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

REPLY COMMENTS OF FUELCELL ENERGY, INC. ON OCTOBER 13, 2011 STAFF PROPOSAL

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Pursuant to the October 13, 2011 Administrative Law Judge's Ruling (1) Issuing proposal (2) Entering staff proposal and other documents into the record and (3) Setting comment dates ("Ruling"), FuelCell Energy, Inc. ("FCE") submits the following reply comments addressing comments and recommendations in response to the Revised Draft Renewable FIT Staff Proposal ("Staff Proposal").

I. Introduction

FCE appreciates this opportunity to respond to the initial comments filed in this proceeding. Many commenting parties suggest taking a step back and considering alternatives to the Staff Proposal. FCE agrees, and the following reply comments focus primarily on this recommendation.

In enacting SB 32, the Legislature advised the Commission on how to approach revising the existing renewable feed-in-tariff ("Renewable FIT"):

> A tariff for electricity generated by renewable technologies should recognize the environmental attributes of the renewable technology, the characteristics that contribute to peak electricity demand reduction, reduced transmission congestion, avoided transmission and distribution improvements, and in a manner that accelerates the deployment of renewable energy resources.[1]

Over the past two years, the Commission has solicited briefs and multiple rounds of detailed comments on how to accomplish this objective, consistent with directives in Public

[1] 2009 Stats., Chapter 328, Section 1(e).

Utilities Code Section 399.20 and the Public Utility Regulatory Policies Act of 1978 ("PURPA"). The Staff has worked hard to identify issues and to solicit input on both legal and regulatory issues. Surprisingly, the most recent Staff Proposal narrowed the discussion of pricing mechanisms to consideration of a single option – using the outcome of the as-yet uncompleted "Renewable Auction Mechanism ("RAM") to set prices for the Renewable FIT.

It is apparent from opening comments that the RAM pricing approach is not supported by many industry stakeholders, the IOUs, ratepayer advocates, or environmental advocacy organizations, many of which propose alternatives or significant changes in their opening comments. More importantly, the record is not adequate to support a determination by the Commission that the RAM approach will result in a reasonable avoided cost price for eligible SB 32 resources. For these reasons, the Commission needs to go back to the drawing board.

The Commission has the data and the expertise at its disposal to set appropriate avoided cost prices for Renewable FIT resources or resource categories. Those prices, according to the Federal Energy Regulatory Commission ("FERC"), should reflect the "cost of electric energy from the generators being avoided, e.g., generators with certain characteristics."[2] There is not one "right way" to accomplish this. The Commission can use available data on real project costs and set resource-specific prices, or the Commission can use an "MPR plus" approach, i.e. starting from the market price referent ("MPR") and using available data to adjust this base price to reflect attributes and values not included in the MPR. What matters most is that the pricing mechanism meets applicable statutory and regulatory requirements and that the SB 32 program is structured to enable all eligible resources to sign FIT contracts and build new distributed generation ("DG") projects.

[2] See *California Public Utilities Commission,* 134 FERC ¶ 61,044 at ¶ 30.

There is a strong stakeholder interest in implementing SB 32 successfully, and FCE is confident that the Commission can accomplish the Legislature's objectives. The IOUs clearly continue to take issue with FERC's recent orders on FIT pricing,[3] and they may file appeals challenging the Commission's exercise of authority to implement SB 32. The Commission should not be deterred by such threats of litigation. Instead it should proceed to implement SB 32 according to applicable requirements, and to explain clearly in its decision the legal basis upon which it is acting.

II. The Staff Proposal should not be the starting point for implementing SB 32.

CEERT correctly observes that the Staff Proposal offers no meaningful legal analysis supporting its proposal to use RAM auction results in place of a FIT price mechanism that is consistent with applicable statutory directives and PURPA requirements.[4] The RAM-based pricing proposal is not grounded in the language of SB 32 itself, does not square with legislative intent, and dismisses without respectful consideration reasonable alternative proposals by stakeholders. FCE agrees with those parties suggesting that the Commission needs to slow down and consider other options.[5]

FCE and other parties have offered detailed proposals for FIT pricing that comport with the specific requirements of SB 32 and with FERC's recent decisions interpreting PURPA. As CEERT points out, those proposals have been dismissed out of hand in the Staff Proposal, apparently in hopes that a RAM-based pricing approach would "avoid the need for complicated calculations or litigation."[6]

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[3] See e.g. SCE Comments at 9 ("SCE continues to maintain that the advisory principle enunciated by FERC in the Clarification Order is inconsistent with PURPA.").
[4] CEERT Comments at 2.
[5] See e.g. California Wastewater Climate Change Group ("CWCCG") Comments at 3; Agricultural Energy Consumers Association ("AECA") Comments at 2-3.
[6] See Staff Proposal at 4.

