

**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 IDAHO WIND PARTNERS 1, LLC  
ON PROPOSED DECISION OF ALJ SIMON IMPLEMENTING  
PORTFOLIO CONTENT CATEGORIES FOR THE  
RENEWABLES PORTFOLIO STANDARD PROGRAM**

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October 27, 2011

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Pursuant to Rule 14.3 of the California Public Utilities Commission (“Commission”) Rules of Practice and Procedure, Idaho Wind Partners 1, LLC (“Idaho Wind”)<sup>1</sup> respectfully submits these comments on the proposed decision (“ALJ PD”) implementing portfolio content categories for the renewables portfolio standard program.

Idaho Wind’s limited comments will address the ALJ PD’s purposeful, arbitrary and capricious, effective elimination of RPS transactions which the Legislature intended to qualify as “[f]irmed and shaped eligible renewable energy resource electricity products providing incremental electricity” eligible for compliance in accordance with Section 399.16(b)(2) of Senate Bill 2 (1X) (“SB 2 (1X)”)<sup>2</sup>. As an integral component of the Legislature’s overarching objective that California retail sellers procure “least-cost and best-fit electricity products from eligible renewable energy resources that meet project viability principles,”<sup>3</sup> SB 2 (1X) authorizes

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<sup>1</sup> Idaho Wind is concurrently filing herewith a Motion to Become a Party to this Rulemaking.

<sup>2</sup> Unless otherwise noted, all statutory references are to the Public Utilities Code as modified by SB 2 (1X).

<sup>3</sup> Section 399.16(b).

satisfaction of Renewables Portfolio Standard (“RPS”) purchase requirements with **up to 50 percent** of qualifying Section 399.16(b)(2) firmed and shaped transactions.<sup>4</sup>

The ALJ PD wrongfully construes this explicit statutory language in a manner which substantially reduces, and potentially eliminates, RPS transactions which would qualify under Section 399.16(b)(2). The ALJ PD’s misguided restriction on the RPS transactions which the Legislature intended to be eligible for Section 399.16(b)(2) status will significantly limit the total number and viability of RPS resources available and thus inevitably increase prices for California customers.

The ALJ PD also fails to achieve the Commission’s stated objectives in this Rulemaking: (i) “RPS market certainty;” (ii) “avoid[ing] creating unnecessary transaction costs;” and (iii) the establishment of a “clear delineation” among the Section 399.16(b) RPS portfolio content categories.<sup>5</sup> As will be explained, the “three commercial elements”<sup>6</sup> that the ALJ PD unilaterally injects into the legislative requirements for Section 399.16(b)(2) transactions (the “Three Commercial Elements”) are internally inconsistent, will necessarily increase transaction and administrative costs, and will engender ongoing confusion and uncertainty inhibiting development of eligible renewable energy resources.

As a matter of California law and sound energy policy, the ALJ PD must be revised to advance the Legislative intent, adhere to the statutory language, and enable firming and shaping transactions to remain a major source of highly-viable, cost-effective RPS-eligible power.

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<sup>4</sup> Sections 399.16(c)(1)(2). Section 399.16(b)(2) transactions may fulfill 50 percent of RPS purchases for compliance periods through 2013; the maximum amount of these transactions then decreases for compliance periods through 2016 to 35 percent, and is then further reduced to 25 percent for compliance periods commencing with 2017.

<sup>5</sup> *Administrative Law Judge’s Ruling Requesting Comments on Implementation of New Portfolio Content Categories for the Renewables Portfolio Standard Program* (“Ruling Requesting Comments”), at 3 (July 12, 2011).

<sup>6</sup> The Three Commercial Elements stated in the ALJ PD’s Ordering Paragraph No. r 2 are set forth in Section II(C), *infra*, at 9.

