

**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)

**COMMENTS OF DAVENPORT NEWBERRY HOLDINGS LLC
ON IMPLEMENTATION OF NEW PORTFOLIO CONTENT CATEGORIES FOR THE
RENEWABLES PORTFOLIO STANDARD PROGRAM**

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Pursuant to the Administrative Law Judge’s Ruling Requesting Comments on Implementation of New Portfolio Content Categories for the Renewables Portfolio Standard Program issued on July 12, 2011 (“ALJ Ruling”), Davenport Newberry Holdings LLC (“Newberry”) submits these opening comments.

Newberry is developing geothermal project(s) (“Newberry Project”) in the Bend area within Deschutes County, Oregon. As such, the Newberry Project will be located within the Bonneville Power Administration (“BPA”) Balancing Authority and its first point of interconnection to the grid will be at the LaPine Substation on the BPA system.¹ Newberry intends to sell both its physical power and Green Attributes directly to a California purchaser at a Delivery Point within California in one fully integrated transaction (*i.e.*, there will be no third-party intermediary participating in the sale of either the Renewable Energy Credits (“RECs”) or physical power the Newberry Project shall produce).²

For purposes of being able to deliver its power to California markets, Newberry acquired

¹ See Resolution E-4041, at 9 (December 14, 2006). Newberry participated in PG&E 2005 RFO, which was authorized by Decision 05-07-039, and was awarded a contract. The Commission approved the Newberry power purchase agreement in Resolution E-4041. PG&E and Newberry subsequently agreed to terminate the agreement in July 2009.

² The California Energy Commission has “pre-certified” the Newberry Project as an eligible renewable resource (RPS ID: 60617C) with an eligibility date of March 29, 2007 for participation in the Renewables Portfolio Standard (“RPS”) program.

the rights to firm transmission capacity to deliver the physical power it generates to the California Oregon border (“COB”).³ It accordingly intends to designate COB as the Delivery Point⁴ within a California balancing authority in any sales transaction with a California purchaser. Newberry’s power will be scheduled for delivery to any California purchaser in compliance with Western Electric Coordinating Council (“WECC”), BPA, and the California Independent System Operator’s (“CAISO”) scheduling protocols. The *pro forma* California utility RPS power purchase agreement (“PPA”) obligates any RPS seller, regardless of whether it is located inside or outside California, to comply with additional scheduling obligations for the benefit of both the utility purchaser and the CAISO.⁵

As such, the intended Newberry transaction will physically deliver RPS power to a Delivery Point within a California balancing authority in a manner that is functionally, economically and physically, the “electrical equivalent” to RPS generation from an in-state generator. Both Newberry and the in-state RPS generator will each sell its power and associated Green Attributes to a California utility purchaser in one integrated transaction and each will be obligated to have the power delivered to the in-state Delivery Point agreed to in its respective PPA. With respect to scheduling, payment and contractual rights and obligations, from the perspective of the California utility purchaser, the CAISO, and the California electric consumer, RPS power generated by and delivered from the Newberry Project, and the Green Attributes associated with such power generation, will be indistinguishable from RPS power generated and

³ COB is the Intertie (as defined in the CAISO Tariff) between the BPA and the CAISO Balancing Authority Areas (“BAA”) and is an import point into the CAISO BAA for power flowing from the BPA BAA. COB is modeled in the CAISO’s Locational Marginal Price scheme as a Pricing Node.

⁴ PG&E 2011 pro forma RPS PPA, Section 3.1(d) requires PG&E and the RPS Seller to agree to the designation of an CAISO recognized location as the Delivery Point at which the RPS Seller will transfer title of the power to PG&E.

These comments will refer to Delivery Point and other capitalized terms in the manner that term is defined in the PG&E 2011 pro forma RPS PPA. A copy is available at: http://www.pge.com/includes/docs/word_xls/b2b/wholesaleelectricssuppliersolicitation/RPS2011/Attachment_H1_PGE_RPS_PPA_05112011.doc.

⁵ See PG&E 2011 pro forma RPS PPA, Section 3.4(b).

delivered within the state.

