BEFORE THE PUBLIC UTILITIES COMMISSION OF

THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program	Rulemaking 11-05-005 (Filed May 5, 2011)

OPENING COMMENTS OF THE UTILITY REFORM NETWORK AND THE COALITION OF CALIFORNIA UTILITY EMPLOYEES ON THE ADMINISTRATIVE LAW JUDGE'S RULING SETTING FORTH IMPLEMENTATION PROPOSALS FOR SB 32 AND SB2_1X AMENDMENTS TO SECTION 399.20

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OPENING COMMENTS OF THE UTILITY REFORM NETWORK AND THE COALITION OF CALIFORNIA UTILITY EMPLOYEES SETTING FORTH IMPLEMENTATION PROPOSALS FOR SB 32 AND SB2_1X AMENDMENTS TO SECTION 399.20

Pursuant to the June 27 ruling of ALJ DeAngeles, The Utility Reform Network (TURN) and the Coalition of California Utility Employees (CUE) submit these opening comments on the implementation of the Feed-in Tariff (FIT) program authorized by §399.20 of the Public Utilities Code. These comments reiterate many of the positions articulated in TURN's opening and reply briefs filed on the same topic in R.08-08-009.

I. THE COMMISSION SHOULD CALCULATE AND UPDATE THE MARKET PRICE REFERENT AS THE BASIS FOR ESTABLISHING PRICES PAID TO GENERATORS UNDER §399.20

The Ruling seeks comments on whether the changes to §399.20 reflect legislative intent to move away from the use of the Market Price Referent to another pricing methodology (Questions 2-5). There is no evidence of such a shift in the statutory text. In enacting SBx2 (Simitian), the Legislature amended §399.20 to reflect the fact that §399.15(c) was being modified to remove the provision requiring a market price calculation for purposes of cost containment. Although the Legislature clearly intended to eliminate the market price calculation within the RPS program, there was no intent to substantively modify the SB 32 program. The new language in §399.20(d)(2) is *identical* to the previous wording in §399.15(c). Therefore, the changes to §399.20 should be understood as *technical amendments* rather than an indication of a substantive shift in direction for the SB 32 program.

While TURN/CUE recognize that the language of §399.20(d)(2) may allow for different approaches to setting a long-term market price for conventional electricity,

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it would be a mistake for the Commission to begin a *de novo* exercise of interpretation. The Commission has previously devoted substantial resources to understanding the preferred approach to implementing this requirement. TURN/CUE strongly recommend that the Commission continue the established approach of calculating a Market Price Referent (MPR) using the basic parameters adopted in previous decisions and updated to reflect revised inputs (specifically, gas prices) on a regular basis. This historic approach was understood to be the impact of this section and was the basis upon which TURN supported both the original SB 32 and the technical changes to §399.20 included in SBx2.

There are two basic approaches to pricing offered by §399.20(d). The first relies on long-term electricity prices "for fixed price contracts" executed by an electric utility. Since the major Investor-Owned Utilities (IOUs) do not execute long-term fixed price contracts for conventional resources, there is no easy way to determine long-term electricity prices based solely on these contracts. Long-term contracts are typically tolling agreements for new resources that include a capacity price and payments based on assumed heat rates, the number of starts, and estimated Operations & Maintenance expenses. The actual "market price of electricity" associated with these contracts depends upon the real-world utilization of the unit and the price of natural gas over the life of the contract. TURN/CUE believe that the Commission can use these long-term contracts to provide a reality check on the assumptions used to develop the MPR. But they cannot provide an off-the-shelf data source to determine the long-term pricing specified by the statute.

The second approach is the path already chosen by the Commission. It relies on the development of a proxy plant model using a new combined-cycle plant with fixed fuel prices over various durations (10, 15, 20, 25 years) with updated inputs to reflect changes to various cost components and fuel prices. This approach comports with the statutory scheme, has been fully vetted through extensive litigation, and provides

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an acceptable long-term avoided cost proxy. The approach has been adapted to produce peaking, baseload and as-available prices along with Time-of-Delivery adjustments. It includes all environmental compliance costs including greenhouse gas mitigation and air pollution offsets. There is nothing in the new codification of §399.20 by SBx2 that suggests the Legislature rejected this approach and prescribed something different.