Clearly the theoretical "pros" of defaulting to a RAM-based Renewable FIT price have not materialized. The Staff Proposal will not "avoid the need for complicated calculations." Indeed, the Staff Proposal itself acknowledges that the outcome of the RAM auction cannot approximate the avoided cost of Renewable FIT resources without adding in avoided costs associated with DG and a mechanism for future adjustments. Nor will the Staff Proposal enable the Commission to avoid litigation. None of the three IOUs support the Staff Proposal, and judging from their comments here and recent experience in the CHP FIT proceeding, appeal of *any* FIT pricing mechanism would seem to be a foregone conclusion.

But a desire to avoid making calculations or to prevent IOU appeals should not have been the starting point in devising the Renewable FIT pricing mechanism in the first place. The starting point should be the plain language of Section 399.20 and FERC's very recent and very specific guidance on how to set a FIT price consistent with PURPA. The Staff Proposal reflects a good intention – the Commission *does* need to narrow its alternatives and eliminate proposals that do not comport with the statute or with PURPA. In fact, that is exactly one of the steps needed in order to focus the discussion on an appropriate and workable approach to SB 32 pricing.

III. The Commission can and should establish a process for implementing SB 32 in a manner consistent with Legislative intent and applicable PURPA requirements.

Numerous parties point out in opening comments that the data and analytical tools needed to set Renewable FIT prices consistent with SB 32 and PURPA are readily available. Sierra Club identifies the California Energy Commission ("CEC") and a number of private sector consultants that have extensive experience in the area of cost and pricing analysis, and Sierra Club notes other jurisdictions with Renewable FITs that may serve as a model.[7] Sustainable

[7] Sierra Club Comments at 8-9.

Conservation and the Green Power Institute observe that studies by the CEC and the State Water Board have provided aggregated data on digester gas projects.[8] And AgPower, CalSEIA and FCE have all provided source data and proposals for deriving prices by using a non-renewable base price and adjustments to reflect the avoided cost and value to ratepayers of additional attributes.[9]

There is nothing preventing the Commission from using available data and accepted analytical methods to set Renewable FIT prices that are differentiated by technology type and project size. There is evidence on the record supporting this approach, which is also endorsed by experts in public policy.[10] The Energy Division staff is very experienced and capable, and the Commission has access to outside consultants and stakeholder input. FCE and other parties advocating a technology-specific or MPR-based pricing approach do not expect or want the Commission to calculate with laser-beam precision every cost element or ratepayer benefit associated with every individual eligible resource or technology. However, the Commission *does* need to make a reasonable effort to set SB 32 prices that reflect the full avoided cost of eligible resources.

IV. A Renewable FIT rate based on the IOU's cost of procuring comparable generation resources will ensure ratepayer indifference.

The Legislature has authorized a Renewable FIT that applies to all eligible renewable technologies. And in Section 399.20(d)(4), the Legislature has authorized the Commission to set prices for the purchase of power from those generators at a rate that ensures ratepayer

[8] SusCon/GPI Comments at 10.

[9] AgPower Comments at 5-6; FCE Comments at 9. *See also* FuelCell Energy, Inc. Comments to Sec. 399.20 Ruling of June 27, 2011 at 6-8. FCE notes that a recently released 2011 update of the pricing study titled "Build-Up of Distributed FuelCell Value In California; Background and Methodology, published by the National FuelCell Research Center at the University of California-Irvine is available at: http://www.nfcrc.uci.edu/2/FUEL_CELL_INFORMATION/MonetaryValueOfFuelCells/Fuel_Cell_Value-Methodology_2011_FINAL_072411_Large-Units_Final.pdf.