Newberry provides these comments to enable the Commission to comply fully with the legislative mandate in SB 2X that RPS power generated out of state, but sold to a California purchaser in one integrated transaction, delivered to a Delivery Point within a California balancing authority through the use of firm transmission rights, and “without substituting electricity from another source” satisfies the procurement content criteria section 399.16(b)(1)(A) establishes. Any possible issues regarding the use of firm transmission rights to deliver otherwise eligible out-of-state generated RPS power are garden-variety commercial issues which for the most part are already resolved in the existing pro forma utility RPS PPAs.

With this as background, Newberry provides these comments to a few of the specific questions that the ALJ Ruling raises. For those questions which Newberry has not provided a response, Newberry reserves the right to comment in its reply comments.

2. Should the first sentence of § 399.16(b)(1)(A) be interpreted as meaning: “The RPS-eligible generation facility producing the electricity has a first point of interconnection with a California balancing authority, or has a first point of interconnection with distribution facilities used to serve end users within a California balancing authority area, or the electricity produced by the RPS-eligible generation facility is scheduled from the eligible renewable energy resource into a California balancing authority without substituting electricity from another source.”

Yes. The first sentence of section 399.16(b)(1)(A) should be interpreted as the ALJ Ruling suggests in this question. An RPS transaction that satisfies any one of the three criteria ((i) first point of interconnection with a California balancing authority; (ii) first point of interconnection with distribution facilities serving California retail load; or (iii) scheduled into a California balancing authority) should be categorized as a section 399.16(b)(1)(A) (“Category 1”) transaction.

Thus an RPS procurement transaction which involves power generated out of state but scheduled “into a California balancing authority area,” (*e.g.*, physical power and Green Attributes from an out-of-state RPS generator delivered into California utilizing firm

transmission rights) and “without substituting electricity from another source” qualifies under the Category 1 criteria.

4. How should the phrase in new § 399.16(b)(1)(A) “. . . scheduled from the eligible renewable energy resource into a California balancing authority without substituting electricity from another source” be interpreted? Please provide relevant examples.

This section 399.16(b)(1)(A) (Category 1) criteria must be interpreted with the words drafted by the Legislature. Thus, section 399.16(b)(1)(A) should include transactions involving the sale to a California purchaser of physical power and the Green Attributes associated with such generation that an out-of-state RPS-eligible generation facility has scheduled for delivery, and then directly delivers through the use of contractual rights to firm transmission capacity, to a contractually-designated Delivery Point located within a California balancing authority. Firm transmission rights provide the out-of-state RPS generator the contractual right to direct the Transmission Provider to deliver its RPS power to a Delivery Point located within a California balancing authority.

Such an integrated sales transaction (whose only two participants are the out-of-state RPS generator and the California purchaser) does not require or involve the “substitut[ion] of electricity from another source.” The Seller’s use of its own firm transmission capacity rights negates the need for any third-party intermediary to effectuate a “delivery” into California; the Seller’s use of its firm transmission capacity rights enables the California purchaser to procure power and Green Attributes in one direct and fully integrated transaction.

The physical flow of power and corresponding commercial relationship between the Seller and the California purchaser are exactly the same as if the RPS generation facility is physically located in California – the physical power and corresponding Green Attributes are produced by the Seller and then delivered to the California purchaser at the Delivery Point designated in the PPA and within a California balancing authority.

The dual requirements of this prong of section 399.16(b)(1)(A) (the RPS power must be both (i) “scheduled from the eligible renewable energy resource into a California balancing authority” and (ii) delivered “without substituting energy from another source”) are intended to distinguish RPS transactions using transmission rights to physically deliver the power to a Delivery Point within a California balancing authority from other possible commercial arrangements involving RPS power generated out of state. For instance, it may be possible to schedule out-of-state RPS power to a California Delivery Point through the use of various “buy-sell,” “firming and shaping,” or other arrangements.

These transactions, however, require some form of substitution of energy from other sources (at least some portion of the time) and thus are to be excluded from section 399.16(b)(1)(A) status. In contrast, the RPS power generated by an out-of-state generator holding firm transmission rights to deliver the power to a Delivery Point within a California balancing authority is able to be delivered as a direct two-party contractual obligation, and without any need for the “substitution of energy from another source.”

5. Does the inclusion of transactions characterized in #4, above, subsume or resolve the work done by Energy Division staff and the parties in response to Ordering Paragraph 26 of Decision (D.) 10-03-021, regarding transactions using firm transmission?

