BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.	Rulemaking 11-05-005 (Filed May 5, 2011)

COMMENTS OF THE CENTER FOR ENERGY EFFICIENCY AND RENEWABLE TECHNOLOGIES ON THE PROPOSED DECISION OF ALJ DEANGELIS REVISING FIT PROGRAM

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The Center for Energy Efficiency and Renewable Technologies (CEERT) respectfully submits these comments on the Proposed Decision of Administrative Law Judge (ALJ) DeAngelis Revising Feed-In (FIT) Tariff Program ("Proposed Decision"). These comments are timely filed and served pursuant to Article 14 of the Commission's Rules of Practice and Procedure and the instructions accompanying the Proposed Decision, which was mailed in this proceeding on March 29, 2012.

I. THE PROPOSED DECISION DOES NOT CORRECTLY INTERPRET SECTION 399.20, COMMITS REVERSIBLE ERROR, AND MUST BE REPLACED BY AN ALTERNATE PROPOSED DECISION THAT PROCEEDS "IN THE MANNER REQUIRED BY THE LAW."

The Proposed Decision seeks to implement "statutory amendments to §399.20" by adopting, among other things, "a new pricing mechanism for the Commission's §399.20 Feed-in Tariff (FiT) Program."[1] The adopted "pricing mechanism," called a "Renewable Market Adjusting Tariff" or "Re-MAT" is to be based on prices resulting from the "Commission's Renewable Auction Mechanism [RAM] auction held in November 2011;" apply, as the RAM does, to "three FiT product types" (baseload, peaking as-available, and non-peaking as-available); and include a "monthly price adjustment" based on "the market response."[2] Accepted projects will be paid a "time-of-delivery adjustment," but no other adders are included. As to the "other things" adopted by the Proposed Decision, these include creating prerequisites to participation based on resources being "strategically located," but not valuing that location, and

[1] Proposed Decision, at p. 2.
[2] Proposed Decision, at p. 2.

restricting the overall program size to 750 MWs *less* the existing 250 MWs in the existing AB1969 FIT Program.

While the Re-MAT is offered as a "pricing mechanism," it serves as much more than that in the Proposed Decision. It is the fundamental lynchpin of the Proposed Decision's implementation of Section 399.20, a statute targeted at a specific renewable generation market, inclusive of recognition of the value of, and barriers to, those identified resources participating in meeting Renewable Portfolio Standard (RPS) Program goals. It is CEERT's position that the Proposed Decision is a complete "miss" in terms of its reading and implementation of Section 399.20 and, most particularly, its complete failure to meet the statutory mandate of including "environmental compliance costs" in the Section 399.20 Renewable FIT payment.[3] In this regard, Commission decisions are required by statute to "procee[d] in the manner required by law," and, to do otherwise, is appealable, reversible error.[4]

Closer to home, and perhaps more disappointingly, the Proposed Decision ignores Commission precedent distinguishing the RAM from a feed in tariff (FIT) in Decision (D.) 10-12-048. It also fails to address and account for the key differences between those "mechanisms" and, most importantly, the *current record* of the inadequacy of the RAM, especially as to its November 2011 auction on which the Re-MAT is to be based, in achieving any diversity, by product or type, in renewable resource procurement, especially in terms of the renewable resources targeted by SB 399.20.

These errors are exacerbated by an allegiance to regulatory "guidelines" over the legislative guidance expressly adopted for the implementation of Section 399.20 in Section 1 of Senate Bill (SB) 32. Thus, due to "complexities" or a claimed need for "ease of administration," the Proposed Decision turns its back on legislative direction and the statute's "plain language" that *requires* "environmental compliance costs" and permits locational value to be included in the Renewable FIT price.

The Commission, however, cannot ignore statutory provisions or legislative intent or implement that law on a piecemeal basis simply to achieve an outcome that it considers easier to implement. As CEERT, along with multiple, varied stakeholders have repeatedly demonstrated, Section 399.20 requires a FIT specific to the size, location, and characteristics of the renewable

[3] PU Code §399.20(d)(1).
[4] See, e.g., Public Utilities (PU) Code §1757.1(a)(3).

generation targeted by Section 399.20, with an *administratively determined, avoided-cost based* pricing mechanism for the Renewable FIT that fully incorporates and reflects the value of the "environmental" and "locational" attributes of a diverse range of renewable resource and technologies in that targeted market. [5] Such an approach complies with current avoided cost determinations made by the Federal Energy Regulatory Commission (FERC), as even referenced by the Proposed Decision.[6]

While the Proposed Decision may have concluded that reliance on the Renewable Auction Mechanism (RAM) bid prices to establish the Renewable FIT price may be "easier," it is simply not an appropriate starting point, as a matter of fact and law, for the implementation of the Section 399.20 FIT, as addressed further below.[7] It also is inconsistent with the Proposed Decision's own conclusion that the language of Section 399.20, as further amended by SB 2 1X allows "a much broader framework" of "pricing options" than the original language tied to the "market price referent."[8]

Reliance on the RAM fails to account for the recent confirmation that the RAM remains a mechanism in which the Commission has had "only limited experience"[9] and, as to the November 2011 auction on which the Re-MAT relies, has been shown to have failed to attract the diversity of renewable resources in the size or with the characteristics the Legislature intended to reach by Section 399.20.[10] Finally, it is important to restate that the RAM is an administrative construct created by the Commission that was not developed to be consistent with or responsive to the legislative mandates and *guidance* required by and applicable to the full and correct implementation of Section 399.20.

CEERT, therefore, strongly urges the Commission to issue an Alternate Proposed Decision that correctly interprets and implements Section 399.20, as intended by the Legislature and addressed further herein. The Commission is required to give effect to each and every word in Section 399.20, including its mandated requirements (i.e., inclusion of "environmental

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[5] Joint Motion (December 19, 2011), at pp. 5-7.
[6] Proposed Decision, at p. 13; see also, CEERT Comments on ALJ's Ruling of June 27, 2011, at pp. 2-3. In fact, CEERT does agree with the Proposed Decision that the "*FERC Clarification Order*…increases the pricing options the Commission can consider when determining the §399.20 FiT Program price" and permits the Commission to "determine multiple different avoided costs." (Proposed Decision, at p. 13.)
[7] Joint Motion (December 19, 2011), at pp. 2-3.
[8] Proposed Decision, at p. 17.
[9] Draft Resolution E-4489, at p. 5.
[10] See, Pacific Gas and Electric Company (PG&E) Advice Letter (AL) 4020-E (March 30, 2012); Southern California Edison Company (SCE) AL 2712-E (March 29, 2012).

compliance costs" in the Renewable FIT payment), according to the *Legislature's guidance* provided in Section 1 of Senate Bill (SB) 32, which has been wholly ignored by the Proposed Decision. While CEERT does not believe that the Proposed Decision can merely be revised to cure its errors and that, instead, an Alternate Proposed Decision is required, CEERT has, nevertheless, included an Appendix A of Proposed Findings of Fact and Conclusions of Law that reflects the extent of the Proposed Decision's erroneous findings and conclusions.

