

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Continue  
Implementation and Administration of California  
Renewables Portfolio Standard Program

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Rulemaking 11-05-005

**INITIAL COMMENTS OF FUELCELL ENERGY  
ON OCTOBER 13, 2011 STAFF PROPOSAL**

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In accordance with 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 these Initial Comments on the Revised Draft Renewable FIT Staff Proposal (“Staff Proposal”). As requested by the ALJ, the following comments are organized consistent with the Staff Proposal.

**I. Introduction and Summary of Position**

FCE appreciates this opportunity to provide further comments and recommendations on the implementation of Senate Bill 32 (“SB 32”), which expands to 3 MW and modifies the existing Renewable Feed-In Tariff (“Renewable FIT”) program. FCE manufactures, distributes and provides other services related to stationary fuel cells, including systems that are fueled by renewable digester gas. The majority of systems FCE sells in California are small customer-owned 1-3 MW baseload combined heat and power (“CHP”) facilities. These customers currently have few feasible options for selling excess renewable electricity. For this reason, FCE and its customers have a real stake in the successful implementation of the SB 32 Renewable FIT program. FCE has participated from the outset in this proceeding in the hope that a Renewable FIT will provide a new opportunity for customers seeking to develop fuel cells at wastewater treatment projects, agricultural digester sites, and in other renewable CHP applications.

As discussed below, FCE has two fundamental concerns regarding the Staff Proposal. First, the Staff Proposal recommends using the outcome of a new, untested reverse auction mechanism (“RAM”) designed for up to 20 MW utility-scale projects to set the base price for an entirely different class of distributed generation (“DG”) resources. The Staff Proposal does not suggest a pricing mechanism that would actually reflect the avoided cost to the investor-owned utility (“IOU”) of a generator with the “particular characteristics” of SB 32 products or technologies, per FERC’s recent guidance. Instead, the Staff Proposal simply speculates that the RAM winning bidders will represent the right “market segment,” and trusts that the auction will yield bids that reflect an accurate Renewable FIT base price. The Staff’s desire to “harmonize” the RPS, RAM, and Solar PV programs with the Renewable FIT sounds attractive as a concept, but is fatally flawed because there is no factual basis for presuming the market clearing price in a price-only auction designed for larger, utility-scale projects will yield an accurate base price for small baseload DG projects.

FCE’s second concern is Staff’s proposal to leave the allocation of Renewable FIT capacity completely up to the IOUs. Once again, the only reason offered for allowing the IOUs to choose which resources will be procured through the Renewable FIT is to “harmonize this program with RAM.”<sup>1</sup> The Commission needs to review the Legislature’s stated intent for enacting SB 32, which says nothing whatsoever about “harmonization” and instead emphasizes the need to address tariff and regulatory structures creating barriers for GHG-reducing, strategically located small projects of less than 3 megawatts to participate in the renewable energy market. Leaving capacity allocation up the IOUs may be justifiable in the case of the RAM program, since the projects will likely be larger and overlap considerably with

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<sup>1</sup> Staff Proposal at 16.

procurement efforts underway under the existing RPS and solar PV programs, but this is not the case with respect to the relatively small systems procured through SB 32.

The Commission should establish allocation targets for the IOUs' implementation of SB 32, taking into account the utilities' procurement needs *and* other relevant considerations, including whether eligible resources have other practical alternatives to the Renewable FIT. In the case of digester gas projects, there is a notable lack of contracting options for worthy projects, notwithstanding the demonstrable and unique benefits such projects offer ratepayers. The proposal of numerous parties to this proceeding for an allocation of program capacity for digester gas projects has simply been ignored in the Staff Proposal. If the Commission likewise does not want to consider this proposal it should at least take reasonable steps to ensure that all technologies are allocated a fair proportion of program capacity.

FCE discusses these issues below and offers recommendations as requested by Staff.

## **II. Guiding Principles**

The Staff Proposal offers twelve Guiding Principles as the foundation for the Renewable FIT program.<sup>2</sup> This is a very important starting point. The Commission's decision on program design should be guided by consideration of the program's objectives. The Guiding Principles include some worthy objectives, and hopefully signal intent to address some of the widely acknowledged problems that have resulted in relatively few on-line projects under the current renewable and wastewater feed-in tariffs. The need to "create [a] stable and sustainable market" (Principle 3) for renewable fuel cells and other small baseload DG resources is very clear.