The inclusion of the three discrete RPS transactions characterized in #4 within the section 399.16(b)(1)(A) Category 1 appropriately reflects and builds upon the record established by the Energy Division staff in response to Ordering Paragraph 26 of D.10-03-021. Through that established record, the Commission can conclusively resolve the issues explored by Energy Division staff and the parties regarding RPS transactions in which an out-of-state generator has scheduled and delivers RPS-eligible power to a Delivery Point within a California balancing authority through the use of its firm transmission rights.

In D.10-03-021, the Commission expressed its “policy preference to accept RPS procurement transactions using firm transmission arrangements as ‘bundled’ RPS procurement.”⁶ At that time, the Commission’s designation of a firm transmission transaction as “bundled” meant that for RPS product classification purposes the transaction would be placed in the same category as transactions involving RPS power generated in state and RPS power generated out of state, but involving “dynamic scheduling” and “pseudo-tie” arrangements.⁷ The Legislature in Senate Bill 2 (1x) recognized this Commission’s preference for RPS transactions involving the delivery of RPS power generated out of state which is delivered to the California-located purchaser through the use of transmission by specifying that all RPS transactions which can be scheduled into a California balancing authority and without the substitution of energy from another source qualify for section 399.16(b)(1)(A) status.

The Commission did, however, condition its tentative decision in D.10-03-021 to include firm transmission transactions within the preferred bundled status on the favorable resolution of two concerns which it directed the Energy Division to conduct a workshop to address:

First, the buyer of firm transmission is not required to use it; in that case, the transmission provider can sell the transmission to another entity. Second, even when firm transmission is used to bring energy to a California balancing authority scheduling point, the buyer could enter into an arrangement to remarket the electricity from that point.⁸

The Energy Division convened a workshop to address these issues on April 23, 2010 (the “Workshop”). The participants at the Workshop comprehensively addressed and definitely resolved these two concerns. No party in any presentation, written or oral, advocated that the concerns raised by D.10-03-021 warrant the Commission to deny in-state bundled status (*i.e.*, the equivalent of the transaction qualifying as a section 399.16(b)(1)(A) transaction) to otherwise

⁶ D.10-03-021, mimeo at 36, quotations added.

⁷ *Id.*, mimeo at 33.

⁸ *Id.*, mimeo at 35.

eligible out-of-state RPS generators employing firm transmission rights to deliver their physical power into California.

Moreover, both of these concerns can be (if not already) resolved through commonly used commercial provisions. An out-of-state RPS generator that sells its firm transmission capacity to a third party would be unable to satisfy its obligations under the PPA to deliver its power to the contractually-designated Delivery Point within a California balancing authority. At a minimum, such an out-of-state RPS generator who deploys its firm transmission rights for a purpose other than delivering power to its California purchaser will suffer substantial financial penalties under the PPA.⁹ If its sales of transmission capacity continued for any period, the out-of-state RPS generator would also likely be in material breach of the PPA. Such a breach would subject the PPA to termination and inevitably obligate the out-of-state RPS generator's payment of a substantial amount as a Termination Payment.¹⁰

Correspondingly, the expressed concern that a California purchaser may divert RPS power delivered to a Delivery Point within a California balancing authority via firm transmission capacity rights for a commercial purpose other than serving its retail load is hard to comprehend. The fact that firm transmission rights would be used to deliver the RPS power does not provide the California purchaser any greater ability to sell RPS purchased power to a third party – the California purchaser can divert any RPS power (including all in-state generation) it procures whether firm transmission plays any part in the delivery of that RPS power.

Moreover, to the extent the existing pro forma RPS PPAs do not already fully resolve these concerns, the addition of routine commercial provisions into the form RPS power purchase agreements can resolve each of these concerns. For instance, Section 3.1(b) of the PG&E 2011

⁹ See PG&E 2011 pro forma RPS PPA, Appendix VII (obligates the RPS Seller to pay substantial liquidated damages (a minimum of \$20/MWh) for failing to deliver the requisite amount of RPS MWh).

¹⁰ See PG&E 2011 pro forma RPS PPA, Section 5.3.

pro forma RPS PPA currently prohibits the Seller from “sell[ing] Product from the Project to a third party ...” The following additional constraint could be added to Section 3.1(b):

Seller currently holds firm transmission capacity rights in the amount sufficient to deliver its delivery obligation of __ MW to the Delivery Point; Seller shall not use these __ MW of firm transmission rights on X system for any purpose other than to deliver power to Buyer at the Delivery Point and in accordance with the terms and conditions of this Agreement.