II.
THE PROPOSED DECISION FUNDAMENTALLY AND FATALLY ERRS IN ITS INTERPRETATION AND IMPLEMENTATION OF SECTION 399.20.

A. The Proposed Decision Misunderstands and Misapplies the Legal Standards Required In the Interpretation and Implementation of Section 399.20.

In Decision (D.) 11-12-020, the Commission made clear that, in "implementing *new* statutory provisions," it is to be "guided by the basic principles of statutory construction."[11] The Proposed Decision faces this same task – "implementing new statutory provisions," namely, the amendments of Section 399.20 enacted by Senate Bill (SB) 32, as modified by SB 1X 2. In addition, Section 399.20 is not a code section that exists in isolation, but rather is part of Article 16 of the Public Utilities Code, the "California Renewable Portfolio Standard Program." Further, in enacting the "new provisions" at issue here, Section 1 of SB 32, which was not changed by SB 1X 2, includes the specific findings and intent of the Legislature that applies to and is to *guide* the implementation of its amendments of Section 399.20.

The Proposed Decision, however, completely neglects this context and even the plain mandates of the statute. It also claims, erroneously, that "CEERT's comments emphasize the importance of legislative history when implementing SB 32 and SB 2 1X," which "history," the Proposed Decision concludes, is irrelevant if there is no ambiguity in the language of the statute.

Contrary to the citation provided by the Proposed Decision,[12] CEERT first raised the concern about how the Commission intended to implement Section 399.20 in response to the October 13, 2011 Renewable FIT Staff Proposal. CEERT did so out of concern that the "guiding principles" adopted in that proposal "completely neglect[ed] applicable rules of statutory

[11] D.11-12-020, at p. 7; emphasis added.

[12] The Proposed Decision states that CEERT had "pointed to the need for the Commission to follow the rules of statutory construction" in its Comments in response to the June 27, 2011 ALJ's Ruling. (Proposed Decision, at p. 14.) However, this statement is not correct; this position was stated by CEERT in its November 2011 Comments in response to the October 13, 2011 Renewable FIT Staff Proposal.

construction and treat[ed] the law's implementation as a matter of discretion by the Commission."[13] Further, CEERT's statements regarding the rules of statutory intent did *not* go to Section 399.20's "*legislative history*," which relates to the evolution, not the language, of the enacted legislation or statute. What CEERT referenced, and what is wholly neglected by the Proposed Decision, is the *express statement of intent, policy, and guidance of the Legislature in enacting Section 399.20 in SB 32.* Specifically, while CEERT concedes that unambiguous words should be given their plain meaning in implementing a statute, *all* statutory interpretation also *requires* that those terms must be construed "in *context*, keeping in mind the nature and purpose of the legislation,'" and, where guidance is given by the Legislature, there is no basis for the Commission to substitute its own, especially if it is conflicting.[14]

As addressed further below, the Proposed Decision not only ignores the Legislature's "guidance" in Section 1 of SB 32 that applies to implementation of Section 399.20, but the "unambiguous" mandates of that law as well. The result achieved by the Proposed Decision is not, therefore, a "reasonable" one consistent either with the language, purpose, or context of Section 399.20.

Further, the Proposed Decision erroneously states that "[*m]ost significantly* for purposes of the §399.20 FiT Program, SB 32 and SB 2 1X provided new direction to the Commission on how to determine the market price for the §399.20 FiT Program."[15] This statement would only be true *if the Commission had ever implemented all the other provisions of SB 32, unchanged by SB 2 1X*, which it has not. In addition, the only amendment SB 2 1X made to SB 32 was to eliminate the prior market price referent benchmark because it had been eliminated by SB 2 1X in favor of "procurement expenditure limitations," described in added PU Code §399.15(c). In fact, at issue in this Proposed Decision are *all requirements of* SB 32 and Section 399.20 that impact the payment structure intended by that law. This implementation, therefore, requires this Commission not only to implement all requirements of that statute, but to do so according to the *Legislature's,* not Commission-adopted, *guidance* (SB 32, Section 1), and to explain, where it has the discretion to do so, why certain valuation "options" were included in its adopted Re-MAT and others were not.

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[13] CEERT Comments on October 13, 2011 Renewable FIT Staff Proposal (November 2, 2011), at p. 2.
[14] *Dyna-Med, Inc.* v. *Fair Employment Housing Com.* (1987) 43 Cal.3d 1379, 1387 (emphasis added); see also, *People* v. *Valladoli* (1996) 13 Cal.4th 590, 602; *Squaw Valley Ski Corp.* v. *Superior Court,* (1992) 2 Cal. App. 4th 1499, 1511.
[15] Proposed Decision, at p. 15.

B. The Proposed Decision Fails to Offer Any Analysis that Ties a RAM-Based Pricing Mechanism with the "Market" the Legislature Expressly Intended to Target in Section 399.20.