## I. IDAHO WIND'S ELIGIBLE RENEWABLE ENERGY RESOURCES

Idaho Wind developed, owns and is currently operating 11 wind power generation facilities in Idaho (collectively the “Projects”).<sup>7</sup> The Projects thus qualify as “eligible renewable energy resources located within the WECC transmission network service area.”<sup>8</sup> The Projects have total installed generation capacity of 183 megawatts. Idaho Wind began development of the Projects in 2005. Each of the Projects completed construction and achieved commercial operation between late 2010 and the first part of 2011. The Projects thus indisputably satisfy a primary objective of SB 2 (1X) and this Commission – that the California retail sellers execute a power purchase agreement with “viable” eligible renewable energy resources.<sup>9</sup>

Each of the Projects has executed a power purchase agreement with Idaho Power Company (“Idaho Power”) to sell its electric generation. Idaho Wind intends to sell the “Environmental Attributes” associated with the Projects’ generation to a California retail seller. Importantly, each power purchase agreement with Idaho Power provides that Idaho Wind retains all Environmental Attributes, specifically including the “Renewable Energy Credits” (“RECs”) associated with the generation of power by the wind facilities.<sup>10</sup> Idaho Wind intends to structure its sales of Environmental Attributes through transactions which California market participants have recognized and relied upon as being “firmed and shaped transactions” and which should thus continue to qualify under the Commission’s rules implementing Section 399.16(b)(2).

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<sup>7</sup> The owners of Idaho Wind are comprised of affiliates of the General Electric Company, Atlantic Power Corporation, Exergy Development Group LLC, and Reunion Power LLC.

<sup>8</sup> Section 399.16(a).

<sup>9</sup> Section 399.13(a)(4)(A)(iii).

<sup>10</sup> See e.g., Firm Energy Sales Agreement Between Idaho Power Company and Yahoo Creek Wind Park, LLC, Section 8.1:

Idaho Power waives any claim to ownership of Environmental Attributes. Environmental Attributes include, but are not limited to, Green Tags, Green Certificates, Renewable Energy Credits (RECs) and tradable renewable certificates (TRECs) directly associated with the production of energy from the Seller’s Facility.

Idaho Wind believes that the firmed and shaped transactions it has presented to California retail sellers offers them a unique opportunity to purchase reliable, competitively-priced Environmental Attributes and to avoid the project development, financing and other timing risks and uncertainties often associated with RPS development projects. Idaho Wind further believes that the Legislature in drafting Section 399.16(b)(2) had no intent to restrict the scope of firmed and shaped transactions that a retail seller could select to satisfy a significant portion of its RPS purchase obligation.

**II. THE ALJ PD’S ADDITIONAL REQUIRMENTS FOR SECTION 399.16(b)(2) TRANSACTIONS CONTRAVENE SB 2 (1X), EFFECTIVELY ELIMINATE SECTION 399.16(b)(2) TRANSACTIONS, AND ARE VAGUE, INCONSISTENT, AND UNCERTAIN**

Section 399.16(b)(2) sets forth the specific and limited requirements for a transaction to qualify for RPS-eligibility:

Firmed and shaped eligible renewable energy resource electricity products providing incremental energy and scheduled into a California balancing authority.

It need be reiterated that the Legislature intends for California retail sellers to satisfy up to 50 percent of their respective RPS purchase obligations with Section 399.16(b)(2) transactions.<sup>11</sup> The requirements specified by the Legislature for a “firmed and shaped” transaction are simply that the transaction (a) be with an “eligible renewable energy resource electricity product;” (ii) provide “incremental energy;” and (iii) be “scheduled into a California balancing authority.”

In delineating the criteria for electric transactions to qualify for Section 399.16(b)(2) status, the Commission is obligated to adhere to this legislative mandate. It acts in an unlawful

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<sup>11</sup> See footnote 4, *supra*.

and ultravires manner when it unilaterally imposes requirements beyond those set forth in the statute.

**A. The ALJ PD Wrongfully Construes a Legislative Intent to Unduly “Narrow the Range” of Section 399.16(b)(2) Transactions**

In Section 399.11(b), the Legislature directed that California retail sellers satisfy their RPS purchase obligations “through the procurement of *various electricity products* from eligible renewable energy resources,” and with the intent to provide “unique benefits to California.”<sup>12</sup> The limited requirements for a Section 399.16(b)(2) transaction are consistent with the Legislature’s intent that firmed and shaped transactions represent a major supply source (up to 50 percent) for the California RPS market.