Similarly, any concern the Commission may have about a California purchaser diverting RPS power delivered through the use of firm transmission capacity rights can be negated through contract. A provision could be readily added in which the Buyer covenants with the Seller that it shall use all power delivered to the Delivery Point within a California balancing authority for the exclusive purpose of serving its retail load and that it shall not resell any such power to any other entity for any other purpose.¹¹

In any event, the written comments and oral presentations at the Workshop created a full record supporting a finding by the Commission that for RPS classification purposes, RPS power generated out of state, but delivered into California, through the use of transmission capacity rights in an integrated and direct two-party transaction and without substituting electricity from another source, should be considered the “functional equivalent” of RPS power generated and delivered within California.

No further hearings or workshops will be required to further address these concerns. The critical facts are undisputed: RPS power generated out-of-state, but delivered to a California Delivery Point via firm transmission capacity for a sale to and use by a California purchaser, is fully available, just as if generated in state, “to serve California load.”

6. How would transactions characterized in #4, above, be tracked and verified? Please address the roles and responsibilities of both the CEC and the Commission.

¹¹ The Commission could also condition a utility purchaser’s right to rate recovery on the basis that the utility purchaser use any such RPS purchased power for the exclusive purpose of servicing its retail load.

Section 399.25(c) charges the California Energy Commission (“CEC”) with:

[E]stablish[ing] a system for tracking and verifying renewable energy credits that, through the use of independently audited data, verifies the generation of electricity associated with each renewable energy credit and protects against multiple counting of the same renewable energy credit. The [California] Energy Commission shall consult with other western states and with the WECC in the development of this system.

Thus, the CEC is responsible for ensuring that the transactions characterized in #4 above are tracked and verified.

Iberdrola’s presentation at the Workshop (“Iberdrola Workshop Presentation”) explained the procedures and protocols by which NERC E-tags provide *auditable* information enabling the tracking and verification of RPS-eligible generation and associated Green Attributes that have been delivered to California.

The Iberdrola Workshop Presentation explained that the NERC E-tag protocols provide the following information to assist in tracking and verifying the deliveries:

- The source and sink control areas
- The purchase and selling entities involved
- The source of energy, the transmission paths, and associated points of receipt and points of delivery
- The type of transmission product being used
- The scheduling entities
- A contract ID that links the E-tag with the California Energy Commission (CEC) renewable facility certification number
- The Token field that includes the RPS Identifier with the CEC Renewable Facility Certification number
- The date and hours of the delivery
- The amount of energy delivered¹²

For deliveries utilizing firm transmission, E-tags demonstrating delivery of energy may be matched with metered output data from the generator to quantify the amount of RECs that may be claimed from the facility.¹³

¹² See Iberdrola Renewables, Inc. presentation titled: *Renewable Energy Delivery, Scheduling, and Firming/Shaping*, at the Workshop and Post Workshop Comments of Iberdrola Renewables, Inc., R.08-08-009 (April 30, 2010) at 4.

¹³ Post Workshop Comments of Iberdrola Renewables, Inc., R.08-08-009 (April 30, 2010), at 4-5.

Beyond the tracking and verification offered by E-tags, the current form of California pro forma RPS PPAs contain commercial provisions designed to ensure that the California purchaser procures verified Green Attributes in transactions characterized in #4 above. Various provisions obligate the out-of-state RPS generator to comply fully with any WREGIS or WECC requirements necessary for the out-of-state RPS generator to be able to convey the Green Attributes associated with its generation to the California purchaser.¹⁴ For instance, the Commission obligates all RPS-eligible PPAs to include the following non-modifiable provision:

Seller warrants that all necessary steps to allow the Renewable Energy Credits transferred to Buyer to be tracked in the Western Renewable Energy Generation Information System will be taken prior to the first delivery under the contract.¹⁵

Thus, as with the other concerns expressed about the use of firm transmission capacity rights to deliver RPS power into California, any issues regarding the actual delivery of the RPS power and the validity of the Green Attributes associated with the generation are commercial and operational. The current form of Commission-approved pro forma RPS PPAs or minor revisions to these contracts can resolve these commercial and operational issues. No policy concerns warrant the summary exclusion of these integrated RPS transactions from section 399.16(b)(1)(A) Category 1 status.