The Commission should take care to balance its practical interest as a regulator in trying to "harmonize" the various existing renewable procurement programs (Principle 7) with the more fundamental and substantive objectives of creating a stable and sustainable market for renewable

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<sup>2</sup> Staff Proposal at 6-7.

technologies and ensuring that *all* RPS-eligible renewable resources are able to participate in the program (Principle 11). This balancing is not an easy task, but it is fundamental to the successful implementation of SB 32 for all eligible resources.

### **III. Comments on Program Elements of Staff Proposal**

#### **a. Pricing**

The Staff Proposal on pricing is based on two initial recommendations:

- The FIT price must be determined to be an avoided cost under PURPA. Generators must register as QFs with FERC and can utilize the self-certification process....
- The renewable market is the appropriate market segment to use in determining the Renewable FIT price since renewable FIT generators are avoiding procurement of other renewable generators.<sup>3</sup>

With respect to the first point above, the Staff is clearly correct in stating that the Renewable FIT price must be determined to be an avoided cost price under the Public Utility Regulatory Policies Act (“PURPA”).<sup>4</sup> While a few parties have argued otherwise, most agree that the Commission should ensure that the Renewable FIT price conforms to the requirements of PURPA, the PURPA regulations and the recent decisions by the Federal Energy Regulatory Commission (“FERC”) providing specific guidance on FIT pricing.<sup>5</sup> Adherence to PURPA and applicable FERC decisions will help minimize legal risk, but of course may not forestall appeals since some parties to this proceeding have taken a position that FERC is wrong and that the Commission may not set an administratively determined avoided cost price.

The Staff’s recommendation that generators must register as QFs is correct, but only for sellers that are subject to FERC jurisdiction. FERC has stated unequivocally that non-jurisdictional public entity sellers are not subject to restrictions imposed under PURPA, although

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<sup>3</sup> Staff Proposal at 8.

<sup>4</sup> 16 U.S.C. § 824a-3.

<sup>5</sup> See *California Public Utilities Commission*, 132 FERC ¶ 61,047 (2010); *California Public Utilities Commission*, 133 FERC ¶ 61,059 (2010); *California Public Utilities Commission*, 134 FERC ¶ 61,044 (2011).

they may voluntarily choose to become QFs.<sup>6</sup> The Commission has clarified this point in implementing AB 1613 and should likewise do so here.

***Recommendation: The Commission should set a Renewable FIT price that is an avoided cost price under PURPA and require all sellers that are not exempt from FERC jurisdiction under 16 U.S.C. § 824(f) to comply with applicable FERC QF certification requirements.***

FCE agrees with the reasoning behind Staff's second point - that renewable resources are the appropriate market segment to use in determining the Renewable FIT price, since renewable FIT generators are avoiding procurement of other renewable generators required to meet RPS obligations. Using renewable resource prices to set the Renewable FIT prices is not the only method of pricing that would pass muster under PURPA, but using the prices that the IOUs are paying for comparable renewable resources is an appropriate approach to setting the Renewable FIT price. The problem is that the Staff Proposal's pricing recommendation refers generally to the "renewable market" rather than specifically to the market for resources comparable to SB 32 resources. The distinction has very important implications for pricing.

In its most recent opinion providing guidance regarding feed-in tariff pricing under PURPA, FERC reaffirmed the states' authority to base renewable resource pricing on comparable resources:

[I]t is the *states* that have the authority to dictate a utility's actual purchase decisions. Because avoided cost rates are defined in terms of costs that an electric utility avoids by purchasing capacity from a QF, and because a state may determine what particular capacity is being avoided, the state may rely on the cost of such avoided capacity to determine the avoided cost rate. Thus, the avoided cost rate may take into account the cost of electric energy from the generators being avoided, e.g., generators with certain characteristics. As explained in the Clarification Order, where a state requires a utility to procure energy from generators with certain characteristics, generators with those characteristics constitute the sources that are relevant to the determination of the utility's avoided cost for that procurement requirement.<sup>7</sup>

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<sup>6</sup> See *California Public Utilities Commission*, 132 FERC ¶ 61,047 (2010) ¶ 71.

<sup>7</sup> *California Public Utilities Commission*, 134 FERC ¶ 61,044 at ¶ 30 (2011) (citations omitted, emphasis in original).