By starting off from the point of a single provision of SB 32, without regard to its Section 1, the Proposed Decision, like the October 13 Renewable FIT Staff Proposal, begins down a path fraught with error in terms of its statutory interpretation and implementation of the statute as a whole. CEERT's response on that error in the October 13 Renewable FIT Staff Proposal is, therefore, equally applicable to the Proposed Decision as follows:

> " The addition of this language is *not* significant since it is the *same* as, and merely embeds, the language of the previous statutory reference of Section 399.20. As such, it cannot be read or interpreted in a manner that ignores or conflicts with the other provisions of Section 399.20 that expressly describe the type of small project and the *specific costs* that are to be reflected in the *standard tariff* that is to result from its implementation.
>
> "In fact, by doing so, the October 13, 2011 Renewable FIT Staff Proposal mistakenly adopts and seeks to link the Section 399.20 'tariff' with a pricing mechanism, the Renewable Auction Mechanism, that is *not* referenced in Section 399.20 and, by the Commission's own admission, is *not* a feed in *tariff* program. In adopting the RAM in Decision (D.) 10-12-048, the Commission made clear that the RAM was 'distinct' from a 'feed in tariff.' [Citation to D.10-12-048, at p. 2.] Specifically, the Commission recognized that, while a RAM 'is a streamlined contracting mechanism and utilizes a standard contract,' it differs from a FIT since it 'relies on market-based pricing, utilizes project viability screens, and selects projects based on least cost *rather than* on a first-come first-served basis at an administratively determined price.'" [Citation to D.10-12-048, at p. 2; emphasis added.][16]

CEERT also noted that, by D.10-12-048, the Commission made clear its understanding of "the difference in developing a procurement mechanism based on an administratively determined price ('feed in tariff') and a procurement mechanism based on a market-based price (the RAM) and the varying jurisdictional requirements for each" and that "these are different programs and different price mechanisms."[17] Further, in adopting the RAM in D.10-12-048, the Commission also considered its jurisdictional authority pursuant to federal law, and determined that it had the authority to establish the RAM "market-based approach" for projects up to 20 MWs, a size many times larger than the 3 MW project size at issue in Section 399.20, without imposing a "QF

[16] CEERT Comments on October 13, 2011 Renewable FIT Staff Proposal, at pp. 7-8.
[17] CEERT Comments on October 13, 2011 Renewable FIT Staff Proposal, at p. 9.

requirement."[18] That "QF Requirement," however, is part and parcel of the RAM or "Re-MAT" pricing mechanisms proposed by the Staff and adopted by the Proposed Decision, respectively.[19]

Neither the October 13, 2011 *nor* the Proposed Decision reference the precedential language of D.10-12-048, which distinguishes the RAM from the Section 399.20 Renewable FIT. Further, neither provides any analysis as to what *renewable generation market* the Legislature *intended* to target in Section 399.20. Instead, the Proposed Decision adopts the Renewable Market Adjusting Tariff (Re-MAT), based on the RAM with a mechanism to increase or decrease prices, claiming its compliance with isolated provisions Section 399.20.[20] In doing so, the Proposed Decision *never* provides any analysis of the RAM itself or the market targeted by Section 399.20 to see if they are truly a match. None of this adds up to a "reasonable" interpretation of Section 399.20.

In fact, the Proposed Decision states that its reliance on the RAM is justified because it is "similar," particularly, in "creat[ing] a market for small renewable distributed generation that harnesses renewable market forces."[21] Further, the Proposed Decision concludes that reliance on the RAM to create the "Re-MAT" is appropriate since, "while not identical, the RAM Program represents the closest comparison."[22]

The Proposed Decision is simply wrong in finding that these programs are a match or even "close" or that the market targeted by the RAM is equivalent to the market targeted by §399.20, notwithstanding its actual intent to create a FIT. In fact, the Proposed Decision's fatal flaw is failing to account for either the express terms of Section 399.20 or the guidance provided by the Legislature, *not the Commission or its staff*, for implementing Section 399.20.[23]

Thus, by Section 1 of SB 32, the Legislature made clear that Section 399.20 was to create *tariffs* for the procurement of *renewable generation from a very specific, targeted market* as follows: "small projects of less than three megawatts that are otherwise eligible renewable energy resources [that] may face difficulties in participating in competitive solicitations under the [RPS] program" that represent "clean generation close to load centers" *and* require a "tariff" that would "address these barriers," "*recognize* the environmental attributes of the renewable

[18] D.10-12-048, at p. 73; emphasis added.
[19] Proposed Decision, at pp. 11-12.
[20] Proposed Decision, at pp. 41-42.
[21] Proposed Decision, at p. 18.
[22] Proposed Decision, at p. 40.
[23] The Proposed Decision does seem to recognize that "other provisions" of Section 399.20 "impact the structure of the program," but then fails to account for those provisions in its adopted Re-MAT. (Proposed Decision, at p. 18.

technology, the characteristics that contribute to peak electricity demand reduction, reduced transmission congestion, avoided transmission and distribution improvements," and "accelerat[e] the deployment of renewable energy resources," and "encourage the generation of electricity from eligible renewable energy resources strategically located and interconnected to the electric transmission and distribution grid in a manner that optimizes the deliverability of electricity generated at the facility to load centers."[24] These declarations, in combination with the "plain" language of Section 399.20, make clear that the *intent and direction of the statute as a whole* was to result in a *simplified, transparent* "*standard tariff for electricity*" that will encourage "small projects" that "face difficulties" in participating in RPS solicitations.[25]

This critical language of SB 32, which establishes the context of Section 399.20, is *never* recited in the Proposed Decision. Yet, by Section 1, the Legislature made clear, regardless of the amendment by SB 1X 2 to remove reference to Section 399.15 ("market price referent"), that Section 399.20 was intended to result in a *standard tariff*, both as to contract and price, that would offer cost-based pricing that would include avoided environmental costs and reflect the value of the supply, generation, and locational characteristics of the targeted resources.[26]

As the Commission has already determined the RAM, a mechanism established by the Commission on its own motion and not in the implementation of any statute, is an auction-based program and pricing mechanism aimed at projects much larger than those targeted by Section 399.20 and is simply not a FIT. The RAM itself is not targeted to, nor was conceived to address, the small projects that are the subject of Section 399.20.

Further, the Proposed Decision never analyzes whether the RAM has been "successful" in targeting and procuring a diverse renewable resources, by type, technology or product, at the distribution level intended by Section 399.20. Instead, the Proposed Decision claims that to "better capture the value provided by different technology types," the Re-MAT will include "a price for each of the following three product types: baseload, peaking as-available, and non-peaking as-available."[27] According to the Proposed Decision, "[b]aseload projects provide firm energy deliveries (e.g., bioenergy and geothermal); peaking projects provide non-firm energy

[24] SB 32, Section 1 (a) – (f).
[25] SB 32, Section 1; Section 399.20(b), (c), and (d).
[26] See, e.g., CEERT Comments to Sec. 399.20 Ruling of June 27, 2011.
[27] Proposed Decision, at p. 43.

deliveries during peak hours (e.g., solar); and non-peaking as-available projects provide non-firm energy deliveries during non-peak hours (e.g., wind and hydro)."[28]

These "product" distinctions are the same as the RAM and do provide a source of comparison as to the "success" of the current RAM in procuring such diversity of resources. Unfortunately, the Proposed Decision does *not* analyze or look at those results to determine whether or not such resource diversity will occur, *especially* at the 3 MW and below level.

