

**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)

**APPLICATION OF PUBLIC UTILITY DISTRICT NO. 1 OF COWLITZ COUNTY
FOR REHEARING OF DECISION 11-12-052**

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January 20, 2012

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Pursuant to Public Utilities Code Section 1731(b) and Rule 16.1 of the California Public Utilities Commission (“Commission”) Rules of Practice and Procedure, the Public Utility District No. 1 of Cowlitz County (“Cowlitz”) submits this Application for Rehearing of Decision (“D”) 11-12-052, entitled “Decision Implementing Portfolio Content Categories For The Renewables Portfolio Standard Program” issued on December 21, 2011 (the “Decision”).

The Decision sets forth clear requirements for transactions involving purchases of in-state generation to qualify for Category 1 treatment for Renewables Portfolio Standard (“RPS”) compliance purposes, but does not do so for transactions involving out-of-state generation and leaves uncertain what is required in order for purchases from an out-of-state generator to qualify for Category 1 treatment. By doing so, the Decision imposes a significant barrier to the negotiation and approval of purchases of out-of-state power and discriminates against out-of-state generators in violation of the Commerce Clause of the United States Constitution.

The Decision also imposes additional restrictions on firmed and shaped transactions that are not required by statute and are likely to result in the treatment of many if not most transactions for the purchase of bundled out-of-state power as Category 3. In doing so, the Decision will unnecessarily, artificially, and severely restrict the ability of out-of-state renewable generators to compete in the California market for RPS compliance purposes, deprive out-of-

state generators of the opportunity to earn a competitive market return on their investment in renewable generation, and increase the cost to California utilities and their ratepayers of meeting RPS requirements. As a result, the Decision is an abuse of discretion¹ and not supported by substantial evidence in light of the record as a whole.²

Cowlitz hereby reserves the federal claims raised in this Application for Rehearing for decision by a federal court in accordance with *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

I. BACKGROUND

Cowlitz is a non-profit, Public Utility District located in Longview, Washington. It is the second largest Bonneville Power Administration (BPA) preference customer and is located within the BPA balancing authority area. Among other generation, Cowlitz maintains an interest in two wind generation projects, known as Harvest Wind and White Creek Wind, which have a total nameplate capacity of 303.6 MW. Both White Creek Wind and Harvest Wind were built to meet Cowlitz' Renewable Portfolio Standards ("RPS") under the Energy Independence Act in Washington State and also for the purposes of selling RPS qualifying power to utilities in California to assist them in meeting California RPS compliance requirements. Cowlitz has been a leader in renewable energy wind development as one of the nation's first public utilities to develop wind generation for the benefit of its ratepayers and those of California utilities. Cowlitz plans and expects to continue renewable development in the region and sales into the California market if California's new RPS statute, SB 2 (1X)³ and the Commission's decisions

¹ The courts have found an abuse of discretion where the Commission failed to consider evidence deemed by the courts necessary for a proper decision. See *City and County of San Francisco v. Public Utilities Commission*, 6 Cal.3d 119, 129.

² Under Public Utilities Code § 1757, Commission findings and decisions must be supported by substantial evidence in light of the record as a whole.

³ Stats. 2011, First Ex. Sess., Ch. 1.

implementing the statute provide the opportunity for out-of-state generation in general, and power sales from Cowlitz's interests in wind projects in the Pacific Northwest in particular, to fairly compete with in-state renewable generation for California RPS compliance purposes.

SB 2 (1X) made a number of significant changes to California's RPS Program. Most importantly, it established three different categories of power purchase transactions that may qualify for California RPS compliance purposes, Category 1,⁴ Category 2,⁵ and Category 3,⁶ and imposed new minimum and maximum limitations on the amount of the power from the different category types that may be used for RPS compliance purposes. The minimum and maximum limitations are to be phased in over three compliance periods and by 2017, California utilities and other retail sellers must procure a minimum of 75 percent from Category 1 products, a maximum of 10 percent from Category 3 products, and the remainder, if any, from either Category 1 or Category 2 products. As a result, under the new RPS statute, the vast majority of RPS procurement must be from transactions that qualify for Category 1 treatment. Transactions structured in such a manner as to qualify for Category 1 are, as a result, far more valuable to utilities and secure a much higher price in the market than other renewable energy transactions that do not qualify for such treatment.