Inexplicably, the ALJ PD has determined that, despite explicit language to the contrary, the Legislature nonetheless intends that the Commission restrict the “scope” of what qualifies for Section 399.16(b)(2) transactions:

It is reasonable to interpret this more prescriptive statutory scope as *narrowing the range* of transactions that would meet the criteria of [Section] 399.16(b)(2).<sup>13</sup>

This interpretation is neither “reasonable” nor lawful. If adopted, it would represent a unilateral policy decision by this Commission and directly undermine the clear legislative intent that Section 399.16(b)(2) transactions continue to play a significant role in California retail sellers achieving RPS compliance through a balanced portfolio of “various electricity products.” The language in Section 399.16(b)(2) should be construed as expressing the Legislature’s intent to continue to allow market participants to develop firmed and shaped transactions which best meet the commercial needs of RPS developers, financing parties and California retail sellers.

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<sup>12</sup> Section 399.11(b) (emphasis added).

<sup>13</sup> ALJ PD at 39 (emphasis added).

The Commission’s decision in D.11-01-025 in January 2011 (the “TREC Decision”) was issued prior to the enactment of SB 2 (IX). It “reclassified” several categories of transactions involving out-of-state RPS generation (including firmed and shaped transactions) that had previously qualified as “bundled” RPS-eligible transactions, into “unbundled” or “TREC” transactions. The TREC Decision directed that such “reclassified” RPS transactions (including firmed and shaped transactions) were subject to a 25 percent procurement limitation.<sup>14</sup> Importantly, firmed and shaped transactions were lumped into the same residual “catch-all” category for RPS imports as any unbundled REC.

The ALJ PD fails to recognize that in Section 399.16(b) the Legislature rejected the Commission’s decision in the TREC Decision to minimize the RPS contribution of firmed and shaped transactions. In particular, Section 399.16(b): (i) clearly distinguishes firmed and shaped transactions from “unbundled” REC transactions; (ii) provides in subclause (2), a separate and higher priority for firmed and shaped transactions; and (iii) authorizes California retail sellers to satisfy up to 50 percent of their total RPS procurement obligations through such transactions.

Thus, contrary to the ALJ PD’s reasoning, the Legislature’s decision to allocate specific percentage portions of the RPS market among “[v]arious [RPS] electricity products” does not suggest any intent to “narrow the range” of commercial transactions which qualify under either Sections 399.16(b)(1), (2), or (3). Fundamental rules of statutory construction instruct that if the Legislature had intended to so “narrow the range” of commercial transactions qualifying under any of Sections 399.16(b)(1)(2) or (3), it would have expressly stated such limitations in the legislation.<sup>15</sup>

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<sup>14</sup> See D.11-01-025, Appendix A, mimeo 11, 14 (Ordering Paragraph Nos. 6-7 and 17).

<sup>15</sup> The ALJ PD recognizes this principle of statutory construction in accepting the following argument made by Southern California Edison:

The ALJ PD achieves its stated (but unlawful) objective of narrowing the scope of Section 399.16(b)(2) by injecting the Three Commercial Elements into the requirements of a firm and shaped transaction. If adopted, the ALJ PD would most certainly “narrow” the scope of Section 399.16(b)(2) to the point of near extinction. However, the ALJ PD’s objective to so restrict Section 399.16(b)(2) transactions is unlawful, contravenes express statutory language, and will harm California electric consumers.

The ALJ PD’s unlawful insertion of the Three Commercial Elements into Section 399.16(b)(2) cannot be justified either lawfully or economically as a means to reduce prices for California electric consumers. The ALJ PD appears to purposely restrict the scope of Section 399.16(b)(1) and (2) transactions with the perspective that ratepayers will benefit if the supply of these presumably higher-priced RPS products is reduced. This logic is flawed from both legal and economic perspectives. Restricting supply, particularly when concurrently increasing demand, inevitably leads to higher prices for electric customers. Idaho Wind believes that it can supply cost-competitive RPS products to California retail sellers. In any event, the Commission will best enhance the ability of the California retail sellers to procure the most cost-competitive RPS products by allowing the broadest array of RPS products to compete on their respective merits and by rejecting the ALJ PD’s arbitrary restriction of the scope of qualifying RPS transactions.