[10] For example, see the Intergovernmental Panel on Climate Change, Special Report on Renewable Energy Sources and Climate Change Mitigation (May, 2011), Chapter 11, page 53. http://srren.ipcc-wg3.de/report

"indifference" to the purchase. From FCE's perspective, if the Commission sets avoided costs at the rate that correctly reflects the "actual procurement requirements" of SB 32 and the actual cost of procuring energy from "generators with those characteristics" per FERC's instruction in recent orders,[11] the resulting price will, *per se*, meet the ratepayer indifference test. However, opening comments and the Staff Proposal itself reveal confusion regarding the meaning of ratepayer "indifference." As a first step in completing the work of establishing a Renewable FIT that complies with Section 399.20, the Commission needs to restate and reaffirm its established interpretation of the ratepayer "indifference" requirement.

In Rulemaking 08-06-024, the CHP FIT proceeding, the Commission carefully considered a variety of proposed interpretations of ratepayer "indifference" and held that:

> We agree with parties that customer indifference is achieved when ratepayers not utilizing the CHP systems are *no worse off, nor any better off*, as a result of power purchased pursuant to AB 1613. While one could argue that indifference would be achieved by setting price equal to an electrical corporation's avoided cost or the market price, we do not believe that such a narrow application would be the appropriate measure in this instance. As we have previously discussed, the intent of AB 1613 is to reduce GHG emissions and other pollutants through the development of small, highly efficient CHP systems. Consequently, customers not utilizing these CHP systems will be receiving not only electricity from these systems, but also certain societal benefits.[12] As such, in order to ensure that customers not utilizing the eligible CHP systems are no better off, the price paid under this program should include the value of these benefits. …
>
> *[W]e find that customer indifference under AB 1613 would not be achieved if the price paid under the program only reflected the market price of power.* As discussed, since customers who are not utilizing the eligible CHP system will receive environmental and locational benefits from these systems, *the price paid for power should also include the costs to obtain these benefits*.[13]

[11] See *California Public Utilities Commission,* 134 FERC ¶ 61,044 at ¶ 33.
[12] These benefits could include environmental benefits due to reduced GHG emissions and more efficient use of waste heat and natural gas, as well as locational benefits associated with reduced congestion in certain load-constrained areas.
[13] D.09-12-042 at 16-17 (emphasis added).

Parties' opening comments offer a variety of views on the meaning of ratepayer "indifference," many of which are markedly inconsistent with the Commission's established position that "the price paid for power should also include the costs to obtain these benefits." The Commission should clarify that it will apply its interpretation of ratepayer "indifference" consistently. And the Commission should reaffirm that customer indifference is *not* achieved by using a market proxy from the RAM that does not include payment for such benefits to price power from resources that provide program-specific benefits to ratepayers.

What does this mean in concrete terms? For a fuel cell system installed at a digester site it simply means that the price paid for energy, capacity and other attributes associated with that project should reflect the actual value of the project to the ratepayers. If the resource is paid at the IOU's avoided cost of obtaining a generator with the same characteristics, this value will be reflected in the price.

V. The Commission does not have the discretion under Section 399.20 to adopt a Renewable FIT program that effectively excludes a class of eligible participants.

A number of parties note with concern that the Staff Proposal's approach to structuring the SB 32 program and pricing could easily end up categorically excluding all digester gas and wastewater gas projects.[14] FCE agrees. The RAM pricing mechanism dumps all "baseload" resources into one category, notwithstanding significant differences in avoided cost and ratepayer benefits.[15] The Commission has allowed the IOUs to procure a negligible quantity of power from baseload resources, and to discard any bids the IOUs deem to be too high. Under the circumstances it seems distinctly possible that whatever "baseload" price emerges will not reflect the avoided cost of a biogas project. Several parties interested in encouraging development of

[14] AgPower Comments at 4; AECA Comments at 5; CWCCG Comments at 2.
[15] This was permissible under RAM because the Commission had no obligation to ensure that auction results comply with avoided cost requirements.

digester projects recognized from the outset the need to ensure that all technologies, not just least-cost resources, have a place in the Renewable FIT program and proposed that the Commission allocate a proportion of program capacity to biogas-fueled projects. Although this proposal was repeatedly raised, it has neither been acknowledged nor discussed in the Staff Proposal.