In D.11-12-052, the Commission has adopted rules and requirements to implement the RPS portfolio content category requirements of SB 2 (1X). The statute and Commission Decision clearly set forth the requirements for transactions involving in-state generation to qualify for Category 1 treatment, but do not do so for transactions involving out-of-state generation. The uncertainty regarding what is required in order for a transaction for purchases of power from an out-of-state generator to qualify for Category 1 imposes a significant barrier to

⁴ Section 399.16(b)(1).

⁵ Section 399.16(b)(2).

⁶ Section 399.16(b)(3).

the negotiation and approval of such transactions for RPS compliance purposes while no such uncertainty exists for purchases from in-state generators. This is a very significant deficiency and is likely to have significant adverse effects on out-of-state generators and interstate commerce in the WECC unless it is promptly remedied on rehearing.

Cowlitz's recent experience with a proposed sale of wind power into California illustrates the nature of this problem and adverse impacts on out-of-state generators that are likely to result from such uncertainties if the requirements applicable to transactions for purchases of power from out-of-state generators are not promptly addressed and clarified.

Approximately two years ago, Cowlitz entered into several commercial agreements for the sale of renewable power from its wind projects through a third party to Pacific Gas and Electric Company ("PG&E") to assist PG&E in meeting California RPS compliance requirements. The power sales were to commence in January 1, 2010 and continue through December 31, 2011. The transactions were structured to comply with all California Energy Commission (CEC) and Commission requirements necessary for the transactions to qualify for California RPS compliance purposes and to be competitive with other RPS qualifying power available to PG&E at the time the commercial agreements were negotiated. On February 1, 2010, PG&E filed Advice Letter 3609-E for Commission approval of the proposed transactions. The PPA's were reviewed by an independent reviewer, as required by Commission rules, and found to be in compliance with Commission requirements for RPS compliance purposes and to have economic benefits for California ratepayers and the independent reviewer recommended that they be approved by the Commission. No protests were filed to the PG&E Advice Letter. The Advice Letter requested approval by the Commission no later than June 24, 2010. No action was taken by the Commission on the PG&E Advice Letter, however, for over two years. During

the interim, the Commission considered and adopted a number of revisions to its RPS program rules and requirements in D.10-03-021 and D.11-01-025. The commercial parties to the agreements for purchase of power from the Cowlitz wind project responded by filing Advice Letter 3609-E-A on February 1, 2011 which specifically addressed the changes to RPS Program requirements adopted by the Commission after the original advice letter was filed and demonstrated compliance with the new requirements. The Commission took no action to review PG&E's amended Advice Letter, however, and after SB2 (1X) was adopted by the Legislature further revising California's RPS Program rules and requirements, PG&E terminated the commercial agreements for the purchase of renewable power from the Cowlitz projects effective October 1, 2011 and on October 5, 2011, notified the Commission that it was withdrawing Advice Letter 3609-E and 3609-E-A.

During the approximately two year period PG&E's Advice Letter was pending before the Commission, the Commission reviewed and approved numerous other Advice Letters for purchases of power from renewable projects that were filed after PG&E's Advice Letter 3609-E and were approved on a more expeditious basis. Many of these were for purchases of power from in-state California generation.

Cowlitz has been informed that no action was taken on PG&E's Advice Letter for purchases from the Cowlitz wind projects primarily because of uncertainties and changing RPS compliance requirements applicable to transactions of the type PG&E proposed for purchases of out-of-state generation. These uncertainties and the Commission's failure to address and resolve them in a timely manner have had a severe adverse financial effect on Cowlitz and contributed to the recent need for Cowlitz to increase retail electric rates to its ratepayers in the Northwest. The uncertainties with regard to California RPS requirements and Commission inaction as a result of

these uncertainties also effectively precluded Cowlitz from pursuing other potential opportunities within and outside the California market for renewable power sales during the prolonged period PG&E's Advice Letter remained pending before the Commission.