This Commission should refrain from micro-managing development of RPS generation and not impose arbitrary prescriptive requirements. Rather, it should allow the market for firm and shaped products to continue to operate in a manner which best meets the commercial needs of the market participants. If a retail seller requests that the Commission approve a firm and

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SCE argues that a requirement as significant as a five-year minimum length of the substitute energy contract can not simply be read in to the statute; if the Legislature had intended to have such a specific requirement, it would have included it. ALJ PD at 42.



shaped transaction which the Commission believe contravenes Section 399.16(b)(2), the Commission retains the ultimate authority to deny the request on the basis that the particular transaction is not in the best interests of California electric customers. However, it serves no purpose for the Commission to adopt the ALJ PD, which would essentially write Section 399.16(b)(2) transactions out of the statute, and effectively reinstate the RPS product categories proposed in the TREC Decision.

**B. The ALJ PD Should Limit the Statutory Requirements for a Section 399.16(b)(2) Transaction to the Requirements Expressly Stated in the Statute**

The ALJ PD’s assessment of Section 399.16(b)(2) firmed and shaped transactions first acknowledges three “fundamental criteria” are necessary to ensure that any qualifying transaction be both “reasonably transparent and commercially reasonable.”<sup>16</sup> Foremost, “firmed and shaped transactions should be seen as fundamentally providing substitute energy in the same quantity as the contracted-for RPS-eligible generation.”<sup>17</sup> Second, energy from a qualifying Section 399.16(b)(2) transaction must be *scheduled into a California balancing* authority “in a manner that meets the timing and quantity requirements of the retail seller.”<sup>18</sup> Third, “[a]s a practical matter, the original RPS-eligible generation is *consumed elsewhere*.”<sup>19</sup>

This statement of the requirements for Section 399.16(b)(2) status are consistent with the legislative mandate. Moreover, these criteria retain for market participants substantial flexibility to best develop “firming and shaping” transactions in a manner which best serves the commercial needs of both the purchasing utility and the RPS-generator. Preserving this commercial flexibility is critical for both RPS developers and retail sellers to continue to execute least-cost, best-fit transactions for the ultimate benefit of California’s electric customers.

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<sup>16</sup> ALJ PD at 39-40.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> *Id.* (emphasis added).

**C. Imposition of the Three Commercial Elements Negates the Possibility of any Commercially Viable Firmed and Shaped Transactions**

Unfortunately, despite recognizing the above three “fundamental criteria,” with no further explanation or justification, the ALJ PD decrees by administrative fiat that any qualifying firmed and shaped transaction must additionally contain the following Three Commercial Elements:<sup>20</sup>

1. the buyer simultaneously purchases energy and associated renewable energy certificates (RECs) from the RPS-eligible generation facility;<sup>21</sup>
2. the energy purchased from the RPS-eligible generation facility is available to the buyer (i.e., the purchased energy must not in practice be already committed to consumption by another party);
3. the buyer acquires the substitute energy at the same time as it acquires the renewables portfolio standard-eligible energy.

These Three Commercial Elements are not intended to and do not clarify the three “fundamental criteria.”<sup>22</sup> Rather, they unlawfully add new, vague and internally inconsistent requirements which contravene, and are beyond the scope of the specific and limited criteria established in the statute for Section 399.16(b)(2) eligibility. Although promoted as “commercial elements,” the ALJ PD fails to explain how any actual *real-world* commercially viable transaction can satisfy these unjustified supplemental requirements.

Foremost, requiring satisfaction of the Three Commercial Elements would make compliance with the three fundamental criteria almost impossible. A plain reading of the statutory requirements under Section 399.16(b)(2) would allow an RPS seller to engage in a Section 399.16(b)(2) transaction to (i) schedule “substitute energy” “into a California balancing

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<sup>20</sup> ALJ PD at 63-64 (Ordering Paragraph No. 2).

