

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to
Integrate and Refine Procurement
Policies and Consider Long-Term
Procurement Plans.

Rulemaking 10-05-006

**COMMENTS OF THE LARGE-SCALE SOLAR ASSOCIATION (“LSA”)
ON PROCUREMENT REQUIREMENTS SUMMARY DOCUMENT
(A.K.A. “RULEBOOK”) – TRACK III**

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June 21, 2010

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I. INTRODUCTION

The Large-Scale Solar Association (“LSA”)¹ appreciates the opportunity to comment on the Procurement Requirements Summary Document (the “Rulebook”) attached to the Administrative Law Judge’s (“ALJ”) “Ruling on Procurement Requirements Summary Document (A.K.A. “Rulebook”) – Track III” issued on June 2, 2010 in this proceeding. The ruling requested comments on the Rulebook by June 21, 2010.

LSA’s comments focus on the critical threshold question raised at the June 14 prehearing conference: Should the end game of the Rulebook initiative be creation of a comprehensive guide to California Public Utilities Commission (“CPUC” or “Commission”) procurement requirements or, instead, issuance of a set of rules that supersede all prior CPUC procurement decisions and become the single, legally-binding expression of CPUC procurement requirements?² LSA believes that a compendium of CPUC procurement requirements would benefit participants in the CPUC’s procurement proceedings and California energy markets, and appreciates the thought and hard work reflected in the draft Rulebook. However, LSA views the additional effort to develop a single set of legally-

¹ LSA represents ten of the nation’s largest developers and providers of utility-scale solar generating resources. Collectively, LSA’s members have contracted to provide over 5 gigawatts (“GW”) of clean, sustainable solar power under contract to California’s load-serving entities. Its members develop, own and operate various types of utility-scale solar technologies, including photovoltaic and solar thermal system designs. For more information, see <http://www.largescalesolar.org>

² June 14, 2010 Prehearing Conference, Reporter’s Transcript (“R.T.”) 43-48.

binding procurement rules as burdensome, unwise and legally suspect. The Scoping Memo should establish that the goal for the Rulebook in this proceeding is to develop a useful compendium to energy procurement rules rather than a legally binding document superseding prior Commission procurement decisions.

II. DISCUSSION

A. The Effort Required To Make The Rulebook A Legally Binding Document Superseding Prior Commission Procurement Decisions Would Be Unduly Burdensome And Could Overwhelm This Proceeding.

Even without the Rulebook, the magnitude of this proceeding is daunting. The order instituting this rulemaking established three separate tracks that are now running concurrently. The timing is tight, the issues are complex, contentious and interwoven, and the stakes are high. Identification of the long-term need for new system and local reliability resources through 2020, timely adoption of the investor-owned utilities' bundled resource plans, and resolution of Track 3 issues – many of which have bedeviled Commission proceedings for years – are ambition enough for one proceeding. To the already “immense challenges” of this proceeding (acknowledged at the prehearing conference)³, the Rulebook initiative imposes a reexamination of almost a decade of prior CPUC procurement proceedings. The Rulebook's table of authorities cites no less than thirty-three separate CPUC decisions. The text of the 132 page Rulebook references multiple statutes and Public Utilities Code sections. And, as the ALJ ruling notes, the Rulebook may inadvertently omit other relevant decisions and laws related to energy procurement.

Comparing the Rulebook to the sources of the CPUC's procurement rules and developing a useful roadmap to the underlying legal sources is a reasonable objective for this proceeding, albeit one that should have a lesser priority than many other proceeding goals. Developing a Rulebook with the degree of accuracy necessary for it to supersede and replace all of the thirty-three or more prior CPUC decisions addressing energy procurement would require an order of magnitude greater commitment of focus, time and resources from the proceeding participants and decision-makers. The effort to make the Rulebook into a

³ R.T. at 81.

legally-binding statement of procurement requirements could overwhelm this proceeding and threaten achievement of its other, much more important objectives.

B. Giving The Rulebook Legal Effect Is Unwise Because Of The High Risk Of Unintended Changes To Procurement Requirements.

LSA also questions the wisdom of trying to create a legally-binding restatement of all energy procurement requirements, particularly in summary form. Any such restatement will necessarily deviate from the source document. The ALJ ruling accompanying the Rulebook stated at page 2 that the “Rules in the Rulebook should be expressed in unambiguous, simple, and concise language.” While this objective is laudable for a compendium, it is troublesome for a controlling legal document. Translating the original language in thirty-three (or more) CPUC decisions and multiple statutes into simple and concise summaries in the Rulebook will unavoidably alter aspects of the original meaning, no matter the care the translators exert.