Discrimination of this nature in the implementation of SB 2 (1X) imposes impermissible barriers to interstate commerce and violates the Commerce Clause and must be promptly remedied.

II. THE COMMERCE CLAUSE PROHIBITS THE COMMISSION FROM DISCRIMINATING AGAINST OUT-OF-STATE GENERATION

The Commerce Clause⁷ reserves to Congress the authority to regulate commerce among the states. It does not expressly prohibit states from enacting statutes, rules or regulations affecting interstate commerce, but the courts have long held that the Commerce Clause includes such a prohibition by implication. This principle is commonly referred to as the “negative Commerce Clause” or “dormant Commerce Clause” and has been used to overturn attempts by states to favor in-state interests over out-of state and to prohibit “economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”⁸ Therefore, the Supreme Court has “interpreted the Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State.”⁹

To determine whether a state statute or regulation violates the Commerce Clause, the courts have applied different approaches depending upon the form and nature of the impact on interstate commerce.

⁷ U.S. Constitution, Art. I, § 8, cl. 3.

⁸ *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988).

⁹ *C&A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 390 (1994).

The first step in analyzing whether a law violates the Commerce Clause is to determine whether it “regulates evenhandedly with only ‘incidental’ effects on interstate commerce, or discriminates against interstate commerce.”¹⁰ Discrimination simply means “differential treatment of in-state and out-of-state economic interests that benefit the former and burden the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid.”¹¹

Once a state law is shown to discriminate against interstate commerce, the burden falls on the State to demonstrate that the law’s means and ends pass the “strictest scrutiny.”¹² Under this test, a discriminatory state law will survive only if the State demonstrates both that the statute “‘serves a legitimate local purpose,’ and that this purpose could not be served as well by available nondiscriminatory means.”¹³ Thus, state regulations that “clearly discriminate against interstate commerce are routinely struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.”¹⁴

Where the statute or regulation is not facially discriminatory but rather applies evenhandedly, it is valid unless the plaintiff can show that it imposes a burden on interstate commerce “clearly excessive in relation to the putative local benefits.”¹⁵ This type of analysis is commonly referred to as the *Pike* balancing test. Under the *Pike* balancing test, the courts consider (1) the nature and extent of the burden on interstate commerce; (2) the legitimacy of the local interests involved; and (3) whether reasonable, non-discriminatory alternatives are available to address the local interests that would not entail the same burdens on interstate

¹⁰ *Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon*, 511 U.S. 93, 99 (1994) (citations omitted).

¹¹ *Id.*

¹² *Id.* at 101; *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 995 (9th Cir. 2002).

¹³ *Maine v. Taylor, supra*, 477 U.S. 131, 138 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1978)).

¹⁴ *New Energy, supra* 486 U.S. at 274.

¹⁵ *Maine*, 477 U.S. at 138 citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

commerce.”¹⁶ If the burden on interstate commerce is determined to outweigh the alleged local interests and other non-discriminatory means are available to address the local interests, then the statute or regulation will be held unconstitutional and in violation of the Commerce Clause.

In *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), for example, the U.S. Supreme Court held that an Oklahoma statute that required at least 10 percent of the coal burned in Oklahoma power plants to come from Oklahoma coal mines was invalid under the Commerce Clause. In doing so, the court stated:

“[The] negative aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. When a state statute clearly discriminates against interstate commerce, it will be struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. Indeed, when the state statute amounts to simple economic protectionism, a virtually *per se* rule of invalidity has applied.”¹⁷

The Court had no difficulty finding the Oklahoma statute invalid under these principles since it was facially discriminatory and explicitly advantaged in-state coal to the disadvantage of out-of-state coal for no strong reason other than economic protectionism. Such facially discriminatory statutes have been struck down by the courts by applying a “virtual *per se* rule of invalidity.”