In fact, both by Commission draft declaration and advice letters filed on the same day or shortly after the issuance of the Proposed Decision, the RAM's product distinctions, as now mimicked in the Re-MAT, have been shown *not to have been sufficient* to achieve renewable resource and technology diversity through these "market" mechanisms. Specifically, by Advice Letter 4000-E (filed on February 2, 2012), Pacific Gas and Electric Company (PG&E) has already sought to *reduce* its RAM allocation of baseload procurement based on the results of its first RAM request for offers (RFO). In rejecting PG&E's request, a pending Draft Resolution (Draft Resolution E-4489) states:

> "[R]educing the allocation available to the baseload category would discourage the participation of baseload developers. Because the IOUs have had only limited experiences with the RAM Program and have only held one RFO, it would benefit developers of baseload and off-peak intermittent projects, which were *underrepresented* in the first RFO, to maintain the same product category allocations for the second RAM RFO."[29]

Thus, the Proposed Decision has chosen as its "starting point" for the Renewable FIT pricing, a mechanism that has already *failed* to attract the varied products it claims to be targeting. This Draft Resolution also confirms that the RAM remains a program about which too little is known at this point to even serve as a starting point for a program (the Renewable FIT) for which it is not even a match.

In this regard, on March 29 and 30, 2012, SCE and PG&E, respectively, also submitted their advice letters with the RPS power purchase agreements (PPAs) (7 for SCE; 4 for PG&E) resulting from their November 2011 RAM solicitations.[30] Notably, PG&E states that its "executed PPAs are less than the product category targets due to the lack of competitiveness of

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[28] Proposed Decision, at p. 43.
[29] Draft Resolution E-4489, at p. 5; emphasis added.
[30] PG&E Advice Letter (AL) 4020-E (March 30, 2012); SCE AL 2712-E (March 29, 2012).

the baseload and as-available off-peak product categories."[31] In fact, approximately 2/3 of the procured capacity consist of solar photovoltaic (PV) or as-available, peak products.[32] The only baseload unit is 14 MWs from a geothermal unit, with PG&E proposing to change its product allocations of 35 MW for each of the three product categories to 85 MW for peaking as-available and only 10 MWs each for non-peaking as-available and baseload and requesting to allocate unsubscribed amounts in the baseload and as-available off-peak categories to the as-available on-peak bucket.[33] All of the selected projects exceed the 3 MW capacity cap for the eligible Renewable FIT projects by 3 to over 6 times in size.

SCE's advice letter makes clear that its RAM procurement was never intended to ensure an equal allocation of MWs among product categories, with SCE targeting a total of 65 MWs divided as follows: 55 MWs from peaking as available; 5 MWs from non-peaking as available, and 5 MWs from baseload. [34] Regardless of this allocation, the offers SCE received tell the true story of what the "RAM" mechanism attracts: "Of the 92 offers received [by SCE], 91 were solar photovoltaic technology and one was a small hydro project."[35] While 3 of the 7 PPAs were for projects of 2.0 MWs, all of three were solar PV, and *all 7 were solar PV* and the remaining 4 exceeded the Renewable FIT limit by 3 to 6 times in size.[36] SCE's advice letter offers no "lessons learned" or suggested changes to alter such an outcome, other than to hold a "program forum to discuss the RAM 1 auction and solicit any feedback."[37]

CEERT requests that the Commission's Draft Resolution E-4489, which is poised to be adopted by the full Commission on April 19, 2012, the same meeting at which this Proposed Decision will be considered, and PG&E's and SCE's advice letters referenced above are "facts" of which this Commission must take official notice in issuing any final decision on the Renewable FIT.[38] This record simply cannot be ignored by the Proposed Decision and, in fact, undermines its "commitment" to diverse products to the extent that its adopted pricing mechanism is based on the November 2011 RAM results – regardless of any future adjustments.

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[31] PG&E AL 4020-E, at p. 4.
[32] Id., at p. 8.
[33] PG&E AL 4020-E, at pp. 8-9.
[34] SCE AL 2712-E, at p. 2.
[35] SCE AL 2712-E, at p. 6.
[36] SCE AL 2712-E, at pp. 7-8.
[37] SCE AL 2712-E, at p. 8.
[38] Commission Rules of Practice and Procedure, Rule 13.9.

In this regard, by starting with a RAM result (November 2011 auction) that has completely failed to produce robust results by product category, a claim that the "price adjustment mechanism" adopted by the Proposed Decision "adequately functions to capture the different costs associated with the renewable distributed generation market segment" has not been demonstrated in any way and cannot be reasonable predicted to so result.[39] In fact, simply using "three product types" and requiring at least "3 MW in each type" are not sufficient "adjustments" to ever ensure, as the Proposed Decision claims, that the Re-MAT "allows renewable resources to compete against other similarly-valued renewable resources, rather than the entire renewable market."[40] The Re-MAT really is still just a RAM for 3MW and below projects, which, without "technology-specific" pricing, will suffer from the same shortcomings as the RAM. CEERT also notes that the "adjusting" feature of the adopted mechanism does not ensure in any way that the value of the products and technologies targeted by SB 399.20 are accounted for in that pricing or will yield a diverse renewable resources that is certainly at the heart of a Renewable *Portfolio* Standard program.

Finally, the Proposed Decision's determination that the RAM is "close enough" to be relied upon in this manner is *not* substantiated by any finding related to the November 2011 RAM results and, again, fails to account for the Commission's own determination in D.10-12-048 as to the differences between the RAM and a Renewable FIT. If the Commission intends to rely on the RAM as the basis for the SB 32 Section 399.20 Renewable FIT Program, it must revise the Proposed Decision to substantiate this decision – especially in consideration of the express requirements of that law, as discussed further below. The Proposed Decision does not do that and is without sufficient record support to rely on the RAM, especially given the November 2011 results, which demonstrate that the RAM is not a program targeted to the Section 399.20 intended market.