All of FERC’s recent statements regarding FIT pricing under PURPA take particular care to acknowledge that “renewable generation” is not a single reference point for pricing. FERC consistently refers to “generators being avoided” and “generators with certain characteristics” in the plural, and recognizes that these generators entail “actual procurement requirements, and resulting costs.”<sup>8</sup> Thus, in determining avoided cost, the Commission can and should start by carefully identifying the characteristics and costs of the “generators being avoided” under SB 32.

The relevant generators are *diverse*. They include a variety of generating technologies with correspondingly diverse avoided costs and benefits. In particular, generators within the Staff’s proposed “baseload” resource category represent a wide range of generating technologies, including geothermal plants, combustion turbines, and fuel cells, with little in common except for the fact that they can operate continuously and do not rely on an intermittent fuel source.

The relevant generators are *small*. The Renewable FIT program is restricted to projects sized up to 3 MW. This category of DG resources includes a higher proportion of customer-owned and operated projects, more public entity-owned projects, and more projects not supported by large developers and multinational corporations.

The relevant generators are *distributed resources*. While it is possible that a few larger projects may be capable of interconnection at transmission voltage, it is very likely that SB 32 resources will be interconnected at distribution voltage, close to load.

The Commission cannot ensure that prices for SB 32 resources accurately reflect the IOUs’ avoided cost of procuring generators with the “particular characteristics” identified above unless the Commission actually focuses on the relevant generators. In other words, before approaching the nuts and bolts of SB 32 pricing, the Commission should state clearly that the

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<sup>8</sup> Id. ¶ 33.

relevant point of comparison is what it would otherwise cost the IOU to procure a diverse portfolio of small renewable DG resources.

***Recommendation: The Commission should acknowledge that a portfolio of RPS-eligible renewable distributed generators with a capacity of up to 3 MW is the appropriate market segment to use in determining the Renewable FIT price since these renewable FIT generators are avoiding procurement of other small, RPS-eligible distributed renewable generators.***

### **Determining the FIT Base Price**

Several parties representing utility-scale solar projects have recommended that the Commission use prices set in the forthcoming RAM auctions as the basis for establishing pricing for under 3 MW projects under the Renewable FIT. The Staff suggests that “RAM represents the most relevant renewable market segment that the Renewable FIT generators are avoiding since RAM is available for projects between 500 kilowatt (kW) to 20 MW.”<sup>9</sup> There are at least two fundamental flaws in this conclusion. The first is discussed above – assuming that a price-only auction open to projects up to 20 MW is the “most relevant market segment” for pricing SB 32 baseload resources is simply incorrect. Obviously the “most relevant market segment” for pricing SB 32 resources is the market for similar-sized resources for each output category.

The second fundamental flaw is that no RAM auction has yet taken place and consequently the Commission has absolutely no idea whether the participants in the RAM will constitute a “relevant” renewable market segment for pricing Renewable FIT resources *even in the very unlikely event that the RAM were to only attract under 3 MW sized projects.*

Consider the upcoming RAM auction: SCE and SDG&E have each apparently capped their first auction for baseload resources at a total capacity of *five megawatts*.<sup>10</sup> The rules governing the RAM auction allow each IOU to procure “plus or minus” 20 MW of the capacity

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<sup>9</sup> Staff Proposal at 9.

<sup>10</sup> See SCE Request for Offers, Art. 2.01; SDG&E Request for Offers, p.3. Five MW was the minimum imposed by the CPUC for SCE’s auction, and 3 MW was the minimum for SDG&E. Resolution E-4414, Ordering Paragraph 7.

targeted in each product category as long as the total capacity in each auction is plus or minus 20 MW.<sup>11</sup> And an IOU may reject an entire auction's results or individual bids if it concludes that the bid prices are "uncompetitive relative to the IOU's other renewable opportunities."<sup>12</sup> It is not necessary to wait for the auction results to see that they cannot yield a robust reference price for baseload resources participating in the Renewable FIT.<sup>13</sup> The Staff Proposal does not address this issue at all, except to acknowledge that the first RAM auction has not yet taken place.

Based on its speculation that the RAM constitutes a "relevant" market benchmark, the Staff Proposal recommends using the as-yet unknown results of the RAM auction to set the Renewable FIT price for the three identified product categories, which also track the RAM process.<sup>14</sup> FCE has no comment on whether this is a reasonable approach for solar projects. However, for the reasons discussed above, FCE does not believe that the Commission should, at this time, use the RAM auction to set the base price for baseload resources. If, in the future, the Commission can determine that the RAM auction has produced projects having similar size, technology, product and other characteristics relevant to pricing under SB 32, use of the RAM for SB 32 pricing might be worth consideration.