In *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), the U.S. Supreme Court relied upon the Commerce Clause in holding a state tax scheme that was neutral on its face as between in-state and out-of state interests invalid. The case concerned a Massachusetts statute that imposed a tax on all raw milk, regardless of whether it was produced in-state or out-of-state, and distributed the proceeds of the tax to in-state milk producers. The court held that while the tax was facially neutral and taxed both in-state and out-of-state raw milk equally, it nevertheless

¹⁶ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁷ 502 U.S. 437 at 454-55 (citations omitted).

worked to confer a direct benefit on Massachusetts milk producers to the commercial disadvantage of out-of-state milk producers. As a result, it was held to violate the Commerce Clause.

More recently, the United States District Court for the Eastern District of California relied upon the Commerce Clause in holding that the California Low Carbon Fuel Standard (“LCFS”) is unconstitutional because the LCFS favors California crude oil over foreign crude oil and out-of-state and foreign existing crude sources.¹⁸ In doing so, the court found that while the two variables that categorize crude oil within the LCFS appeared to be facially neutral, “the design and practical effect of the LCFS is to favor California [crude oil].”¹⁹ Specifically, the court found that the LCFS improperly categorizes California crude oil differently than foreign crude oil without serving a legitimate local purpose, which in turn impermissibly provides an economic advantage to California crude oil over foreign crude oil. Thus, the court found that “the LCFS is related to economic protectionism.”²⁰

In Commerce Clause cases, the courts do not apply any rigid rules, but rather evaluate each particular case on the specific facts and circumstances involved in the matter. “The commerce clause forbids discrimination, whether forthright or ingenious. In each case, it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.”²¹

State statutes and regulations affecting electricity markets are particularly susceptible to challenge on Commerce Clause grounds because the electric system in most of the United States

¹⁸ *Rocky Mountain Farmers Union et al. v. Goldstene*, No. 09-2234 (E.D.Cal. Dec. 29, 2011) (order granting summary adjudication).

¹⁹ *Id.*, at 19.

²⁰ *Id.*, at 22.

²¹ *West Lynn Creamery*, 512 U.S. 186 at 201.

and portions of Canada and Mexico is an interconnected grid that must be operated in a coordinated manner. The U.S. Supreme Court has recognized this in holding the market for energy production one of the most “basic elements of interstate commerce.”²²

III. SB 2 (1X) AND THE COMMISSION’S DECISION IMPLEMENTING IT IMPOSE DIFFERENT REQUIREMENTS ON IN-STATE AND OUT-OF-STATE GENERATORS IN VIOLATION OF THE COMMERCE CLAUSE

There can be no legitimate argument, however, that the classification scheme set forth in SB 2 (1X) and in the Decision applies in a fundamentally different manner to in-state verses out-of-state generation. Since the vast majority of out-of-state facilities will be unable to connect directly to the California grid and the protocols and procedures for dynamic transfers of intermittent renewable resources are still under development, few out-of-state transactions are likely to be able to qualify for Category 1. Most in-state facilities will be connected directly to the California grid, however, and will easily qualify for Category 1. The Commission may contend that neither SB 2 (1X) nor its Decision has used state-based criteria in defining the requirements for classification of renewable power purchase transactions for California RPS compliance purposes among the three RPS portfolio content Categories, but the effect of its SB 2 (1X) and the Decision will clearly impose very different burdens to the disadvantage of out-of-state generators and to the benefit of in-state generators.

Neither can it be claimed that the maximum and minimum limitations on use of transactions in the different Categories for compliance purposes will not effectively impose severe restrictions on out-of-state transactions, most of which are not likely to qualify for

²² *FERC v. Mississippi*, 456 U.S. 742, 757 (1982); and see *Ark. Elec. Coop. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 377 (1983).

classification as Category 1, while mandating greater use of in-state transactions many more of which will qualify for classification as Category 1.

The Decision aggravates these problems by leaving the requirements for out-of-state transactions to qualify for Category 1 treatment uncertain while making it clear how in-state transactions may do so and further aggravates the problem by imposing additional restrictions on Category 2 transactions that are not required by the RPS statute and will further reduce the out-of-state generation likely to qualify for RPS compliance purposes.