23. Reviewing your proposals above, please describe the value to the buyer, the seller, and ratepayers of transactions in each portfolio content category. Identify the direct and indirect costs that would be associated with transactions in each category.

This Commission's adherence to the legislative directive to include RPS transactions with out-of-state RPS generators involving firm transmission as section 399.16(b)(1)(A) Category 1 transactions will provide significant benefits to California purchasers, out-of-state RPS generators, and the electric consumers of California. The California purchaser and its

¹⁴ See, e.g., Section 3.1(g) of PG&E 2011 pro forma RPS PPA.

¹⁵ The Commission required the inclusion of this non-modifiable provision in all RPS PPAs in D.11-01-025.

electric consumers each benefit from an increased supply of transactions that qualify under Category 1. Allowing the supply of RPS power to be included in section 399.16(b)(1)(A) Category 1 to correspond with the Legislature's intent will best ensure a substantial supply of Category 1 power; conversely artificially restricting the RPS supply eligible for Category 1 status will reduce supply and increase prices.

From an out-of-state RPS generator's perspective, having a transaction qualify under Category 1 first promises savings in transaction costs as the RPS power and the associated Green Attributes can be conveyed in one integrated transaction. Second designating a transaction for Category 1 status enables the out-of-state RPS Seller to compete for the largest, and potentially unlimited, portion of the California RPS market. Thus, it is to everyone's benefit to not bar qualifying RPS transactions with out-of-state generators involving firm transmission that are the functional equivalent of RPS power generated and delivered within California from Category 1 status.

Furthermore, there are no incremental costs, direct or indirect, to California purchasers or electric consumers associated with the Commission implementing the Legislature's intent that transactions with out-of-state RPS generators involving firm transmission be designated as a section 399.16(b)(1)(A) Category 1 transaction. The costs for an out-of-state RPS generator to deliver its power and Green Attributes to a Delivery Point within a California balancing authority have been, and will continue to be, borne entirely by the out-of-state RPS generator under the PPA.¹⁶ These costs may be reflected in the out-of-state RPS generator's overall bid price, but delivery costs are included in every Seller's overall bid price whether the Seller is in state or out of state. In any event if these transmission costs cause the out-of-state generator's bid to be too high relative to the other respondents to the utility Request for Offer, the California purchaser

¹⁶ See e.g., PG&E 2011 pro forma RPS power purchase agreement, at Section 3.1(b) which directs that "Seller shall be responsible for any costs or charges imposed on or associated with the Product or its delivery of the Product up to the Delivery Point."

will select among the other lower price options. From the standpoint of the California purchaser or electric consumers presented with competing bids from various sellers, qualifying transactions with out-of-state RPS generators involving firm transmission under Category 1 creates no additional costs and ensures additional competition.

Moreover, enabling RPS transactions involving the delivery of RPS eligible power from out-of-state generators into a California balancing authority through the use of firm transmission capacity will lead to greater utilization of existing transmission resources throughout the Western Region to be dedicated to RPS-eligible power. For instance, in each instance in which an out-of-state RPS generator with firm transmission rights executes a PPA with a California purchaser, the generator obligates itself to use its firm transmission capacity rights to deliver RPS power to a Delivery Point within a California balancing authority. This obligation ensures that some incremental portion of scarce transmission capacity into California will be dedicated exclusively for the delivery of RPS eligible power (*i.e.*, coal and other fossil-fuel generated power will no longer be able to be delivered on these now RPS-dedicated MW of transmission capacity).

Respectfully submitted,

/s/

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Dated: August 8, 2011

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LLC

VERIFICATION

I am the attorney for the Davenport Newberry Holdings LLC, and I have been authorized to make this verification on the behalf of Davenport Newberry Holdings. Said party is located outside of the County of San Francisco, where I have my office, and I make this verification for said party for that reason.

I have read the foregoing document and based on information and belief, believe the matters in the application to be true.

I declare under penalty of perjury that the foregoing is true and correct and executed on August 8, 2011, at San Francisco, California.

/s/
Steven F. Greenwald