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)

REPLY COMMENTS OF THE UTILITY REFORM NETWORK AND THE COALITION OF CALIFORNIA UTILITY EMPLOYEEES ON THE PROPOSED DECISION OF ALJ SIMON IMPLEMENTING NEW PORTFOLIO CONTENT CATEGORIES FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

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Pursuant to Rule 14.3 of the Commission Rules of Practice and Procedure, TURN and CUE submit these reply comments on the Proposed Decision (PD) of ALJ Simon.

I. ALL UNBUNDLED RECS SHOULD BE CLASSIFIED UNDER §399.16(b)(3)

Many parties take issue with the PD's determination that the purchase of an unbundled Renewable Energy Credit (REC) is a §399.16(b)(3) product regardless of the location of the generator. These parties devote much of their comments to torturing the statutory language in an attempt to show that the Legislature would have opted for a slightly different grammatical construction had it intended to actually place all unbundled REC transactions in the third product category.[1] Without exception, these efforts are exercises in wishful thinking and should not justify modifications to the PD.

The PD is correct in noting that the Legislature classified all unbundled REC transactions, regardless of the location of the generator, under §399.16(b)(3). During the three years of negotiations over SBx2, the Legislature was subjected to endless rounds of hearings and meetings in which stakeholders spoke at length about the virtues and limitations of unbundled RECs. The Legislators definitely knew what an unbundled REC was, and ultimately decided what percentage of the portfolio could be satisfied with unbundled RECs. The Legislature deliberately placed this type of transaction solely in §399.16(b)(3) and limited the use of unbundled RECs in §399.16(c).[2]

The parties seeking a different interpretation fail to make a persuasive argument. It is a general rule of statutory construction that, where the Legislature "has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded."[3] Moreover, "it is a maxim of statutory construction that courts should give meaning to every word of a statute if

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[1] IEP opening comments, page 9; Calpine opening comments page 3; CCSF opening comments, page 2; PGE& opening comments, pages 5-6; AREM opening comments, page 2.

[2] IEP and the LA Sanitation District point to a technical amendment made to SBx2 which both parties claim represents proof that the Legislature intended to allow unbundled RECs to count towards the first or second product category. (IEP opening comments, page 9; LA Sanitation District opening comments, page 5) This amendment was never intended to be substantive, makes no obvious change to the meaning of the section, and IEP fails to identify a single piece of legislative history to support the claim that this edit reflected a change in Legislative intent. In fact, this change was driven by the grammatical preferences of Legislative Counsel rather than by a stakeholder or legislator and was meant to be purely technical in nature.

[3] *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 576.

possible, and should avoid a construction making any word surplusage."[4]

Given that §399.16(b)(3) contains the sole explicit reference to "unbundled renewable energy credits," it is not reasonable to "imply" that the Legislature intended for these words to also be included in §399.16(b)(1) and (b)(2). Opponents of the PD would effectively render meaningless the inclusion of "unbundled renewable energy credits" in §399.16(b)(3) without explaining what purpose these words logically serve. If unbundled RECs can be created for any of the three products defined in §399.16(b), why would the Legislature explicitly include them in §399.16(b)(3)? What purpose would this language serve? Opponents of the PD fail to provide any rational explanation that supports their preferred legal interpretation.

The PD correctly concludes that the Legislature intended for these words to have meaning as written and that their inclusion in §399.16(b)(3) was not an accident. There is no reason to disturb this sound reasoning in favor of an approach that relies on wishful thinking and policy preferences.

II. BUNDLED ENERGY AND REC PRODUCTS CAN BE INSTANTANEOUSLY RESOLD AS BUNDLED PRODUCTS WITH THEIR ORIGINAL ATTRIBUTES

Many parties express concern that the PD would prevent any resale of first and second category products and assume that any secondary sale would automatically render the transaction a third category product.[5] For example, WPTF complains that some generators "have already contracted with third parties to market their output," that the PD would "remove such resources from eligibility for consideration by California compliance entities," and that there would be no opportunity to rely on third party services in facilitating transactions.[6] Other parties worry that the PD would thus make it difficult for parties to trade any excess procurement.

The PD does not require that all resales be treated as third category products. In the event a bundled product (energy and RECs) is resold from one retail seller (or marketer) to another retail seller so that the second retail seller takes delivery of the energy in real-time, the transaction should retain the attributes of the original product. Under such an arrangement, the final buyer should be able to claim credit as if there was no intermediary entity. This type of resale has already been proposed by SCE and SDG&E. In SCE AL 2641-E (Filed October 20,

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[4] *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22, 56 Cal.Rptr.2d 706, 923 at 2d 1.) *State Office of Inspector General v. Superior Court* (2010) 189 Cal.App.4th 695, 2010 WL 3898237, *9.

[5] AREM opening comments, page 2; Pilot opening comments, page 3; PG&E opening comments, page 7.

[6] WPTF opening comments, pages 3-4.

2011), SCE proposes to sell between 254-362 GWh/year of renewable energy from its current portfolio to SDG&E.[7]

SDG&E has also filed for approval of a purchase of geothermal energy from plants owned by the Northern California Power Authority and originally contracted to Silicon Valley Power.[8]

A resale would be treated as a third category product in the event that there is a temporal lag between the initial generation of renewable energy and the resale to a retail seller. By preventing a time lag between initial generation and resale, intermediaries will be unable to engage in the hoarding of first and second category renewable products for purposes of manipulating or inflating prices. For purposes of clarity, the PD should affirmatively state that any resale where the energy is transferred in real-time will be treated as if the final retail seller is the original purchaser.