C. The Proposed Decision Commits Reversible Error by Failing to Implement Mandatory Requirements of Section 399.20 and Ignoring Other Key Provisions.

The Proposed Decision rejects the position advocated by multiple parties, including CEERT, that effective and appropriate implementation of Section 399.20 requires "technology-specific pricing." It does so on the bases that such an approach creates a "challenge in

[39] Proposed Decision, at p. 43.
[40] Proposed Decision, at p. 75.

implementing the §399.20 FiT program" because it requires "establishing an avoided cost pricing methodology consistent with the provisions of state law and federal law that supports specific types of renewable technologies, which provide general societal benefits that cannot be easily quantified."[41]

This broad, erroneous statement is at the heart of the errors committed by the Proposed Decision in implementing Section 399.20. What parties supporting a FIT pricing structure "differentiated according to resource type" and inclusive of environmental and locational costs avoided by such resources was *not* a request for the quantification of "general societal benefits," but rather an implementation of Section 399.20 consistent with its *requirements.*

While admitting that the "statute refers to certain costs that the Commission must consider in setting a tariff price" including ""all current and anticipated environmental compliance costs,"[42] the Proposed Decision astonishingly *rejects* this legislative mandate on the grounds that "no party presented evidence that their proposals addressed specific 'environmental compliance costs.'"[43] Even though the Proposed Decision attempts to shift the burden to implement this legislative mandate from the Commission to "parties," it still denies the Joint Motion, which absolutely did seek an opportunity for the costs mandates of Section 399.20 to be addressed and fully recognized that, by statute, the Renewable FIT price *requires* that "the payment shall be the market price…*and shall include all current and anticipated environmental compliance costs*…."[44]

The responsibility to fulfill the mandates of SB 32 does not fall on the parties, but on the Commission – and the Commission cannot "excuse" its obligation to implement that law, as written, based on actions by parties or limited opportunities the Commission itself has provided for party participation. *If* the Commission believes, as the Proposed Decision states, that "evidence," other than that before it now, was required to be adduced to complete its

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[41] Proposed Decision, at p. 33.
[42] Proposed Decision, at p. 34.
[43] Proposed Decision, at p. 34.
[44] PU Code Section 399.20(d)(1) (emphasis added.) The Commission has never required or sought "evidence" as part of its implementation of Section 399.20. As stated in the Joint Motion and CEERT's prior comments, the opportunities to "debate" this statute were limited by an ALJ's Ruling that restricted comments to "staff proposals" contained in the October 13, 2011 Renewable FIT Staff Proposal and, as CEERT observed, resulted in a ruling that was "*dispositive* of the issue of Sec. 399.20 implementation, especially as to key "elements" such as "a. Pricing." (CEERT Comments on October 13, 2011 Renewable FIT Staff Proposal (November 2, 2011), at pp. 1-2, quoting from October 13 Renewable FIT Staff Proposal, at p. 8.)

implementation of Section 399.20, it was incumbent on the Commission to ensure a full and complete record and hold evidentiary hearings on that issue, as needed. The existence of Commission-adopted "policy guidelines" for its decision, including "administrative ease" or avoiding "administrative complexity" also does *not* excuse compliance with applicable statutory mandates.[45]

Most significantly, the "environmental compliance costs" referenced by the Proposed Decision are *not* "general societal costs," but *are* among those mandated to be included in the Renewable FIT payment by Section 399.20 and, even by the Proposed Decision's own admission, can be taken into account in establishing avoided costs consistent with federal law.[46] Stating that "technology-specific costs" were not required by Section 399.20 misinterprets this law entirely and the party positions. What CEERT sought in arguing for recognition of specific avoided costs in determining the price required for the Renewable FIT is *exactly* what the law requires.

Unless and until the Commission "includes all environmental compliance costs" in the payment price adopted for the Renewable FIT, it has *not* complied with Section 399.20, and, if the Proposed Decision is adopted as written, will have violated that law. Finally, while Section 399.20 permits the "market price" for the Renewable FIT to include "the value of different electricity products *including* baseload, peaking, and as-available electricity," that language is inclusive, not exclusive, and, in turn, permits consideration of other costs, especially where mandated (i.e., "environmental compliance costs").[47]

A further erroneous reading of Section 399.20 results from the Proposed Decision's treatment of the language "strategically located." Section 1 of SB 32 makes clear that the purpose of Section 399.20 is to create a tariff for electricity generated by renewable technologies that "recognize[s] the environmental attributes of the renewable technology, the characteristics that contribute to peak electricity demand reduction, reduced transmission congestion, avoided transmission and distribution improvements,… in manner that accelerates the deployment of renewable energy resources."[48] This direction arises from the "policy of this state and the intent of the Legislature to encourage the generation of electricity from eligible renewable energy

[45] Proposed Decision, at p. 35.
[46] Proposed Decision, at p. 34.
[47] PU Code §399.20(d)(2)(C).
[48] SB 32, Section 1(e).

resources strategically located and interconnected to the electrical transmission and distribution grid in a manner that optimizes the deliverability of electricity generated at the facility to load centers."[49] In turn, facilities eligible for the Section 399.20 Renewable FIT must be so "strategically located."[50]

The Proposed Decision isolates this requirement and implements it as a condition precedent to participation in the Renewable FIT without also considering the statutory direction that permits the Commission to "establish a value" for such strategic location as part of the Renewable FIT payment.[51] The Proposed Decision describes this valuation as an "optional input" to the price, along with "time-of-delivery."[52] While the Proposed Decision permits a single "adjustment" to the Re-MAT "starting price" based on "time-of-delivery," it never addresses or explains an apparent decision not to include the other "option" of a locational value, as also permitted by Section 399.20.[53]

The rationale and support for the recognition of locational benefits in the Renewable FIT was advanced by many parties. However, the Proposed Decision does not address these points other than, as discussed above, the inappropriate, summary rejection of "technology specific" pricing. This "analysis" is just not good enough to inform parties or the Legislature of the reason why the Proposed Decision, and, if adopted, the Commission, "elected" not to include a value in the Renewable FIT payment of "strategically located" resources on "a distribution circuit," especially in furtherance of Legislative guidance and intent.[54]

Finally, the Proposed Decision ignores the fundamental differences of the AB 1969 FIT and the SB 32 Renewable FIT in choosing to limit the 750 MW program cap allowed for the SB 32 Renewable FIT by *deducting* out the 250 MW Program Cap for the AB 1969 FIT, including those projects already under contract based on the AB 1969 FIT.[55] Such a result is not required by the "plain language" of SB 32, contrary to the Proposed Decision's claims, and, in fact, diminishes a program that the Legislature clearly believed would serve to advance the "deployment" of the otherwise under-recognized source of renewable generation represented by 3 MW projects interconnected at the distribution level.