In particular, there is no basis for including new adders to the methodology as previously proposed by various parties unless such adders reflect actual costs incurred by the developer of a conventional gas-fired generation project. Such costs include compliance with any AB 32 regulations adopted by the California Air Resources Board (CARB) or any other air quality regulations promulgated by local air districts. TURN/CUE would agree that the cost of air pollution offsets could reasonably be adjusted to reflect the actual costs likely to be incurred in each local air quality management district. However, this adjustment is not necessary, has a minimal impact on the total long-term price produced by the model, and may overly complicate the process of updating the MPR.

The ruling asks about the "benefits and the drawbacks of continuing to use the MPR" (Question 4). TURN/CUE recognize that the MPR has been critiqued by various parties as unrepresentative of the true cost of renewable energy. However, the legislature has explicitly decided that the §399.20 program will offer contracts with prices set at the long-term price of conventional resources. To the extent that parties believe that the MPR is not representative of prices for conventional electricity, TURN/CUE are open to exploring modifications and adjustments that would ensure the §399.20 price is consistent with the cost of procuring conventional resources having similar production characteristics to renewable FIT projects.

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While it is unlikely that the MPR will continue to be used for cost containment under the RPS program, TURN/CUE believe that the MPR should be updated each calendar year for purposes of the §399.20 program (Question 5). The update can be performed by issuing a draft resolution with comments by parties prior to the Commission approving a final resolution.

II. ESTABLISHING A PRICE BASED ON THE COST OF RENEWABLE RESOURCES WOULD BE CONTRARY TO LAW

Some parties will argue that the Commission should create a price based on the cost of building and operating the renewable energy projects eligible to participate in the FIT program (Question 10). This approach does not comport with §399.20(d)(1) and (d)(2) which specify that the price must be based on electricity procured from conventional sources. It would be legal error for the Commission to reach a different conclusion with respect to the same language that was heavily litigated in previous proceedings.

The Commission approved a string of decisions in various RPS rulemakings interpreting the exact language contained in §399.20(d).[1] All of these decisions conclude that the statutory provision requires the use of conventional power transactions as the basis for setting a price. In response to claims by some parties that these provisions allow the calculation a "market price" tied to the costs of a renewable generating facility, the Commission explicitly rejected this position in two separate decisions:

> In light of a number of party comments on the Draft Decision, we will clarify also what the MPR is not: it does not represent the cost, capacity or output profile of a specific type of renewable generation technology. As is clear in Pub. Util. Code §399.15(c), the MPR is to represent the presumptive cost of

[1] *See* D.03-06-071, D.04-06-015, D.05-12-042, D.07-09-024

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> electricity from a non- renewable energy source, which this Commission, in D.03-06-071, held to be a natural gas-fired baseload or peaker plant.[2]

> The proxy plant, as we have repeatedly noted, does not represent a specific type of renewable generation technology; rather the MPR is to represent the presumptive cost of electricity from a non-renewable energy source. The operating characteristics of renewable energy sources are more properly addressed in the context of the least cost/best fit evaluation of bids, not the MPR.[3]

Given the history associated with Commission implementation of this statutory language, it would be wholly inappropriate to conclude that the Legislature intended §399.20 to lead to a fundamentally different result. It is a "settled principle of statutory construction that a Legislature in legislating with regard to an industry or an activity must be regarded as having had in mind the actual conditions to which the act will apply; that is, the customs and usages of such industry or activity."[4] Nothing in SBx2 or §399.20 suggests any legislative intent to alter the long-standing Commission holding that the "market price" calculation refers to the cost of conventional power and not renewable generating facilities.

TURN worked closely with the sponsors and author of SB 32 and only agreed to remove opposition to the bill if the price was limited to an MPR that includes all relevant environmental compliance costs. This understanding is fully consistent with the legislative history. Both the Senate and Assembly floor analyses of SB 32 provide the exact same summary of the pricing provision:

> [SB 32] Provides that the price paid by IOU for electricity purchased under this program shall be a price determined by the CPUC that reflects the cost of fossil fuel generation in the state and the value of environmental compliance

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[2] Decision 04-06-015, page 7, footnote 10
[3] Decision 05-12-042, pages 29-30.
[4] *Wolski v. Fremont Investment & Loan*, 127 Cal.App.4th 347, 505 (Cal.Ct.App. 2005), quoting *Irvine Co. v. California Emp. Com.*, 27 Cal.2d 570, 165 P.2d 908 (Cal. 1946).

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costs.[5]

A review of the legislative history of SBx2 (Simitian) fails to reveal any intent to modify the meaning of the pricing provisions originally contained in SB32.[6] The transfer of language from §399.15(c) to §399.20(d) was a purely technical drafting exercise. Throughout the legislative process, there was no discussion evincing any intent to substantively amend the pricing rules for §399.20. Therefore, the Commission must reject any proposals to adopt a "market price" based on the cost of renewable technologies.