In the meantime, the Commission should consider an approach more consistent with the goals of regulatory certainty (Principle 3), transparency (Principle 4), and ensuring that all eligible resources are able to participate (Principle 11). In comments and reply comments on the Initial Staff Proposal, FCE indicated its support for two alternative approaches for setting SB 32 prices in a manner that would reflect the avoided cost of SB 32 resources -- one based on

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<sup>11</sup> Resolution E-4414, Ordering Paragraph 8.

<sup>12</sup> D.10-12-048 at 36.

<sup>13</sup> SCE and SDG&E are primarily seeking on-peak intermittent generation (55 MW and 10 MW respectively) in the first RAM auction. PG&E has split its RAM procurement target evenly at 35 MW between the three product categories.

<sup>14</sup> Staff Proposal at 9.

technology-specific pricing, and the other based on the market price referent (“MPR”) plus adders.

The cost to an IOU of procuring a digester gas-fueled <3 MW fuel cell project can be derived from market data or from actual IOU procurement data. FCE’s proposal for doing this is described in FuelCell Energy Inc.’s Comments to Sec. 399.20 Ruling of June 27, 2011 (July 21, 2011)) at pages 6-8. FCE’s discussion of how to approach an MPR plus adders-based pricing methodology is described on pages 11-12 of FCE’s August 26, 2011 Reply Comments. Other parties have suggested a similar approach. These suggested pricing mechanisms, which reflect the *avoided cost to ratepayers of procuring small distributed renewable projects*, are mentioned in passing on page 3 of the Staff Proposal but appear not to have been seriously considered as alternatives to the RAM-based approach.

***Recommendation: In light of the fact that the RAM is designed for larger, utility-scale projects, the fact that SCE and SDG&E are only seeking to procure a negligible quantity of baseload renewable power through the RAM auction, and the lack of any evidence that this new auction mechanism will yield a price reflecting the avoided cost of baseload Renewable FIT resources, the Commission should use either a technology-specific or an MPR- plus pricing approach, starting with the recommendations of several interested parties.***

If the Commission adopts the Staff’s Proposal to use the RAM auction to set the base price for baseload resources, the Commission needs to decide *now* what happens if the RAM auction does not result in any executed contracts or otherwise fails to yield a reasonable base price. This is obviously a distinct possibility, in light of the minimal capacity targeted for procurement in the forthcoming RAM auction for off-peak intermittent and baseload resources. The alternatives discussed above or an alternate proxy for the base price (e.g. in the case of fuel cells by reference to actual IOU procurement of similar generating facilities) should be identified now, and the Commission should instruct the Staff to file within 30 days an alternate Staff Proposal for comment by interested stakeholders. This “Plan B” approach is essential in order to

create a stable and sustainable market and regulatory certainty (Principle 3) and to ensure administrative ease and lower transaction costs for the buyer, seller, and regulator (Principle 6).

In the event the proposed RAM base price fails to materialize in any product category, the Commission should NOT use the price from another product category, as suggested in Question 1.<sup>15</sup> The reason for this is obvious – the avoided cost to the IOU of procuring different product categories from renewable resources (and for that matter, from different generating technologies within a product category) is significantly different. More importantly, for the reasons described above, there is no reason to assume that *any* price set in the first RAM auction will be a reliable base price reference point for any SB 32 resource.

***Recommendation: The Commission should assume a reasonable possibility that the RAM auction will not yield a usable base price in one or more product categories and decide on Plan B ahead of time. Plan B should be use of technology-specific avoided cost data or a reasonable “MPR Plus” pricing mechanism. In considering options for Plan B, the Commission should not use the RAM price for one product as the Renewable FIT base price for another.***

Lastly, in discussing its proposal to use the RAM auction results to set the base price for the Renewable FIT, the Staff Proposal provides that the existing FIT will still be available for interested developers during the “time lag” between a final decision implementing the Renewable FIT and the results of the RAM auction.<sup>16</sup> FCE is concerned that this statement may be subject to misinterpretation or debate. The Commission state clearly that the expanded program capacity available to the Renewable FIT program under SB 32, the switchover of resources from the current wastewater program to renewable, and the increase in Renewable FIT size cap will NOT be implemented until a new pricing mechanism is in place. It appears that this is the Staff’s intention, but clarification would be helpful.

#### **Locational Adder**

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<sup>15</sup> Staff Proposal at 24.

<sup>16</sup> Staff Proposal at 9.