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[49] SB 32, Section 1(f).
[50] PU Code §399.20(b)(3).
[51] Proposed Decision, at pp. 60-61.
[52] Proposed Decision, at p. 18.
[53] Proposed Decision, at p. 37, 43.
[54] SB 32, Section 1(f); PU Code §399.20(e).
[55] Proposed Decision, at pp. 69-71.

The Proposed Decision should, therefore, be modified to preserve both tariffs (AB 1969 and SB 32) and make clear that any standard tariff that results from implementation of Section 399.20, as amended by SB 32 and SB1X 2, will not supplant the existing AB 1969 tariffs (250 MW cap). The statutory direction that serves to support these two programs is *fundamentally* different and nothing in SB 32 indicates that the program it identifies is to encompass the existing tariff. Instead, both tariffs should remain in place, with the existing AB 1969 tariff set at a 250 MW cap and the new Renewable FIT tariff set at the additional 750 MW cap.

III.
CONCLUSION

It is CEERT's position that the Proposed Decision's legal analysis and creation and adoption of the Re-MAT for use in implementing Section 399.20 are fundamentally and fatally flawed. At this point, only an Alternate Proposed Decision that correctly and reasonably interprets Section 399.20, consistent with its language, legislative purpose, and intent, and adopts a pricing mechanism consistent with those terms and the "market" expressly targeted by that law can cure these errors. CEERT, nevertheless, has offered Proposed Findings of Fact and Proposed Conclusions of Law, attached hereto as Appendix A, that demonstrate the widespread errors and needed corrections in the Proposed Decision.

Respectfully submitted,

April 9, 2012

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APPENDIX A
PROPOSED CONCLUSION OF LAW AND ORDERING PARAGRAPH

CEERT recommends that the following changes be made in the Findings of Fact and Conclusion of Law of the Proposed Decision of ALJ DeAngelis Revising FIT Program issued in R.11-05-005 on March 20, 2012. A page citation to that Proposed Decision is provided in brackets for the finding or conclusion for which a modification is proposed. Added language is indicated by **bold type**; removed language is indicated by **bold strike-through**. An "**Added Finding of Fact**" or "**Conclusion of Law**" is so indicated.

PROPOSED FINDINGS OF FACT:

1. [100] The June 27, 2011 ALJ Ruling, our RAM Program, and the October 13, 2011 Renewable FiT Staff Proposal contain the following five policy guidelines relevant to today's decision**, exclusive of the paramount requirement that the Commission apply established principles of statutory construction in implementing Section 399.20**: [Subsections not shown.]

2. [101] **To meet the Commission's paramount responsibility of achieving a "reasonable" interpretation of Section 399.20, in context with its legislative intent and purpose, the adopted Renewable FIT pricing mechanism must ensure a diversity of resources and products for a market defined as "small" projects sized at 3 MWs and below that have locational and environmental attributes consistent with that law. ~~The MPR price may be too high or too low for different FiT product types, such as baseload, peaking as-available and non-peaking as-available.~~**

4. [101] **While ~~T~~t**he renewable market has evolved **with respect to larger renewable projects that can compete in competitive solicitations, the same is not true for projects sized at 3MWs and below, especially to achieve a diversity of resources and technologies. ~~since the Commission first established the MPR in 2003 at the beginning of the RPS Program.~~**

5. [101] The renewable market **bidding into annual RPS solicitations or the RAM** is **not** sufficiently robust **or relevant to the project size and type targeted by Section 399.20** to serve as the point of reference for establishing the market price for small renewable projects rather than the very different market represented by the MPR, which reflects the costs of a combined-cycle natural-gas power plant.

6. [101] **To implement Section 399.20 as written and intended, the Commission must adopt an administratively determined, avoided cost-based pricing mechanism that will incorporate the attributes and values of the renewable market targeted by Section 399.20, including, as necessary**, ~~The methodologies presented to determine certain~~ adders **that account for this market's locational and environmental attributes~~, such as those~~**

~~based on technology specific generation, are largely based on general avoided *societal* costs, and not *ratepayer* costs~~.

7. [101] **While ~~I~~it ~~is~~ may** not **be** easy to quantify the ~~general societal benefits~~ **attributes of** ~~that support~~ specific types of renewable technologies**, such an approach is required by Section 399.20,** consistent with ~~**the provisions of state law and**~~ federal law.

9. [101-102] This decision adopts a pricing methodology ~~**that**~~ **based on an administratively, determined, avoided cost based approach consistent with Section 399.20 that is technology and product specific.** ~~**upon renewable market power pricing information from the RAM adopted in D.10-12-048 and takes components from a number of different pricing proposals presented by parties, including IREC, SunEdison, Silverado Power, Vote Solar Initiative, and [102] SCE and by Staff. The pricing methodology also relies upon a monthly market adjustment mechanism to increase or decrease the FiT price for a particular product type based on market conditions.**~~

10. [102] ~~**A separate price for each of the three product types (baseload, peaking as-available, and non-peaking as-available) better captures the value provided by the different technology types.**~~

11. [102] ~~**Baseload projects provide firm energy deliveries (e.g., bioenergy and geothermal); peaking projects provide non-firm energy deliveries during peak hours (e.g., solar); and non-peaking as-available projects provide non-firm energy deliveries during non-peak hours (e.g., wind and hydro).**~~

12. [102] ~~**There is not enough market information for the three product types to enable us to adopt a unique starting price for each product type.**~~

13. [102] ~~**Adjusting the starting price by time-of-delivery factors based on the generator's actual energy delivery profile captures the value of each generator to the utility.**~~

14. [102] ~~**Based on the results from the November 2011 RAM auction, we anticipate that the starting price for each separate product type will be $89.23/MWh pre-time-of-delivery adjustment).**~~

15. [102] ~~**The Re-MAT price should only increase or decrease if there is sufficient market interest in a product type, but the price is either too low or too high as determined by how many projects execute contracts at a particular monthly Re-MAT price.**~~

16. [102] ~~**Allocating a utility's total capacity share to the three product types over a limited time period will serve to stimulate the market for small renewable distributed generation by providing an adequate supply of available capacity to each product type.**~~

17. [103] ~~**Reallocating capacity between the product types after the expiration of 12 program months will prevent gaming, minimize ratepayer exposure to excessively high contract prices, and efficiently manage allocated unused capacity.**~~

19. [103] **An avoided cost-based approach to electric generation pricing has long been recognized by the Commission as** ~~**To**~~ ensur**eing** ratepayer indifference, **as required**

by ~~under~~ § 399.20(d)(3)**~~, a market-based approach to pricing is in the best interest of California electricity customers~~**.