Some out-of-state generators may be able to connect directly to a California balancing authority and qualify for Category 1 treatment. A regulatory scheme that is otherwise discriminatory will not survive strict scrutiny under the Commerce Clause, however, merely because it may benefit some out-of-state producers.²³ Nor does the fact that an in-state generator may connect to the grid outside of a California balancing authority, and therefore be subject to the same RPS maximum and minimum portfolio content limitations as out-of-state generators, save the Commission's decision from the Commerce Clause since incidental burdens to in-state producers do not negate substantial burdens on out-of-state producers and barriers to interstate commerce.²⁴

The practical effect of SB 2 (1X) and the Commission's Decision is discrimination against interstate commerce. As the Decision offers no legitimate interests unrelated to economic protectionism favoring in-state interests, it is invalid under the Commerce Clause.

²³ *New Energy, supra*, 486 U.S. at 274.

²⁴ *C&A Carbone, supra*, 511 U.S. at 391.

IV. THE COMMISSION'S FAILURE TO ESTABLISH CLEAR RULES AND REQUIREMENTS FOR OUT-OF-STATE GENERATION TO QUALIFY FOR CATEGORY 1 TREATMENT WHILE DOING SO FOR IN-STATE GENERATION VIOLATES THE COMMERCE CLAUSE

Under the Decision and SB 2 (1X), it is clear what is required in order for transactions for purchases from in-state generators to qualify for Category 1 treatment under section 399.16(b)(1). It is much less clear, however, what is required under the statute in order for transactions for purchases of power from out-of-state generators to qualify for Category 1 treatment under section 399.16(b)(1) and the Decision fails to adequately address or clarify these requirements.

Transactions for in-state generation may qualify through simple, easily understood means, either through having a “first point of interconnection with a California balancing authority” or a “first point of interconnection with distribution facilities used to serve end users within a California balancing authority area.”²⁵ Nearly every in-state generator interconnected to the grid in California will meet either of these requirements. Few out-of-state generators will be able to do so, however.

Under the RPS statute, out-of-state generators may nevertheless qualify for Category 1 treatment for RPS compliance purposes if either they are scheduled “into a California balancing authority without substituting electricity from another source,”²⁶ There is considerable uncertainty, however, and no clear understanding among affected parties regarding how transactions must be structured in order to satisfy these criteria.

The comments of parties in this proceeding illustrate this uncertainty. Sempra Generation, which has a “pseudo tie” project, for example, proposed an interpretation of section

²⁵ Section 399.16(b)(1)(A).

²⁶ *Id.*

399.16(b)(1)(A) in its August 8, 2011 Opening Comments that appears to conflate the criteria set forth in this section with criteria set forth in section 399.126(b)(1)(B). It stated, “(a)part from resources directly connected to a CBA or associated distribution facility, this phrase should be interpreted as a configuration involving a dynamic transfer arrangement between the resource and a CBA. Dynamic transfers require firm transmission to a CBA, and thereby provide for the same contemporaneous delivery of capacity and energy to California consumers as renewable resources directly connected to a CBA or associated distribution systems. Configurations which provide functionally equivalent energy and capacity delivery (i.e. via firm transmission for the full contract capacity) from the renewable resource to California loads may also qualify under this interpretation.”²⁷

Centennial West Clean Line viewed the matter differently and stated in its October 27, 2011 Comments that the high voltage DC transmission line it has proposed to interconnect renewable energy resources in New Mexico and Arizona to the California grid and other similar high voltage DC transmission lines, will permit out-of-state generating resources to be “scheduled into a California balancing authority without substituting electricity from another source” and that section 399.16(b)(1)(A) should be interpreted by the Commission as permitting such arrangements to qualify for Category 1 treatment for RPS compliance purposes.²⁸ If the Commission agreed, this presumably would permit renewable energy resources in the Pacific Northwest interconnected to the California grid through the high voltage DC Northwest Intertie to qualify as Category 1. As a result, in its Reply Comments, Cowlitz supported Centennial West Clean Line’s recommendation and urged the Commission to adopt this interpretation of section 399.16(b)(1)(A).

²⁷ Sempra Generation Comments, at 5 (Aug. 8, 2011).