The Staff Proposal concludes, based on recent studies by Energy and Environmental Economics, Inc. (“E3”), that a Locational Adder is appropriate in order to compensate generators for the locational value of projects located in high value locations or “hot spots.” On the basis of this finding, Staff recommends that:

- Generators located in hot spots should receive an additional payment, which should be based on the generator’s product category and the estimated avoided or deferred T&D costs and line losses calculated for the hot spot.
- While the CPUC estimated the locational bonus based on the E3 Avoided Cost Model in the CHP FIT proceeding staff has worked with E3 to determine location-specific values for the avoided T&D costs for each product category.
- The IOU distribution engineers should use the methodology E3 articulates in Attachment C to identify the hot spots that receive the locational value estimated in the E3 analysis. SCE should identify hot spots that cover 10% of its load, and PG&E and SDG&E should identify hot spots that cover 5% of their load in order to maximize the locational adder and limit project locations to where they can defer an upgrade. The IOUs should work with CPUC staff to confirm that their calculations conform with E3’s methodology. The IOUs can update the avoided distribution system cost numbers based on more recent data, but [must] work with staff to ensure that the reason for the change is based on new or updated cost information.

The Staff is correct in assuming that DG projects located in proximity to load or in other locations (e.g. where generation provides VAR support or other system benefits) provide additional value for which the project should be compensated. The method described in the Staff Proposal is new and complex. If the Commission chooses this approach, it should mandate reasonable safeguards to ensure transparency and a reasonable outcome. The IOUs’ methodology and calculations should be available to any interested party. And the Commission should review after one year data from all three IOUs showing which projects received the Location Adder in order to determine whether the methodology for choosing “hot spots” is systematically favoring either one type of generating technology or product category.

***Recommendation: If the Commission adopts the Staff’s proposed Locational Adder, it should order that all relevant data, methodology and implementation calculations be made available to interested parties. The Commission should review the results of the Locational***

*Adder after one year to ensure that the mechanism is not systematically favoring one resource or resource category over another.*

### **Price Adjustment**

The Staff Proposal recognizes the need for an adjustment mechanism for the Renewable FIT. The Staff appears to favor an automatic trigger along the lines of the step decreases in the California Solar Initiative program, noting that “automatically increasing or decreasing the price based on market response is an elegant and simple solution to responding to the market, although it must be balanced with the need for a sustainable and long-term market signal to incentivize development and investment.” The Staff specifically proposes;

- The Renewable FIT price for each product category for each IOU should be increased or decreased after a certain subscription (or lack thereof) occurs.
- This type of trigger mechanism will help adjust the Renewable FIT price in the case that the initial base price is too high or too low.<sup>17</sup>

The Staff Proposal invites parties to comment on various proposals offered by parties in earlier comments, or to offer their own proposal.

FCE believes that a trigger mechanism may be appropriate for adjusting Renewable FIT prices once the Commission has set an initial price for each product at a level that is demonstrably reasonable and in line with the market. However, a trigger mechanism is not enough if the Commission decides to set the Renewable FIT base price on the unknown outcome of the RAM.

Given that the RAM is an entirely new auction mechanism with no history or track record, the disconnect in project size between the RAM and Renewable FIT, and the very minimal quantity of baseload and off-peak intermittent generation capacity solicited by SCE and SDG&E in the first RAM auction, there is no basis for assuming that the base price produced by RAM auction will be reasonable, at least with respect to the off-peak intermittent and baseload

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<sup>17</sup> Staff Proposal at 12.

categories. As discussed above, the Commission should acknowledge this up front and authorize Energy Division staff to either abandon the RAM pricing approach altogether (in the event that there is NO base price) or make any other necessary program adjustment (in the event that the results of the RAM produce a clearly unreasonable, disputed or unusable.)

***Recommendation: In the event the Commission adopts the RAM market clearing price as the base price for the Renewable FIT, authorize Energy Division staff to immediately take steps to implement Plan B avoided cost pricing (per recommendations above) for the Renewable FIT in the event the RAM process does not result in a base price in any category.***

## **b. Program Cap**

### **Calculating the IOU Share of the Program Cap**

The Staff Proposal recommends implementing Section 399.20(f) by “working with the CEC to determine the IOUs’ share of statewide system demand for retail service load.”<sup>18</sup> FCE supports this approach.