<sup>21</sup> Ordering Paragraph No. 2 describes the first commercial element as stated above. ALJ PD at 63. However, the text of the ALJ PD would add to this requirement that the simultaneous purchase occur and without the buyer “selling the energy back to the generator [sic].” *Compare* ALJ PD at 40. These comments assume that the ALJ PD intends the Three Commercial Elements be stated as set forth in Ordering Paragraph No. 2. In all events, if the Commission adopts any of the Three Commercial Elements (which it should not), it must revise the ALJ PD to conform the requirements in the text with the applicable Conclusions of Law and Ordering Paragraph.

<sup>22</sup> *See* Section II(B) *supra*.

authority;” and (ii) as a “practical matter” have the purchased energy “consumed elsewhere.” In contrast, the second Commercial Element arbitrarily requires that the “purchased energy must not in practice be already committed to consumption by another party.”

However, contrary to the ALJ PD, if the physical power is to be “consumed elsewhere,” then there necessarily must be a transaction where the purchased energy is “committed to consumption by another party.” This second Commercial Element would thus *per se* disqualify any such transaction from Section 399.16(b)(2) status and accordingly foreclose the opportunity for most, if not all, firmed and shaped transactions to engage in a qualifying transaction.

The first Commercial Element is similarly objectionable, unduly restricting the scope of possible firmed and shaped transactions which market participants have historically found commercially reasonable and beneficial to electric customers. Consistent with prior RPS rules, firmed and shaped transactions have often been structured with an initial simultaneous sale of the physical energy and the associated Environmental Attributes as contemplated by the first Commercial Element. However, the ALJ PD arbitrarily imposes on this recognized requirement for a “simultaneous sale,” the additional requirement that the initial “buyer” must be the ultimate California retail seller.

Contrary to this additional restriction, the commercial viability, cost competitiveness, and customer benefits associated with a firmed and shaped transaction are not dependent whatsoever on the identity of the counter-party to the required “simultaneous sale.” Maintenance of the simultaneous sale requirement does not require restricting the buyer to the California retail seller.

As demonstrated above, it is inappropriate and unlawful for this Commission to construe Section 399.16 as a legislative mandate to “narrow the range” of firmed and shaped transactions which should qualify for Section 399.16(b)(2) status. Thus, the Commission should delete the

first Commercial Element as it is arbitrary and benefits no market constituency. Alternatively, if the Commission were to retain the first Commercial Element, it should delete the reference to the “buyer” in order to preserve the current commercial structures that market participants have found commercially reasonable and beneficial to electric customers.

**D. Retention of the Three Commercial Elements Would Undermine the Three Fundamental Criteria and Will Prejudicially Inhibit Development of RPS Power Throughout the WECC**

As explained above,<sup>23</sup> the Ruling Requesting Comments urged that respondents structure comments with the objective to enable this Commission to implement SB 2 (1X) in a manner which promotes fairness, efficiency, transparency, ease of verification, *market certainty*, avoidance of unnecessary transaction costs and clear delineation among the procurement categories, including the delineation of “firmed and shaped” products providing “incremental power” under Section 399.16(b)(2).

The ALJ PD’s unlawful insertion of the Three Commercial Elements, in contrast, engenders the very market *uncertainty* which this Commission is striving to eliminate. These uncertainties relating to the qualifications for out-of-state RPS generators to engage in Section 399.16(b)(2) firmed and shaped transactions (assuming any can possibly satisfy the Three Commercial Elements) will further serve to “chill” the development of out-of-state renewable generation projects which are essential for California to fulfill the 33 percent RPS targets by 2020 with least-cost, best-fit transactions.

RPS developers and their financing parties cannot as a practical matter invest years of project development and hundreds of millions of dollars, and remain subject to the risk that the RPS output may not qualify as a Section 399.16(b)(2) transaction. This chilling impact will

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<sup>23</sup> See discussion of Ruling Requesting Comments *supra*, at 2.

reduce RPS generation available to California – undermining California policies to promote RPS power in the region and increasing prices for all RPS products.

**III. IN ALL EVENTS, THE ALJ PD SHOULD PROVIDE CLEAR EXAMPLES OF TRANSACTIONS THAT COULD QUALIFY FOR SECTION 399.16(b)(2) STATUS**

The ALJ PD’s insertion of the Three Commercial Elements into Section 399.16(b)(2) will accomplish its stated (but unlawful) intent of “narrowing the range” of qualifying firmed and shaped transactions.