²⁸ Opening Comments of Centennial West Clean Line at 1-2 and 5 (Oct. 27, 2011).

The Decision fails, however, to adequately clarify what will be required for transactions for purchases of power from out-of-state generators to qualify as Category 1 under section 399.16(b)(1)(A). It rejects the proposal of several parties that firm transmission must be required,²⁹ but fails to address or resolve the issue raised by Centennial West Clean Line.³⁰

The record in this proceeding also makes clear that there is no clear understanding among affected parties regarding what constitutes “dynamic transfer” within the meaning of section 399.16(b)(1)(B). SCE, for example, pointed out in its August 8, 2011 Opening Comments that, “Notably, dynamic transfers are still relatively new for many renewable generators and the contours of what an agreement for dynamic transfer entails is still evolving” and in an adjoining footnote further noted that,“(i)ndeed, the CAISO is currently holding a stakeholder process to modify its tariff to expand opportunities for dynamic transfers by revising its dynamic transfer scheduling policies. Such opportunities would include dynamic transfer of intermittent and/or renewable resources into the CAISO from other balancing authority areas, and extension of pseudo-tie service to include intermittent and/or renewable resources. *See* <http://www.caiso.com/informed/Pages/StakeholderProcesses/DynamicTransfers.aspx>.”

Similarly, Evolution Markets noted in its August 8, 2011 Opening Comments that, “the notion of dynamic scheduling is not sufficiently understood by market participants nor is the CAISO currently equipped to provide the required services to the potential customer pool.”

The Decision fails to adequately resolve these uncertainties. It concedes that, “the techniques and protocols for dynamic transfer are evolving”³¹ and effectively passes the buck and responsibility for interpreting and implementing these provisions of the RPS statute to California balancing authorities. The Decision states that because the techniques and protocols

²⁹ Decision, mimeo at 26-27.

³⁰ *See id.*, generally.

³¹ *Id.*, mimeo at 28.

are still uncertain, section 399.16(b)(1)(B) should be interpreted as applying to “those arrangements accepted by a California balancing authority as providing for dynamic transfer.”³²

California balancing authorities have not yet made clear, however, what arrangements are necessary in meet this requirement. As a result, the Decision has left it uncertain how transactions for purchases of power for RPS compliance purposes from out-of-state generators may qualify for Category 1 treatment. The Decision has left no such uncertainty, however, regarding what is required in order for transactions for purchases of power from in-state generators to qualify for Category 1 treatment.

In doing so, the Decision imposes a significant barrier to the negotiation and approval of transactions for purchases of power from out-of-state generators for California RPS compliance purposes while imposing no similar barriers for such transactions for purchases from in-state generators. To make matters worse, pending further consideration of these issues by the Commission and California balancing authorities of what will be required in order for transactions for purchases of out-of-state generation to qualify as Category 1, thousands of MW of power purchases have been and are continuing to be negotiated by utilities with in-state generators and approved by the Commission for RPS compliance purposes as Category 1 for RPS compliance purposes. The Commission recently issued a press release in which it stated that it had approved over 1,000 MW of new in-state generation for RPS compliance purposes at a single Business Meeting.³³ Each of these transactions approved for purchases from in-state generation reduces the remaining market in California for RPS power available to out-of-state generators. Such discrimination in the implementation of SB 2 (1X) imposes impermissible barriers to interstate commerce and violates the Commerce Clause.

³² Decision, mimeo at 28.

³³ Commission Press Release, “CPUC Approves More than 1,000 Megawatts of In-State Renewable Energy Capacity that Will Contribute to California’s 33% Renewable Target” (Jan. 12, 2011).