### **Program Cap Limit**

The Staff Proposal rejects the recommendation of some parties to treat the 750 MW allocated to the Renewable FIT under SB 32 as an addition to projects that signed up for a renewable or wastewater FIT under the current programs. Instead, Staff recommends that “[b]oth existing and new contracts executed pursuant to 399.20 will count towards this cap since SB 32 and SB 2 (1x) did not create a new program but amended the existing program.”<sup>19</sup>

FCE believes the Commission has the authority and the discretion to treat the 750 MW cap as either a cumulative *or* a new program cap. If the Commission adopts Staff’s recommendation to include both existing and new FIT contracts signed under Section 399.20 as counting toward the 750 MW cap, the Commission should ensure that all existing projects are

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<sup>18</sup> Staff Proposal at 15.

<sup>19</sup> Staff Proposal at 15.



assigned to the appropriate product category before determining the IOUs' procurement targets going forward. This is necessary in order to ensure that the Commission has a clear view of what is already in the queue or operating before allocating capacity under the expanded SB 32 program. We discuss further below the need to allocate a reasonable portion of the program to baseload projects generally, and to digester gas projects specifically.

### **Increasing the Program Cap**

The Staff Proposal recommends, based on the language in Section 399.15, that “the IOUs can raise the FIT program cap,” but observes that a planning process is necessary to evaluate the costs and benefits of increasing the program cap relative to other renewable procurement options and total RPS program cost limitation. The Staff Proposal identifies this proceeding, Rulemaking 11-05-005, and the long-term procurement planning proceeding (“LTPP”) as potential forums for this evaluation.<sup>20</sup> FCE generally agrees with the Staff Proposal’s conclusion. However we note that it is the Commission, not the IOUs, that has the authority to increase the program cap, subject to proper consideration of procurement policy priorities, costs and benefits.

FCE does not have preference as to the forum for discussion of expanding the SB 32 program, but notes the importance of ensuring that all interested parties have adequate notice and an opportunity to participate. Small stakeholders do not have the resources to monitor and participate actively in all of the Commission’s procurement proceedings, and so the Commission should not assume that all interested parties will be aware of a proposal related to SB 32 that is embedded in a comprehensive IOU long-term procurement plan proceeding. If and when the Commission considers increasing the SB 32 program cap it should provide notice to the parties

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<sup>20</sup> Staff Proposal at 15-16.

in this phase of Rulemaking 11-05-005 (or its successor) and offer all interested parties an opportunity to provide comments on the issue.

**c. Project Size Limit: 3 MW**

FCE supports the Staff Proposal's recommendation that the project size limit should be 3 MW, and the observation that the IOU interconnection study will determine the requirements for a generator to maintain system safety and reliability, as required under Section 399.20.

**d. Product Categories**

The Staff Proposal recommends that:

In order to harmonize this program with RAM, the IOUs should determine how much of each product category to contract with based on the product's value to the utility and the utility's need. However, the IOUs should allocate a minimum amount to each product category.<sup>21</sup>

FCE cannot support the Staff Proposal recommendation on the capacity allocation to product categories because the recommendation is founded on a faulty premise, namely that allowing the IOUs to determine the allocation to product categories will appropriately "harmonize" this program with RAM. The Staff Proposal is also unworkable to the extent that it protects program diversity only through a very vague instruction to allocate a "minimum amount" to each product category. The Commission should take a more considered, hands-on approach to product allocation. This topic merits more discussion and consideration of alternatives than the Staff Proposal offers – particularly in light of the fact that the renewable FIT program will be the only practical option for some categories of < 3 MW resources, while others will have many programs and contracting options to choose from.

The Commission's decision in the RAM rules to authorize the IOUs to allocate capacity into product categories might be justifiable, at least for the first auction, in light of the fact that

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<sup>21</sup> Staff Proposal at 16-17.

the RAM will include projects up to 20 MW. Procurement of multiple projects of this scale should be coordinated with other IOU procurement of similar resources under the RPS, PV and QF CHP programs. In addition, most projects eligible for and likely to participate in the RAM will have other program options as well, and so an IOU's decision to allocate few MWs to a particular product category will not altogether exclude a category of sellers from the market.

Smaller DG projects likely to participate in the Renewable FIT program do not present the same IOU procurement coordination issues. More importantly, at least with respect to many smaller baseload projects, the developer will have few options besides the Renewable FIT.