The Commission should therefore eliminate the Three Commercial Elements. However, if the Commission decides to retain any one or all of the Three Commercial Elements, it must provide market participants with multiple detailed examples of commercially viable structures that fully comply with the Three Commercial Elements. Idaho Wind is not aware of any structure for firmed and shaped transactions recognized by market participants and funded by financing parties that would have the requisite certainty of satisfying the Three Commercial Elements.<sup>24</sup>

Absent the Commission providing clear examples involving all the component parts of a “qualifying” firmed and shaped transaction, it is highly unlikely that any will proceed. The current recitation of ambiguous, abstract and commercially unrelated “elements” fails to provide market participants the necessary precision and certainty upon which to structure transactions qualifying for Section 399.16(b)(2) status.<sup>25</sup> For example, the intended meaning of “substitute

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<sup>24</sup> It is also likely that in seeking to provide the necessary components of a firmed and shaped transaction which could satisfy the supposed Three Commercial Elements, the Commission will recognize that no commercially viable, cost effective, and financeable structure can be developed with these constraints.

<sup>25</sup> For instance in the prior versions of the CEC Guidebook, the CEC provided specific, unambiguous, and complete descriptions of the firmed and shaped transactions that could satisfy the then applicable RPS “delivery” requirements for out-of-state RPS generators. SB 2 (1X) has deleted the “delivery” requirement. However, for purposes of providing the market the necessary clear guidance and regulatory certainty, the Commission should describe to the same level of detail as the CEC guidelines the defining requirements and specific examples of eligible Section 399.16(b)(2) transactions.

energy” and “purchased energy” are critical to enable a developer to incorporate the Three Commercial Elements into an actual commercial transaction; yet they are each undefined and appear to be used inconsistently.

The exigencies of power plant development (evidenced by the unacceptably low “success” rate for RPS projects) mandate that the Commission provide clear examples of Section 399.16(b)(2) firmed and shaped transactions containing the Three Commercial Elements. The regulatory uncertainty created by the ALJ PD will inhibit the development of renewable projects, thereby disrupting California’s ambitious RPS goals, reducing reliability, and increasing costs.

**IV. THE COMMISSION SHOULD NOT “AFTER-THE-FACT” DENY THE ABILITY OF VIABLE PROJECTS TO PARTICIPATE IN THE CALIFORNIA RPS MARKET**

If adopted by this Commission, the ALJ PD will “after-the-fact” deny Idaho Wind the ability to sell its Environmental Attributes to a California retail buyer as a Section 399.16(b)(2) transaction. Transactions that were structured prior to the December 2011 effectiveness of SB 2 (1X) among market participants and which meet all then applicable requirements for firmed and shaped transactions should not be now *per se* disqualified through the imposition of the Three Commercial Elements.

If the Commission decides that it must reject the scope and substance of firmed and shaped transactions that the market has historically recognized and instead administratively dictate new restrictions on the commercial terms for such transactions, it should for purposes of regulatory certainty and ratepayer benefit, allow for a meaningful transition period. As demonstrated by the chronology of the Idaho Wind facilities, RPS projects require at least 4 to 5 years, and often longer, to achieve commercial operation. Critical and irrevocable procurement and investment decisions must be made at an early stage for projects to obtain financing and

reach timely completion. The Commission furthers no purpose by effectively punishing projects such as Idaho Wind which complied with all then applicable rules and regulations.

Accordingly, to the extent that the Commission were to retain any of the Three Commercial Elements, it should also allow that any renewable energy projects that were developed to engage in firmed and shaped transactions with California retail sellers and which achieved commercial operation prior to the effective date of SB 2 (1X) should remain eligible for Section 399.16(b)(2) status, and be exempt (grandfathered) from the requirements to comply with any new eligibility requirements that the ALJ PD proposes, including any of the Three Commercial Elements.