V. THE ADDITIONAL REQUIREMENTS FOR CATEGORY 2 TRANSACTIONS ARE NOT SUPPORTED BY THE RECORD, ARE AN ABUSE OF DISCRETION, AND VIOLATE THE COMMERCE CLAUSE

The Decision also imposes additional three additional restrictions on Category 2 firmed and shaped transactions that are not required by SB 2 (1X). Specifically:

1. The buyer's simultaneous purchase of energy and associated RECs from the RPS-eligible generation facility without selling the energy back to the generator;
2. The availability of the purchased energy to the buyer (i.e., the purchased energy must not in practice be already committed to another party); and
3. The initial contract for substitute energy is acquired no earlier than the time the RPS-eligible energy is purchased and no later than prior to the initial date of generation of the RPS-eligible energy under the terms of the contract between the buyer and the RPS-eligible generator.³⁴

These additional requirements are not found in the actual statutory language of the new RPS statute and will only serve to further limit the transactions with the out-of-state generators that may qualify for RPS compliance purposes. The Decision concedes this point by confirming that Category 2 “applies to RPS-eligible generation located outside the boundaries of a California balancing authority area”³⁵ and stating that it interprets SB 2 (1X) “as narrowing the range of transactions that would meet the criteria of § 399.16(b)(2).”³⁶ Few transactions for purchases of out-of-state power are likely to qualify as Category 2 under this interpretation and most are likely to be classified as Category 3.

The record contains substantial evidence that imposing additional restrictions on Category 2 firmed and shaped transactions not required by SB 2 (1X) will unnecessarily restrict the ability of out-of-state renewable generators to compete in the California market for RPS

³⁴ Decision, mimeo at 47.

³⁵ *Id.*, at 45.

³⁶ *Id.*, at 45.

compliance purposes, reduce competition for RPS-compliant products and increase the overall cost to California utilities and their ratepayers of RPS compliance.³⁷ As a result, the adoption of the additional restrictions is an abuse of discretion³⁸ and not supported by substantial evidence in light of the record as a whole.³⁹

Imposing such additional conditions on Category 2 transactions would also discriminate against out-of-state generators to the benefit of in-state generators in violation of the Commerce Clause.

The Commission should remedy these deficiencies by eliminating these additional conditions on Category 2 transactions and acknowledging the broader and more flexible definition of firming and shaping transactions authorized by the CEC.⁴⁰ Such an approach would be consistent with the current statutory language in §399.16(b)(2) and the goals of SB 2(1x) outlined in §399.11, would increase commercial flexibility for out-of-state generators, RPS project developers and retail sellers, and would provide greater benefits for California utilities and ratepayers.

VI. CONCLUSION

For the reasons set forth above, the Commission should grant rehearing of D. 11-12-052, clarify the requirements for transactions for purchases of out-of-state power to qualify as Category 1 for RPS compliance purposes; eliminate the additional three additional restrictions imposed by D.11-12-0152 on Category 2 firmed and shaped transactions that are not required by

³⁷ See, e.g., Southern California Edison Reply Comments at 2-3 (Nov. 1, 2011) and Cowlitz Reply Comments at 3-4 (Nov. 1, 2011).

³⁸ The courts have found an abuse of discretion where the Commission failed to consider evidence deemed by the courts necessary for a proper decision. See *City and County of San Francisco v. Pub. Util. Comm'n*, 6 Cal.3d 119, 129.

³⁹ Under Public Utilities Code §1757, Commission findings and decisions must be supported by substantial evidence in light of the record as a whole.

⁴⁰ See CEC Guidebook, 4th Edition, at 37, fn. 61 available at: <http://www.energy.ca.gov/2010publications/CEC-300-2010-007/CEC-300-2010-007-CMF.PDF>.

SB 2 (1X); and eliminate to the extent possible other impermissible limitations on the eligibility of out-of-state generation for RPS compliance purposes that do not effectively apply in equivalent measure to in-state generation.

/s/ _____
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January 20, 2012

VERIFICATION

I, Paul Brachvogel, am General Counsel of Public Utility District No. 1 of Cowlitz County and am authorized to make this verification on its behalf. I do hereby verify that the information contained in the foregoing Application for Rehearing of D. 11-12-052 is true, correct and complete to the best of my knowledge.

I verify that the foregoing is true under penalty of perjury.

Executed on January 20, 2012, at Longview, Washington.

_____/s/
Paul Brachvogel
General Counsel
Public Utility District No. 1 of Cowlitz County