***Recommendation: The Commission should determine and regularly update the capacity allocation to each product category, taking into consideration IOU recommendations, market conditions and relevant policy considerations, including the options available to each technology eligible for the Renewable FIT.***

#### **e. Contract**

The Staff Proposal recommends, with respect to the Renewable FIT contract, that:

- All IOUs should use PG&E's contract for "projects up to 1 MW" for all project sizes.
- In order to harmonize the Renewable FIT program with RAM, the IOUs should offer contracts of 10, 15, and 20 years to both new and existing generators.
- The excess sales option should be retained.<sup>22</sup>

FCE strongly supports the Staff's recommendation that all IOUs should use PG&E's contract with appropriate modifications to reflect statutory requirements. There is no reason the Renewable FIT contract should not be standardized for all three IOUs, and having a single standard contract will reduce administrative burden on the Commission staff overseeing the program. The Commission should make every effort to ensure that the terms of the Renewable FIT contract are appropriate to the size of the projects. The terms should be clear and

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<sup>22</sup> Staff Proposal at 17.

unambiguous, and should allocate risk in a manner that accommodates project financing and participation by public agencies.

FCE also supports requiring the IOUs to offer contracts of 10, 15 and 20 years to both new and existing generators that meet program requirements. However, rather than limiting contract terms to the three specific terms mentioned in SB 32, the Commission should allow the parties to contract for any contract term from 10 to 20 years. This would be consistent with legislative intent, and as a practical matter biogas projects may need this additional contract term flexibility in order to align onsite fuel supply availability to the term of the Renewable FIT.

Finally, FCE supports the Staff's recommendation to retain the excess sales option for the Renewable FIT. Allowing an excess sales option is necessary in order to ensure that biogas projects can participate in the Renewable FIT program. Requiring a CHP project owner or host to purchase electricity at retail while selling electricity produced onsite at wholesale would not make sense from an environmental perspective, and would be uneconomic for the project owner/operator. The Commission should adopt the Staff's proposal to include an excess sales option for the Renewable FIT.

#### **f. Contract Terms and Conditions**

##### **Development Deposit**

The Staff Proposal recommends a \$20/kW development deposit for projects less than 1 MW and a \$50/kW development deposit for projects between 1 MW and 3 MW.<sup>23</sup> FCE has consistently supported establishing a non-refundable development deposit as a means of discouraging non-viable projects from tying up available program capacity. However, there is no explanation in the Staff Proposal why the development deposit for RAM projects under 5 MW is limited to \$20/kW while smaller 1-3 MW Renewable FIT projects will be obliged to

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<sup>23</sup> Staff Proposal at 17.

provide a deposit of \$50/kW.<sup>24</sup> An \$20/kW deposit for all FIT projects seems adequate and fair. The Commission can revisit this in the future if necessary.

***Recommendation: Adopt a \$20/kW development deposit for all Renewable FIT projects.***

### **Performance Standards**

Section 399.20(j)(1) requires the Commission to set performance standards for any electric generation facility that has a capacity greater than 1 MW. The Staff Proposal recommends that the performance standard for projects over 1 MW should be 140% of guaranteed energy production over a two-year period for non-baseload facilities and 180% of the contract capacity over a two-year period for baseload facilities.<sup>25</sup>

As SB 32 requires a performance standard for all projects over 1 MW, the Commission should adopt one. The Staff Proposal, unfortunately, does not explain or attempt to justify its application of a more stringent 180% over two-year performance requirement to 1-3 MW baseload projects under the Renewable FIT than the 140% requirement currently required of 20 MW baseload projects under the RAM.<sup>26</sup> As in the case of the development deposit, it would be unfair and counterintuitive to impose a more onerous obligation on smaller projects than on larger projects.

FCE recommends adopting a performance obligation of 140% over two years for all Renewable FIT projects. Regardless of the level of performance obligation, the Commission should make it clear that the interruption of fuel supply at a digester site due to circumstances outside the seller's control will not be counted in determining whether the project has satisfied its

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<sup>24</sup> See D.10-12-048 at 55.

<sup>25</sup> Staff Proposal at 18.

<sup>26</sup> See D. 10-12-048 at 60.

performance requirement. This accommodation for digester projects is appropriate because of the unique nature of the feedstock.

***Recommendation: The Commission should adopt a performance standard of 140% over two years for all projects.***

### **Telemetry**

FCE supports the Staff Proposal's recommendation that required telemetry should not exceed applicable CAISO requirements.

### **Other modifications to PG&E's contract**

FCE supports the modifications proposed by AECA.