21.[103] **~~In the absence of any specific legislative directive, a~~ A** Commission requirement that pricing be distinguished based on **a** technology-specific basis **~~would~~ does not** interfere with the application of the statutory provisions requiring first-come-first-served.

25. [104] **While the Section 399.20 Renewable FiT Program is not a subset of the RAM Program, there is no overlap between the two programs that needs to be addressed. ~~Unless today's decision modifies the RAM Program, the RAM Program and the FiT Program will overlap for projects 3 MW and under and the potential for gaming of the price of the two programs for projects of 3 MW and under will exist.~~**

30. [104] **The amendments to Section 399.20 resulting from SB 32 alters this program significantly from the earlier FIT program identified by this statute and, as such, there is no basis to integrate these programs and the ~~The plain language of the statute establishes a~~** the 250 MWs represented by the existing FIT shall not be deducted from or included in the total **program** cap of 750 MW **for the Renewable FIT adopted in this decision~~for the entire § 399.20 Program.~~**

32. [105] **The implementation of the Renewable FIT pursuant to this decision does not result in ~~No statutory provision requires us to consider~~** a set aside **~~and~~ or** a set aside program for a particular technology **~~is inconsistent with the requirement that the program be made available on a first-come-first-served basis~~**.

43. [106] The Joint Parties filed a motion on December 19, 2011 requesting ~~further~~ consideration of an administratively determined, avoided cost based pricing mechanism **is appropriate and its recommendations have been reflected in the Renewable FIT adopted herein pursuant to Section 399.20. ~~and noted their concern that this proceeding had given the Renewable FiT Staff Proposal greater consideration or more evidentiary weight than other pricing proposals because the Staff's Proposal was presented in an ALJ's ruling dated October 13, 2011 and, in addition, discussed at a Staff Workshop on September 26, 2011.~~**

PROPOSED CONCLUSIONS OF LAW:

1. [107] In implementing the amendments to the § 399.20 FiT Program, we rely **first and foremost on the language and legislative intent contained in that section and Senate Bill (SB) 32 ~~federal law, specifically, avoided cost under PURPA, state laws governing statutory construction, and the policy guidelines adopted herein~~**.

5. [107] In implementing the statutory amendments to § 399.20, we are guided by~~, among other things,~~ the **established** rules of statutory construction**, which requires those terms to be given their plain meaning and read in context with the legislative purpose of that section. ~~together with the Commission's fundamental responsibility is to oversee the utility's provision of an adequate supply of safe and reliable electricity at just and reasonable rates.~~**

6. [107] Our primary source of guidance in implementing SB 320, SB 32 and SB 2 1X is derived from the rules of statutory construction.

7. [107] **To date, the Commission has not implemented any of the amendments to Section 399.20 included in SB 32, as further amended by SB 2 1X, which amendments define the renewable energy market to be targeted by the Renewable FIT.** ~~**Most significantly for purposes of the § 399.20 FiT Program, SB 32 and SB 2 1X provide new direction to the Commission on how to determine the market price for the § 399.20 FiT Program as electricity purchased under § 399.20 [108] is no longer tied to the MPR. As a result, the potential range of pricing outcomes for the § 399.20 FiT Program has expanded.**~~

8. We should adopt ~~five~~ core policy guidelines **that are first and foremost guided by establishes rules of statutory construction** ~~**as an important secondary source of guidance**~~ in implementing SB 320, SB 32 and SB 2 1X. ~~**These policy guidelines underlie our adoption of a revised § 399.20 FiT Program price and other program elements.**~~

11. **Neither** ~~**T**~~**the RAM Auction mechanism nor the annual RPS solicitations are appropriate** ~~**renewable market is sufficiently robust**~~ to serve as a point of reference for establishing a ~~**market**~~ price for the § 399.20 FiT Program~~**, and, therefore, we decline to adopt a pricing proposal that relies upon the MPR**~~.

12. ~~**Other proposals that incorporate the MPR, such as those proposals by CALSEIA, Placer County, Silverado Power, the Solar Alliance, Vote Solar Initiative, Clean Coalition, and other parties should not be adopted because these proposals fail to recognize that the renewable market is sufficiently robust to more accurately reflect generation costs of the FiT Program as compared to the cost reflected in the MPR, that of a natural gas plant**~~.

13. ~~**The**~~ **An administratively determined, avoided cost methodology**~~**ies**~~ represents the most reasonable interpretation of Section 399.20, consistent with ~~**presented to determine certain adders, such as those based on technology specific generation, are largely based on general avoided societal costs, and not ratepayer or utility costs, which might be argued to be inconsistent with**~~ federal requirements under PURPA.

14. ~~**Because technology specific adders are largely based on general avoided societal costs, and not ratepayer costs, these adders are inconsistent with three of the policy guidelines adopted by this decision: (1) Establish a feed-in tariff price based on quantifiable utility avoided costs that will stimulate market demand; (2) Contain costs and ensure maximum value to the ratepayer and utility; and (3) Ensure administrative ease and lower transaction costs for the buyer, seller, and regulator**~~.

15. ~~**State law does not specifically direct the Commission to account for the unique cost of each technology.**~~ **The legislative intent of SB 32, as stated plainly in Section 1, coupled with** ~~**T**~~**the** plain language of § 399.20 ~~**neither directs nor suggests**~~ **requires** that technology-specific costs be included in a FiT Program price methodology.