The Commission does not have to create a "carve out" for digester gas projects. But it *does* have a statutory obligation under Section 399.20 to make the Renewable FIT available to *all* eligible renewable generating resources. TURN argues otherwise, speculating that the Legislature did not intend to include all resources but instead meant to fashion the Renewable FIT as a "least cost" program.[16] The Commission should dismiss this reading of SB 32 as inconsistent with the plain language and stated intent of Section 399.20. The Commission does not have the discretion to set prices so far below avoided cost that entire classes of otherwise eligible technologies or applications cannot participate, or to allow the IOUs to allocate all but a meaningless fraction of the program to a subcategory of least-cost resources. The law includes all eligible renewable resources and the Commission has a legal obligation to ensure that they all have a place in the program.

As the Staff Proposal acknowledges, the RAM-based pricing idea is supported only by a few parties representing utility-scale solar PV developers.[17] This is a very homogeneous group of stakeholders with a narrow interest in this proceeding. While it would seem preferable to adopt a consistent approach to Renewable FIT pricing, FCE would not oppose a Commission decision carving out a RAM- based pricing mechanism for an appropriate subcategory of solar projects eligible for the Renewable FIT. Having reviewed the comments by the larger solar

[16] See TURN Comments at 10-12.
[17] Staff Proposal at 4.

parties and by CalSEIA, which represents "small" solar, it seems the Commission might use the RAM approach for 2-3 MW systems and a different approach for smaller solar projects.

VI. The Commission must draw a clear line between the existing FIT program and the program authorized under SB 32.

Several parties note that the Commission needs to draw a very clear line between the existing Renewable FIT program, which was established under AB 1969, and the expanded Renewable FIT program that will be available upon implementation of SB 32.[18] FCE strongly agrees that such clarification is clearly necessary. Otherwise, the Legislature's intention to modify the program's requirements and pricing methodology at the same time as it expands the capacity and reach of the program would be thwarted. The AB 1969 program appears to have been fairly successful recently in eliciting applications (if not completed systems) from a substantial number of solar PV projects. It has *not* resulted in any meaningful number of biogas projects, for reasons discussed in the record of this proceeding. Hopefully that imbalance will be corrected with the implementation of SB 32.

The Commission needs to clarify that the availability of contracts under the existing AB 1969 program will be limited to the capacity of that program. As of the effective date of the SB 32 program, all eligible resources will have an equal opportunity to participate in this separate program. No portion of the SB 32 program should be allocated from a "waiting list" from the previous program, but no project on a waiting list should be prevented from signing up under the SB 32 program.

FCE takes no position on the specifics of dealing with the overflow of solar PV projects that have apparently applied for but not signed contracts under the AB 1969 program, except to request clarification that the Commission should not reserve any portion of the SB 32 program

[18] See e.g. CEERT Comments at 14.

for such projects or allow them to displace baseload projects that have been effectively excluded from participation in the AB 1969 program because the current price is too low to make project development feasible.

VII. The final rules for implementing the Renewable FIT must include strict measures for controlling gaming by large developers.

FCE was disturbed to read in opening comments acknowledgement that the IOU administrators of the existing FIT program have apparently permitted "daisy chaining" of large projects and perhaps other gaming behavior.[19] The Commission must establish clear and specific tariff rules to prevent gaming, and instruct the IOUs to immediately seek tariff changes in the event that large developers find new ways to circumvent those rules. SB 32 was explicitly enacted in order to allow small developers that have no other place in the IOUs' procurement portfolio a chance to develop small renewable DG projects. The Commission should take steps to ensure that the Legislature's intent is respected and the objectives of SB 32 are achieved.

VIII. Conclusion

FCE appreciates the Commission's consideration of the recommendations discussed above and looks forward to further effort to develop an appropriate and effective pricing mechanism for the Renewable FIT.

Dated: November 14, 2011

Respectfully submitted,

By: /s/

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[19] See PG&E Comments at 29; DRA Comments at 3-4.

VERIFICATION

I am the attorney representing FuelCell Energy, Inc. in this proceeding. FuelCell Energy, Inc. is absent from Sacramento County, where my office is located, and under Rule 1.11(d) of the Commission's Rules of Practice and Procedure, I am submitting this verification on behalf of FuelCell Energy, Inc. for that reason. I have read the attached **REPLY COMMENTS OF FUELCELL ENERGY, INC. ON OCTOBER 13, 2011 STAFF PROPOSAL.** I am informed and believe, and on that ground allege, that the matters stated in this document are true.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 14th day of November, 2011, at Sacramento, California.

/s/

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