#### **g. Transition from Existing FIT to Amended FIT**

The Staff recommends rejecting a proposal that an applicant under the current program should be allowed to increase the capacity of its project to 3 MW. FCE supports this recommendation. As noted above, the Commission needs to draw a bright line between implementation of the SB 32 Renewable FIT and the existing Renewable FIT program.

#### **h. Interconnection**

##### **Interconnecting Tariff**

The Staff Proposal provides that generators can choose to apply for interconnection through either Rule 21 or the Wholesale Distribution Access Tariff ("WDAT") until new interconnection procedures under Rule 21 are in place, and that once Rule 21 procedures are in place, all generators should interconnect through Rule 21.<sup>27</sup> FCE supports this approach.

##### **Expedited Interconnection**

The Staff Proposal recommends that implementation of the Section 399.20(e) requirement that the IOUs provide expedited interconnection be addressed in the Interconnection

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<sup>27</sup> Staff Proposal at 19-20.

OIR/Distribution Interconnection Settlement.<sup>28</sup> FCE agrees. FCE appreciates the Commission’s effort to address the issues currently preventing small DG projects from timely interconnection. However, the Commission is under a statutory obligation to ensure that the IOUs provide expedited interconnection to eligible SB 32 resources. If the settlement process does not produce an expedited interconnection procedure within a reasonable time, FCE agrees with Staff that the Commission needs to revisit the issue.

**i. Project Viability and Queue Management**

FCE supports the project viability criteria recommended in the Staff Proposal.

**j. Program Location Restrictions**

With respect to the requirement in Section 399.20(b)(3) that SB 32 resources be “strategically located...” the Staff Proposal offers three options for implementation, including 1) an SCE-specific plan to restrict projects to SCE-designated “preferred locations,” 2) an alternative proposal allowing only projects that do not exceed minimum load at the substation, or 3) an option that would limit generators to utility-identified “hot spots” as discussed above in relation to the Locational Adder.<sup>29</sup> None of these proposals appear to have taken into consideration projects that are restricted by fuel source to a limited choice of host site. The Commission should not adopt any definition of “strategically located” resources that does not take into account otherwise eligible resources that can only locate in proximity to renewable feedstock. The words “strategically located” are not defined in SB 32, and the Commission should avoid a definition that would categorically exclude some program participants. It is “strategic” for a community digester project to locate near the source of biofuel. The Commission should acknowledge this.

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<sup>28</sup> Staff Proposal at 20.

<sup>29</sup> Staff Proposal at 22-23.

***Recommendation: Any definition of “strategically located” projects must take into account and include projects such as digester and landfill gas facilities that can only be located in proximity to available renewable fuel.***

SB 32 includes a provision that allows the IOUs to deny any applicant if the project adversely affects the grid.<sup>30</sup> It appears that this is a determination that can only be made in the interconnection process and should not be part of the IOUs’ application process. If the Commission adopts the the Staff Proposal that “the program should determine up front project locations that would not be subject to IOU tariff denial,” it needs to explain how this information relates to the interconnection process.,”<sup>31</sup>

***Recommendation: The Commission should clarify how implementating Sections 399.20(n)(2) and (4) relates to the interconnection process.***

#### **k. Data Reporting**

FCE has no comment on the data reporting recommendations.

#### **l. Other Issues**

##### **Inspections**

The Staff Report recommends that parties “work together to create a uniform format and submit it in their comments to this Ruling.” FCE has not had an opportunity to participate in any discussion of a uniform format but will respond to any suggestions made by other parties in opening comments. Since SB 32 only requires inspections every other year, the Commission should not adopt a more costly and burdensome annual inspection and reporting requirement.

##### **Dispute Resolution**

The Staff Proposal recommends that if a dispute occurs before contract execution, parties should use the CPUC’s complaint process. FCE agrees that the complaint process may be appropriate in cases in which there is a clear dispute over application of SB 32 program

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<sup>30</sup> Staff Proposal at 22.

<sup>31</sup> Id.



requirements. However, the Commission should also clarify that parties may contact program staff for guidance on interpretation of program rules or assistance in addressing ambiguities.

FCE agrees with the Staff Proposal that after a contract is executed, the contract dispute resolution provisions should control.

#### **IV. Conclusion**

FCE appreciates this opportunity to comment on the Revised Staff Proposal.

Dated: November 2, 2011

Respectfully submitted,

By: \_\_\_\_\_ /s/

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## 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 **INITIAL 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 2nd day of November, 2011, at Sacramento, California.

/s/

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