16. Technology-specific pricing is ~~in~~consistent with **and required by Section 399.20.** ~~**three of the policy guidelines adopted by in this decision: (1) Establish a feed-in tariff price based on quantifiable utility avoided costs; (2) Contain costs and ensure maximum value to the ratepayer and utility; and (3) Ensure administrative ease and lower transaction costs for the buyer, seller, and regulator**~~.

19.[110] ~~**When combined with SCE's adjustment mechanism, using RAM contracts to set the FiT Program starting price is consistent with the three policy guidelines that relate to choosing a FiT price: (1) Establish a feed-in tariff price based on quantifiable utility-avoided costs that results in market demand; (2) Contain costs and ensure maximum value to the ratepayer and utility; and (3) Ensure administrative ease and lower transaction costs for the buyer, seller, and regulator**~~.

20. [110] The pricing methodology we adopt today, ~~**Re-MAT,**~~ complies with both state and federal law.

21. [110] Because the § 399.20 FiT Program seeks to implement a directive from the Legislature to procure energy from specific sources, renewable generation of 3 MW and less, and to consider the value of different electricity products including baseload, peaking, and as-available electricity, ~~**we find using RAM contracts to set the § 399.20 FiT Program starting price, which includes these product types,**~~ **it** is ~~**the**~~ most reasonable ~~**alternative**~~ to **to base pricing for the Renewable FIT by** determining the cost of the resources being avoided.

22.[110] ~~**A starting price for the § 399.20 FiT Program based on the weighted average of PG&E's, SCE's, and SDG&E's highest executed contract resulting from the RAM auction held in November 2011 is reasonable**~~.

23. ~~**Based on the November 2011 auction prices and related information, PG&E's recommendation articulated in its November 2011 comments to use a weighted average of the highest executed RAM contract from each IOU to establish a single, statewide FiT price for each of the three product types provides a reasonable starting price for the FiT Program because the price will be set by the most recent comparable competitive solicitation for renewable distributed generation**~~.

24. [111] It is reasonable to ~~adjust the starting price by~~ **include** time-of-delivery factors **in administratively determining the avoided cost pricing to be adopted for the Renewable FIT** based on the generator's actual energy delivery profile to capture the value of each individual generator to the utility.

25. [111] ~~**A monthly price adjustment mechanism for each product type should be adopted. The monthly price may increase or decrease from the prior month's price by increasing or decreasing amounts, depending on the subscription results in each product type for each utility.**~~

26. [111] ~~**Each utility should operate this adjustment mechanism for each of the three product types.**~~

28. [111] ~~**Utilities should be allowed to reassign capacity between the product types after the expiration of 12 program months to prevent gaming, minimize ratepayer exposure to excessively high contract prices, and efficiently manage allocated unsubscribed capacity**~~.

30. The adopted pricing methodology **using an administratively determined, avoided cost basis is reasonable and consistent with the requirements of Section 399.20.**~~**, Re-MAT, is a market-based pricing methodology that reflects the supply and demand of the renewable electricity market to best ensures ratepayer indifference under § 399.20(d)(3).**~~

31. [112] ~~Re-MAT, which includes consideration of product types but not specific technologies, is consistent with the first-come-first-served provision set forth in § 399.20(f) because the statute permits consideration of product types~~.

34.[112] ~~To effectively prevent potential gaming, generators with a nameplate capacity of 3 MW and under that meet other eligibility criteria for the FiT Program should be prohibited from participating in the RAM Program if the capacity for the relevant FiT product type has not yet been reached.~~

35. [112] The statutory language, "strategically located," is **reasonably interpreted, consistent with Section 1 of SB 32, to require that pricing for the new Renewable FIT reflect the value of that locational attribute.** ~~interpreted to optimize the deliverability of electricity generated at the FiT project to load centers, which means that a generator must be interconnected to the distribution system, as opposed to the transmission system, and, in addition, must be sited near load, meaning not in an area with such low load that interconnection of the proposed generation would require utilization of the transmission system and new transmission infrastructure.~~

36. [113]To increase the likelihood that projects participating in the FiT Program are viable projects, it is reasonable to adopt project viability criteria**.** ~~similar to those relied upon in the RAM Program~~**.**

38. [113] **For purposes of program caps, the Existing FIT shall retain its current program cap of 250 MW and the separate, new Renewable FIT, adopted herein, shall have a program cap of** ~~The FiT Program cap should be increased to~~ 750 MW ~~and a proportionate share of the 750 MW (with a proportionate share designated for publicly owned utilities) should be allocated to the three largest electric utilities regulated by the Commission.~~ The allocations **for the new, separate Renewable FIT, adopted herein**, made in accordance with the methodology adopted in D.07-07-027, should be as follows: PG&E 218.8 MW; SCE 226 MW; SDG&E 48.8 MW, for a total of 493 MW.

40. No set-aside (or carve-out) of capacity for specific technologies **is necessary given the adoption of an administratively determined, avoided cost based pricing mechanism for the new Renewable FIT herein, which will reflect the value of various renewable technologies and products.** ~~should be adopted because § 399.20 applies equally to all electric generation facilities, regardless of technology, and must be made available on a first-come-first-served basis under § 399.20(f).~~

41. [113] **Because the existing FIT and new Renewable FIT adopted here pursuant to SB 32, as amended by SB 1X 2, are fundamentally different programs,** ~~Due to the various statutory changes, it is logical for~~ PG&E, SCE, and SDG&E ~~to~~ **should not** combine existing tariffs setting forth their § 399.20 FiT Programs into **the tariff adopted pursuant to this decision.** ~~a single tariff for each utility~~.

51.[115] ~~The Commission gave full consideration to all pricing options presented in the proceeding, including that of an "administratively determined, avoided-cost based pricing mechanism."~~

VERIFICATION

(Rule 1.11)

I am the attorney for the Center for Energy Efficiency and Renewable Technologies (CEERT). Because CEERT is absent from the City and County of San Francisco, California, where I have my office, I make this verification for said party for that reason. The statements in the foregoing Comments of the Center for Energy Efficiency and Renewable Technologies on the Proposed Decision of ALJ DeAngelis Revising FIT Program, have been prepared and read by me and are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct and executed on April 9, 2012, at San Francisco, California.

Respectfully submitted,

/s/ SARA STECK MYERS

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