III. TREATMENT OF DISTRIBUTED GENERATION

Several parties express concern about the treatment of behind-the-meter renewable generation under the PD, claiming that it would be inequitable to limit the ability of these resources to qualify under §399.16(b)(1). Specifically, the Solar Alliance asserts that the statutory reference to the "first point of interconnection with distribution facilities" in §399.16(b)(1)(A) means that the Commission should modify the PD to allow all distribution-level distributed generation to count towards the first product category regardless of whether the energy is consumed onsite.[9]

The PD gives appropriate meaning to the distribution interconnection eligibility criteria in §399.16(b)(1)(A). The Legislature did not intend for this amendment to automatically allow all behind-the-meter generation to qualify in the first product category. Smaller renewable generation projects that export power to the grid may interconnect to the distribution system (on the utility side of the meter). The 12,000 MW DG goal established by the Governor includes these projects that will be developed under the Renewable Auction Mechanism and the SB 32 Feed-in Tariff. Any procurement of a bundled renewable product from such generation would

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[7] SCE AL 2641-E, page 4 ("the renewable energy to be delivered to SDG&E under the Agreement consists of bundled renewable generation from in-state facilities that was originally to be delivered to SCE pursuant to Commission-approved PPAs.")

[8] SDG&E Advice Letter 2278-E, page 3, filed August 17, 2011. ("SVP will schedule the energy for delivery to the CAISO and allocate to SDG&E 40 MW per hour of firm fixed energy and associated green attributes from the designated units. SDG&E will coordinate its load schedules to take into account the 40 MW per hour supplied.")

[9] Solar Alliance opening comments, page 3.

presumptively count towards the §399.16(b)(1) category.

The more complex issue relates to behind-the-meter renewable generation that consumes some or all of the production for onsite loads. CWCCG, LADWP and the Los Angeles Sanitation District express concern that these generators may not count towards the first product category.[10] These concerns are misplaced. Any DG unit can be configured to export power to the distribution system and thereby qualify under §399.16(b)(1).

That said, TURN/CUE urge the Commission to modify the PD to allow the retail seller serving a customer with behind-the-meter generation to receive credit under §399.16(b)(1), if the retail seller provides a bill credit for the energy production and procures the associated RECs. This arrangement reflects the key elements of a bundled transaction by providing compensation for both energy and RECs and ensuring that the energy is used to serve the loads of the retail seller. In making this modification, the PD should ensure that any transfer of the RECs to an unrelated retail seller would constitute an unbundled transaction properly classified under §399.16(b)(3).

If the Commission makes this modification, it should require that any energy produced and consumed onsite is added to the sales of the retail seller in order to prevent double counting of the system output. Finally, the Commission should clarify that any customer selling RECs to a retail seller may not make any product claims regarding their use of renewable power. In other words, a business with a net metered solar system may not sell the RECs to a retail seller and then publicly claim that its business is "solar powered."

IV. REQUIREMENTS FOR FIRMED AND SHAPED PRODUCTS

PG&E and Idaho Wind Partners both argue against the requirement that a firmed and shaped product excludes any transaction where the energy has previously been "committed to consumption by another party".[11] PG&E desires more flexibility to construct firmed and shaped products involving unbundled RECs from WECC generators and unrelated energy purchases. Idaho Wind wants to be able to offer a firmed and shaped product from wind projects selling energy to Idaho Power under QF contracts.

The Commission should reject attempts to eviscerate the §399.16(b)(2) product definition. The arrangement described by Idaho Wind does not fit within the definition of "firmed and shaped" and should be classified as an unbundled REC product pursuant to

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[10] CWCCG opening comments, page 5; LADWP opening comments, pages 5-6; LA Sanitation District opening comments, page 13.

[11] PD page 40; PG&E opening comments, page 10; Idaho wind partners opening comments, pages 3-4.

§399.16(b)(3). The Idaho Public Utilities Commission previously explained, in filings with FERC, that Idaho Wind has unbundled RECs available for sale to third parties.[12] Allowing Idaho Wind to transform its unbundled RECs into a "firmed and shaped" bundled product would undermine the bright lines between products described in §399.16(b)(2) and §399.16(b)(3).

V. FOR FIRST CATEGORY PRODUCTS, NO SUBTITUTION MAY OCCUR REGARDLESS OF THE TYPE OF RESOURCE

Powerex seeks a modification to the PD in order to allow a pool of renewable generation resources to be scheduled into a CBA as a §399.16(b)(1) product even if one renewable resource "substitutes" for another in the course of normal operations.[13] The Commission should reject this proposed expansion of the product definition as inconsistent with the plain text of §399.16(b)(1) requiring a specific generator to schedule into a CBA "without substituting electricity from another source." The statute explicitly prohibits substitution with energy from both renewable and non-renewable resources. It would therefore be legal error to allow such a product to be composed of many different resources.

Respectfully submitted,

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[12] See 134 FERC 61, 217 at ¶9 (2011).
[13] Powerex opening comments, page 5.

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 November 1, 2011, at San Francisco, California.

/s/
Matthew Freedman
Staff Attorney