes action at odds with the Commission rules and its own acknowledgment of the report’s relevance to Phase 2 by denying the CalWEA Motion to Reopen. The May 27 ALJ’s Ruling concludes that “the cited portion of the NERC Report appears to be relevant to the issues that were considered in Phase 2 of this proceeding.”⁷ Yet, it relies on the timing of the CalWEA Motion to Reopen to reject the request. Specifically, the May 27 ALJ’s Ruling concludes that the CalWEA Motion to Reopen to Reopen must be denied on the ground that it was “too late to allow the report to be

⁴ The record in this proceeding was presumably closed as of February 27, 2009, the date for filing of reply comments on all Phase 2 issues except for the LCR study and local procurement obligations.

⁵ CalWEA Motion to Reopen, at pp. 2 - 3, with supporting citations to the NERC Special Report, at n. 5 and n. 6.

⁶ CalWEA Motion to Reopen, at p. 3.

⁷ Administrative Law Judge’s Ruling on Motion to Reopen Record to Accept Report, p. 1.

considered in Phase 2” because “it was filed just nine days prior to the scheduled release of the proposed decision (PD) on Phase 2 issues.”⁸

The Joint Parties submit that this reasoning undermines the rationale for Rule 13.14. Rule 13.14 anticipates the need for reopening the records and the setting aside of submission to allow for the taking of additional evidence, including “material changes of fact or of law alleged to have occurred since the conclusion of the hearing.”⁹ Clearly, the underlying principle for allowing this additional evidence to come in after the submission of the proceeding is to ensure that the Commission’s decision is based on a full and appropriate record. Further, if timing relative to the Proposed Decision was of concern, the ALJ had the authority to shorten the time for responses to the motion.¹⁰ If the ALJ had so ordered, the Commission would have learned prior to the issuance of the Proposed Decision that the CalWEA Motion to Reopen was not opposed by any party and instead was expressly supported by DRA as being relevant to, and providing clear direction on, the method that should be used to assess the RA value of intermittent resources.¹¹

Thus, to reject the CalWEA Motion to Reopen based on the lack of time for parties to respond to the NERC Special Report, is contrary to the intent of Rule 13.14. The May 27 ALJ’s Ruling, therefore, wrongly rejects the CalWEA Motion to Reopen and must be reversed.

B. The May 27 ALJ’s Ruling Results in Unequal Treatment of Parties and “Relevant” Motions in the Proceeding.

Repeatedly, the Commission has re-opened records and set aside submissions, *even after* a Proposed Decision or draft Resolution has been issued, to ensure the propriety of the records

⁸ May 27 ALJ’s Ruling, at pp. 1-2.

⁹ Commission Rule of Practice and Procedure, Rule 13.14(b).

¹⁰ Commission’s Rules of Practice and Procedure, Rule 11.1(e).

¹¹ DRA Response to CalWEA Motion to Reopen, at pp. 1-2.

on which its final decisions are based.¹² Despite the fact that the CalWEA Motion to Reopen was timely in bringing the NERC Special Report to the Commission’s attention, the motion was not addressed in the Proposed Decision and instead was the subject of the separate May 27 ALJ’s Ruling. In contrast, a motion to “supplement the record” filed just three weeks before the CalWEA Motion to Reopen by Southern California Edison Company (SCE), Pacific Gas and Electric Company (PG&E), and The Utility Reform Network (TURN) (SCE/PG&E/TURN Motion) has been accorded very different treatment in this case. Namely, the SCE/PG&E/TURN Motion, filed on April 14, 2009, asking to “supplement the record” with a 2008 Resource Adequacy Report issued by the Commission’s Energy Division staff on March 23, 2009, is both addressed in the Proposed Decision and *granted* on the simple ground that “the report provides information *relevant* to the issues in Phase 2.”¹³

The Joint Parties submit that, since both the CalWEA Motion to Reopen and the SCE/PG&E/TURN Motion were filed in order to bring relevant new information into the record, they should be accorded equal treatment, even if it means a modest delay to the timing of the Final Decision. As suggested by DRA in its Response to CalWEA’s motion, if the motion had been granted, parties could have been allowed to comment on the NERC report in their comments on the PD.

Given that both reports – the 2008 Resource Adequacy Report and the NERC Special Report – are relevant to this proceeding, the Commission must reverse the May 27 ALJ’s Ruling and *revise* the Proposed Decision to treat both motions and reports equally and include both reports as part of the record on which any final decision in this phase of R.08-01-025 is based.

¹² See, e.g., D.07-11-025 (permitting and considering amendment to petition for modification after Proposed Decision on original petition was issued); Resolution ALJ-209 (December 6, 2007), withdrawing draft Resolution in response to motion for consideration of additional information.

¹³ Proposed Decision, at p. 4; emphasis added.

C. The Commission Should Take Official Notice of the NERC Special Report.

Rule 13.9 of the Commission’s Rules of Practice and Procedure states: “Official notice may be taken of such matters as may be judicially noticed by the courts of the State of California.” Judicial notice pursuant to California Evidence Code §§451 and 452 extends to the actions of state and federal “boards,”¹⁴ as well as decisions, regulations, and “official acts” of state and federal legislative, executive, and judicial departments. In this case, NERC is “subject to oversight by the U.S. Federal Energy Regulatory Commission [FERC] and governmental authorities in Canada” and its adopted reliability standards are enforceable not only by FERC, but by NERC itself.¹⁵ Thus, the NERC Special Report is among those “actions” that can be judicially noticed and, in turn, officially noticed by this Commission. The Joint Parties request that the Commission take official notice of the NERC Special Report.