For example, at page 2-4, the Rulebook defines “Energy Service Provider (ESP)” as: “A non-utility entity licensed by the CPUC that offers retail electric service to customers within the service territory of a distribution utility. Electricity is delivered using the distribution system of a distribution utility.”

The Rulebook cites “D.07-05-029 and PU Code 218.3” as the basis for this definition. However, the citation to D.07-05-029 is apparently an error, as that decision addresses demand response agreements, not energy service providers, and a word search of the decision did not find the terms “Energy Service Provider” or “ESP”.

While such an error – if caught – can be corrected in the final document, a comparison of the Rulebook definition of “ESP” to Public Utilities Code §218.3 illustrates the potential for significant differences between the Rulebook and its sources. Public Utilities Code §218.3 defines not an “*Energy* Service Provider” but rather an “*Electric* Service Provider.” The Rulebook’s substitution of “Energy” for “Electric” is puzzling – is it intended to create a category of providers that differ from those defined in Section 218.3? Is it trying to encompass natural gas retail providers as well as electric? Or is the wording change simply inadvertent?

Even beyond this change in terminology, the Rulebook definition differs substantively from its cited statutory origin. For example, the Rulebook definition would cover independent solar energy producers who retain ownership of a PV unit and sell the electricity to a retail customer for use on the property where the unit is located, while Section 218.3 would not.⁴ Such a difference might matter little in a compendium, but it could matter a great deal if the Rulebook were to have independent legal force.

In addition, even if the Rulebook were initially perfected, the creation of a single legal procurement requirements document means the Commission and participants in energy procurement proceedings will have to devote significant on-going time and resources to maintain and update the Rulebook as procurement requirements evolve. Given the outpour of federal and state energy legislation, the pace of energy market changes, and the multiplicity of Commission proceedings related to energy procurement, it will be no small task continually to update the Rulebook with the degree of accuracy required if it is to have the force and effect of law. If attention flags or resources disappear, the Rulebook will soon contain obsolete requirements which appear to be binding but which actually conflict with Commission decisions.

C. If The Rulebook Is To Supersede Prior Commission Decisions, Notice And An Opportunity To Be Heard Must Be Given To The Parties To The Proceedings In Which Those Decisions Were Issued.

LSA questions whether the Rulebook can, through this proceeding, supersede and replace all thirty-three or more prior CPUC energy procurement decisions consistent with Public Utilities Code §1708. Section 1708 provides that the Commission may at any time “rescind, alter or amend any order or decision made by it,” but only “upon notice to the parties, and with an opportunity to be heard as provided in the case of complaints.” LSA doubts whether the notice and process in this proceeding suffice under Section 1708 to create a Rulebook which, simply by restating the procurement requirements embedded in thirty-three or more Commission decisions using “simple and concise” language, will necessarily

⁴ PU Code §218.3(c) provides that ““Electric service provider” does not include an independent solar energy producer, as defined in Article 3 (commencing with Section 2868) of Chapter 9 of Part 2.”

alter or amend those decisions. If the Rulebook is intended to supersede those prior Commission decisions, notice and an opportunity to be heard must be given to the parties to the proceedings in which the decisions were issued.

III. CONCLUSION

The effort to make the Rulebook into a stand-alone statement of Commission procurement requirements having force and effect of law would divert considerable attention from much more important proceeding objectives, risk unintended changes and confusion, and require additional notice and an opportunity to be heard under Public Utilities Code §1708. LSA urges that the Scoping Memo establish that the goal for the Rulebook in this proceeding is to develop a useful compendium to energy procurement rules rather than a legally binding document superseding prior Commission procurement decisions.

Respectfully submitted,

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June 21, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing ***Comments of the Large-Scale Solar Association (“LSA”) on Procurement Requirements Summary Document (A.K.A. “Rulebook”) – Track III*** on all parties of record in R.10-05-006 by transmitting an email message with the document attached to their email addresses of record and, for those parties without an email address of record, by mailing a properly addressed copy by first-class mail with postage prepaid to each party on the Commission’s official service list for this proceeding.

This Certificate of Service is executed on June 21, 2010, at Berkeley, California

/s/ Linda Agerter
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R.10-05-006

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