III. RATEPAYER INDIFFERENCE MEANS THAT ANY COMPENSATION PROVIDED ON THE BASIS OF SYSTEM BENEFITS MUST BE VERIFIED WITH ACTUAL SAVINGS CREDITED TO NON-PARTICIPATING RATEPAYERS

The ruling requests comments on the interpretation of "ratepayer indifference" protections contained in §399.20(d)(4) and clarification on the impact of any changes resulting from the enactment of SBx2 (Question 14). There are no changes to §399.20(d) caused by SBx2 that have any impact on this requirement. "Ratepayer indifference" is only achieved if the Commission ensures that any "rates and charges" provided under the tariff are tied to real, quantifiable and verifiable costs or benefits that flow to non-participating ratepayers.

TURN/CUE are deeply concerned about proposals for a wide array of adders to the MPR designed to represent some type of societal or system benefit. Most of these proposals assume that DG systems lead to cost savings that are not captured by the

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[5] SB 32 Senate Floor Analysis, September 11, 2009, page 2; SB 32 Assembly Floor Analysis, September 21, 2009 page 2.

[6] For example, see *Assembly Committee on Natural Resources Analysis of SBx2, March 7, 2011, page 2* ([SBx2] "Amends existing "feed-in tariff" statute for small renewable generators, which relies on the RPS MPR for pricing, to account for this bill's repeal of the MPR, by requiring the PUC to set a similar market price specifically for purposes of the feed-in tariff statute.")

MPR methodology. There is no evidence that any such cost savings always occur. In fact, the utilities have demonstrated that there are many occasions where there are actually increased system costs. Consequently, it is not possible to have any across-the-board adder to the FIT price to reflect system cost savings.

At a minimum, ratepayer indifference requires the Commission to ensure that any monetary enhancements to the MPR intended to reflect "peak demand" benefits (§399.20(e)), infrastructure savings, or other perceived system contributions from any specific project are tied to actual savings that result in equivalent reductions in other utility revenue requirements. For example, if any generator receives a credit based on the understanding that a particular project will cause the utility to defer investments in the distribution system, the utility must demonstrate that it has actually deferred such an investment once the generation project comes online. Absent a concrete deferral of particular utility capital projects, the claimed savings are merely illusory.

IV. THE COMMISSION MUST TAKE STEPS TO ENSURE THAT SELLERS DO NOT CIRCUMVENT THE 3 MW SIZE LIMITATION BY SUBDIVIDING LARGER PROJECTS

The ruling requests comments on any changes needed to implement the expansion of the FIT to projects up to 3 MW in size (Question 17). TURN/CUE are concerned about the possibility that developers may artificially subdivide larger projects into 3 MW increments to take advantage of the FIT program. The Commission and the IOUs must ensure that any FIT project is a stand-alone installation of no more than 3 MW and is not adjacent to, or in close proximity of, another FIT project developed, owned or operated by the same company. The IOUs should be given the authority to deny a tariff request pursuant to §399.20(n) if the project appears to be part of a larger overall installation by the same company or consortium in the same general

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location.

V. REFUNDS OF PREVIOUSLY AWARDED COMMISSION INCENTIVES MUST OCCUR PRIOR TO ANY GENERATOR RECEIVING SERVICE UNDER §399.20

The ruling proposes to defer implementing §399.20(k) until the beginning of 2012 (Question 28). This section requires that any project seeking the FIT provide a refund of any incentives received from the California Solar Initiative or the Small Generator Incentive Program. TURN/CUE do not oppose deferring implementation of this provision so long as such projects are ineligible to participate in the FIT until the refund process is finalized. It would be inappropriate to allow such projects to participate in the FIT in advance of providing refunds.

Since this provision only applies to existing projects that have already received incentives, there is no reason to believe that this proposal would delay the construction of new renewable generating resources.

Respectfully submitted,

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VERIFICATION

I, Matthew Freedman, am an attorney of record for THE UTILITY REFORM NETWORK in this proceeding and am authorized to make this verification on the organization's behalf. The statements in the foregoing document are true of my own knowledge, except for those matters which are stated on information and belief, and as to those matters, I believe them to be true.

I am making this verification on TURN's behalf because, as the lead attorney in the proceeding, I have unique personal knowledge of certain facts stated in the foregoing document.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 21, 2011, at San Francisco, California.

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Matthew Freedman
Staff Attorney

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