D. Other Procedural Options Are Available That Would Allow the Commission to Fully Consider the NERC Special Report.

The Joint Parties appreciate that the May 27 ALJ’s Ruling may have been motivated by a concern that taking the time to consider the NERC Special Report would necessarily delay the issuance of proposed and final decisions in this matter. We appreciate that this case includes issues that are important to the ongoing administration of the Resource Adequacy program. However, the record in this case also shows that the issue of the RA value of wind and solar resources is a crucial (and contentious) long-term policy issue, given the commitment that the state has made to renewable resource development. As a result, it is incumbent upon the Commission to decide this issue based on a full consideration of all relevant information,

¹⁴ See also, California Government Code §18576.

¹⁵ NERC Special Report, at p. 2; NERC Overview at <http://www.nerc.com/page.php?cid=1|7>.

including the NERC Special Report, a major new study from the organization with responsibility for ensuring the reliability of the electrical grid in North America.

The Commission certainly has procedural options available to it that would allow it both to process the ongoing, time-sensitive RA issues in an expeditious fashion and to give full consideration to the important long-term issue of the RA value of intermittent renewable resources. For example, the Commission could sever the issue of the RA value of wind and solar from the PD and decide that issue in a later order after the parties have had a chance to comment on the NERC Special Report.

As another option, the Commission should note that a number of the parties in this case, including CalWEA/AWEA/Solar Alliance, LSA, and the Utility Reform Network (TURN), specifically urged the Commission to delay any change in the RA counting rule for wind and solar for at least a year, to allow the review of additional studies. These parties all provided post-workshop comments recommending that the Commission not act now with respect to intermittent capacity values, but rather take the time to develop more complete and up-to-date ELCC studies and to take advantage of work pending at other venues with respect to the integration of intermittent resources.¹⁶

These recommendations remain particularly valid now in light of the release of the NERC Special Report and underscore the value of undertaking a careful review of this specific, substantive issue separate from other more mechanical RA program questions that must be decided in advance of contracting for next year's RA capacity. This approach makes further

¹⁶ See, CalWEA/AWEA/Solar Alliance's February 17, 2009 Opening Comments, at pages 7-8 [CalWEA recommends that the Commission should not change the current counting rule until additional, updated ELCC studies are available.]; TURN's February 17, 2009 Opening Comments at pages 11-13 [TURN recommends maintaining the current calculation approach for 2010 to allow for "fully baked" ELCC analysis.]; and LSA February 17, 2009 Open Comments, pages 5-6 [Maintain the current counting conventions for solar facilities for the next few years to allow time to see if the coming integration study efforts at CAISO, WECC and FERC provide additional useful information on solar's capacity credits], and LSA February 27, 2009 Reply Comments, pages 1-2 and *passim* [There is value to take time and review studies to determine solar capacity value].

sense in light of the fact that, practically speaking, major new additions of wind and solar resources are not expected to come on-line for several years due to the need to complete major new transmission projects to the areas with the most active development of new wind and solar resources. This fact counsels for taking the time necessary to make a fully-informed decision on important policy matters such as the issue presented in this case.

E. Expedited Action Is Required.

For the foregoing reasons, the Joint Parties urge the Commission to act quickly to grant this motion for reconsideration of the May 27 ALJ's Ruling. Currently, opening and reply comments on the May 15 Proposed Decision (PD) are due on June 4 and June 9, respectively, but the PD itself cannot be considered until the Commission's meeting of June 18. As set forth in an accompanying motion, the assigned ALJ or Commissioner should shorten the time for responses to this motion to Monday, June 8, 2009, and act expeditiously thereafter to grant this motion and sever the issue of the RA value of intermittent renewable resources from the current Proposed Decision for later consideration in this or the next RA proceeding.

CONCLUSION

The Joint Parties respectfully ask for expedited reconsideration of the May 27 ALJ's Ruling in this proceeding. The Commission should revise the procedural schedule for this case to permit the NERC Special Report to be included in the record and its implications fully considered by the parties and the Commission in deciding the important issue of the RA counting rule to apply to the state's intermittent renewable resources. The Joint Parties, therefore, recommend that the CalWEA Motion to Reopen be granted, the NERC Special Report accepted into the record, and the issue of the RA value of intermittent renewable resources removed from consideration in the pending Proposed Decision and addressed either in a subsequent decision in this phase of R. 08-01-025 or in Phase 1 of the next RA proceeding.

Respectfully submitted,

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Dated: June 1, 2009

CERTIFICATE OF SERVICE

I, Patrick G. McGuire, am over the age of 18 years and employed in the City of Berkeley, Alameda County. My business address is 2560 Ninth Street, Suite 213A, Berkeley, California 94710.

On June 1, 2009, I served the within document **MOTION OF THE CALIFORNIA WIND ENERGY ASSOCIATION, DIVISION OF RATEPAYER ADVOCATES, AMERICAN WIND ENERGY ASSOCIATION, SOLAR ALLIANCE, LARGE-SCALE SOLAR ASSOCIATION, AND CENTER FOR ENERGY EFFICIENCY AND RENEWABLE TECHNOLOGIES FOR EXPEDITED RECONSIDERATION OF MAY 27 ALJ'S RULING** in R.08-01-025, on the service list in R.08-01-025, in the manner prescribed the Commission's Rules of Practice and Procedure, and with separate delivery of hard copies by U.S. Mail to Assigned Commissioner Peevey and Assigned ALJ Wetzell, at San Francisco, California.

Executed on June 1, 2009, at San Francisco, California.

/s/ PATRICK G. MCGUIRE
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