

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

COLORADO AND SANTA FE ENERGY  
COMPANY, LLC

Plaintiff,

v.

NEXTANT, INC.,

Defendant.

No. C 12-00011 JSW

**NOTICE OF TENTATIVE  
RULING AND QUESTIONS FOR  
HEARING**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE  
NOTICE OF THE FOLLOWING QUESTIONS FOR THE HEARING SCHEDULED ON  
MAY 4, 2012, AT 9:00 A.M.:

The Court has reviewed the parties' papers and, thus, does not wish to hear the parties  
reargue matters addressed in those pleadings. If the parties intend to rely on authorities not  
cited in their briefs, they are ORDERED to notify the Court and opposing counsel of these  
authorities reasonably in advance of the hearing and to make copies available at the hearing. If  
the parties submit such additional authorities, they are ORDERED to submit the citations to the  
authorities only, with reference to pin cites and without argument or additional briefing. *Cf.*  
N.D. Civil Local Rule 7-3(d). The parties will be given the opportunity at oral argument to  
explain their reliance on such authority. The Court suggests that associates or of counsel  
attorneys who are

1 working on this case be permitted to address some or all of the Court's questions contained  
2 herein.

3 The Court **tentatively denies** Nexant's motion to dismiss, and the parties each shall  
4 have fifteen (15) minutes to address the following questions:

- 5 1. Does Nexant contend that the conditions at issue were "conditions precedent" or  
6 concurrent conditions? It appears to take inconsistent positions in its briefs. (*Compare*  
7 Motion at 2 *with* Reply at 5.)
- 8 2. Colorado has alleged that as to the first quarter, it did not deliver RECs within the  
9 Delivery Period because it could not do so by virtue of WREGIS' structure. It also  
10 explains that it used the attestation method, because Nexant stated that it would only  
11 accept RECs that were delivered within the Delivery Period. Does Nexant have any  
12 additional authority to show that these facts are, as a matter of law, insufficient to allege  
13 that Colorado's performance of the conditions was excused?
- 14 a. What is Colorado's response to Nexant's argument on reply that Colorado  
15 cannot argue that it was excused from performing by operation of law, because  
16 WREGIS is not a governmental entity?
- 17 b. How would Section 14 of the Master Agreement impact this argument, if at all?
- 18 3. Does Nexant have any additional authority to support its argument that RECs are  
19 "goods" as that term is used in California Commercial Code 2105(1)?
- 20 a. Apart from the issue of materiality, are there any other factual disputes that  
21 Colorado contends would preclude the Court from determining whether, as a  
22 matter of law the perfect tender rule precludes it from showing that Nexant  
23 breached the contract?
- 24 4. What is Nexant's response to the argument that the breach of contract and breach of  
25 implied covenant claims are not duplicative?

26 Dated: May 2, 2012

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JEFFREY S. WHITE  
UNITED STATES DISTRICT JUDGE