## **V. CONCLUSION**

Idaho Wind Partners 1, LLC respectfully requests that the Commission revise the ALJ PD in the following manner:

1. Construe the requirements for a Section 399.16(b)(2) firmed and shape transaction to be consistent with, and limited to, the requirements set forth in the statutory language and with the “fundamental criteria” set forth in the carry over paragraph on page 39 of the ALJ PD;
2. Delete the Three Commercial Elements from page 40 of the ALJ PD and from the corresponding legal conclusions and ordering paragraphs;
3. To the extent that the Commission were to retain any of the Three Commercial Elements: (a) delete Commercial Element number 1, or revise it to delete the reference to “buyer;” (b) delete Commercial Element number 2; (c) correct the inconsistencies identified herein; (d) define the utilized terms; and (e) provide clear, realistic and complete examples of eligible Section 399.16(b)(2) transactions that satisfy the Three Commercial Elements; and

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4. To the extent that the Commission were to retain any of the Three Commercial Elements, provide for “grandfathering” of renewable energy projects that were developed and structured to engage in firm and shaped transactions with California retail sellers and which achieved commercial operation prior to the effective date of SB 2 (1X).

Respectfully submitted,

/s/

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## **Appendix A Proposed Revisions to Proposed Decision**

### **Text**

- The following text on page 39 should be deleted in its entirety:

SB 2 (1X) provides both more precise requirements in new § 399.16(b) and stricter usage limitations in new § 399.16(c) that those used in the implementation of SB 107. It is reasonable to interpret this more prescriptive statutory scope as narrowing the range of transactions that would meet the criteria of § 399.16(b)(2).

- The following text on page 40 should be deleted in its entirety:

From the perspective of an RPS procurement transaction, this general characterization of a firm and shaped transaction necessitates three commercial elements:

1. the buyer's simultaneous purchase of energy and associated RECs from the RPS-eligible generation facility without selling the energy back to the generation;
2. the availability of the purchased energy to the buyer (i.e., the purchased energy must not in practice be already committed to consumption by another party);
3. the acquisition of the substitute energy at the same time as acquisition of the RPS-eligible energy, or at least prior to submission of the contract for the firm and shaped transaction for Commission approval.

### **Conclusions of Law**

- Conclusions of Law No. 16 should be revised to state:

Procurement from contracts signed on or after June 1, 2010 may be counted in the portfolio content category described in Pub. Util. Code § 399.16(b)(2), as effective December 10, 2011, if the generation facility from which the electricity is procured is certified as eligible for the California RPS and the generation from that facility is firm and shaped with substitute electricity scheduled into a California balancing authority within the same calendar year as the generation from the facility eligible for the California RPS, and if the substitute electricity provides incremental electricity, ~~if the following conditions are met, so long as the renewable energy credits originally associated with the electricity have not been unbundled and transferred to another owner and all other procurement requirements for compliance with the California RPS are also met:~~

- ~~• the buyer simultaneously purchases energy and associated RECs from the RPS-eligible generation facility;~~
- ~~• the energy purchased from the RPS-eligible generation facility is available to the buyer (i.e., the purchased energy must not in practice be already committed to consumption by another party);~~
- ~~• the buyer acquires the substitute energy at the same time as it acquires the RPS-eligible energy.~~

## Ordering Paragraphs

- Ordering Paragraph No. 2 should be revised to state:

A retail seller claiming that procurement for compliance with the California renewables portfolio standard from a contract signed on or after June 1, 2010 counts in the portfolio content category described in Pub. Util. Code § 399.16(b)(2), as effective December 10, 2011, must provide information to the Director of Energy Division sufficient to demonstrate that the generation from that facility is firmed and shaped with substitute electricity scheduled into a California balancing authority within the same calendar year as the generation from the facility eligible for the California renewables portfolio standard, and that the substitute electricity provides incremental electricity, **if the following conditions are met:**

- ~~• the buyer simultaneously purchases energy and associated renewable energy certificates (RECs) from the RPS-eligible generation facility;~~
- ~~• the energy purchased from the RPS-eligible generation facility is available to the buyer (i.e., the purchased energy must not in practice be already committed to consumption by another party);~~
- ~~• the buyer acquires the substitute energy at the same time as it acquires the renewables portfolio standard-eligible energy.~~

