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 THE CENTER FOR ENERGY EFFICIENCY AND RENEWABLE TECHNOLOGIES FOR REHEARING OF DECISION 12-05-035

June 20, 2012

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The Center for Energy Efficiency and Renewable Technologies (CEERT) hereby applies for rehearing of Decision (D.) 12-05-035. D.12-05-035 was mailed on May 31, 2012, the statutory "date of issuance" for purposes of an application for rehearing.[1] This application for rehearing is, therefore, timely filed and served pursuant to Rule 16.1 of the Commission's Rules of Practice and Procedure.

I. INTRODUCTION: GROUNDS FOR REHEARING

Rule 16.1(c) of the Commission's Rules of Practice and Procedure requires applications for rehearing to set forth specifically "the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous." The purpose of an application for rehearing "is to alert the Commission to a legal error, so that the Commission may correct it expeditiously."[2]

That is the precise purpose of this application for rehearing – to "alert" the Commission of legal errors in D. 12-05-035 and permit the Commission to correct those errors expeditiously. Specifically, D.12-05-035 seeks to implement "statutory amendments to [Public Utilities (PU) Code] §399.20" by adopting, among other things, "a new pricing mechanism for the

[1] Applications for rehearing are due within 30 days after the date the Commission mails its decision (Public Utilities (PU) Code, 1731(b)(3); Rule 16.1(a), Commission Rules of Practice and Procedure).
[2] Rule 16.1(c), Commission's Rules of Practice and Procedure.

Commission's §399.20 Feed-in Tariff (FiT) Program"[3] (Renewable FIT Program), but does so in a manner that results in the Commission acting without, or in excess of, its powers or jurisdiction and failing to proceed in the manner required by law.[4]

These legal errors must be addressed and remedied by granting rehearing of D.12-05-035. Further, because the Commission has yet to adopt the standard contract that is a required part of the Renewable FIT Program, the Commission has the opportunity to correct the fundamental legal errors of D.12-05-035 before the Renewable FIT Program is launched. Such action is critical to ensure that the Renewable FIT Program does in fact comply with Section 399.20, as written and intended by the Legislature.

II.
APPLICABLE LAW AND STANDARDS FOR REVIEW

A. The Commission's Jurisdiction and Authority Are Defined by the Legislature.

The Commission's regulatory jurisdiction extends to investor-owned public utilities as defined by the Legislature in the California Public Utilities (PU) Code.[5] Only the Legislature "has plenary power" to "confer additional authority and jurisdiction upon the [C]ommission."[6]

B. Statutes Must be Construed and Applied by the Commission According to Their Terms and Well-Established Judicial Principles.

With the Commission's "authority" defined by statute, the language of that statute is obviously critical to determining the extent of this Commission's jurisdiction and whether its decisions comply with that law. For purposes of statutory construction, the courts have adopted and applied well-established principles, which, in turn, have been routinely followed by the

[3] D.12-05-035, at p. 2.
[4] See, PU Code §1757.1(a)(2) and (3).
[5] See, Cal. Const., Art. XII, Sections 3 and 5.
[6] Cal.Const., Art. XII, Section 5.

Commission in its own decisions.[7] Those principles include (1) ascertaining the intent of the legislature so as to effectuate the purpose of the law,[8] (2) giving words used in a statute a plain and common sense meaning consistent with the statute's "legislative purpose,"[9] and (3) construing "a statute in context, keeping in mind the nature and purpose of the legislation."[10]

These principles stem from a clear understanding of the "judicial role" in a democratic society, which is "to interpret laws, not to write them," a power reserved to the legislative branch, and, in turn, to interpret statutes in accordance with the "expressed" intention of the Legislature.[11] Similarly, administrative regulations that seek to alter a statute or "enlarge" its scope are void.[12] As part of the implementation of statutes that are part of the Renewable Portfolio Standard (RPS) Program, like the Renewable FIT, the Commission itself, as recently as its decision in D.11-12-052, has confirmed that, in "implementing *new* statutory provisions," it is to be "guided by the basic principles of statutory construction."[13]

III.
BY D.12-05-035, THE COMMISSION HAS ACTED WITHOUT, OR IN EXCESS OF, ITS POWERS OR JURISDICTION AND FAILED TO PROCEED IN THE MANNER REQUIRED BY LAW.

A. The Legislature Has Specifically Defined the Requirements for the Renewable FIT, Including the Components for the Mandated "Payment."

A review of the express language of Section 399.20, coupled with the *legislative guidance* included in Section 1 of Senate Bill (SB) 32,[14] demonstrates that the Legislature intended and enacted a very specific program (Renewable FIT) for the Commission to

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[7] See, e.g., Decision (D.) 01-11-031, at p.6.
[8] *California Teachers Assn.* v. *Governing Bd. of Rialto United School Dist.* (1997) 14 Cal.4th 627, 632; *Dyna-Med, Inc.* v. *Fair Employment Housing Com.* (1987) 43 Cal.3d 1379, 1386.
[9] *California Teachers Assn., supra*, 14 Cal.4th at 633; *People* v. *Valladoli* (1996) 13 Cal.4th 590, 597, 599, 602.
[10] *Dyna Med, Inc., supra,* 43 Cal. 3d at 1387, *People V. Valladoli, supra*, 13 Cal. 4th at 602; *Squaw Valley Ski Corp.* v. *Superior Court,* (1992) 2 Cal. App. 4th 1499, 1511.
[11] *California Teachers Ass'n, supra*, 14 Cal.4th at 633.
[12] *Dyna Med, Inc., supra*, 43 Cal.3d at 1389.
[13] D.11-12-052, at p. 6; emphasis added.
[14] Stats. 2009; ch. 328.

implement and adopt. In this regard, Section 399.20 requires a FIT targeted to RPS-eligible renewable electric generation of a particular size, location, characteristics, and "attributes," both "locational" and "environmental," to be priced in a manner that fully incorporates and reflects the value of that generation.[15] While Section 399.20 was amended to a limited extent in SB 2 1X,[16] the program as expanded and envisioned by the Legislature in SB 32 was unchanged and *never* implemented by the Commission until D.12-05-035. Thus, Section 1 of SB 32 remains the operative *legislative* guidance to the Commission and, in addition to the express language of Section 399.20, dictates the terms of the Renewable FIT Program, including pricing.

What is the renewables market targeted by Section 399.20? Specifically, this program is to "encourage the location of clean generation close to load centers," provide a procurement mechanism for RPS-eligible "[s]mall projects of less than 3 megawatts" that "face difficulties in participating in competitive [RPS] solicitations" through a "tariff" that will "address these barriers," "recognize the *environmental attributes* of the renewable technology," 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."[17]

To that end, Section 399.20 specifically requires the Commission to establish a "*standard tariff*" procurement mechanism in which participation is limited to renewable energy facilities that have an effective capacity of not more than three MWs and are "strategically located" in a manner that "optimizes" delivery of electricity to load centers.[18] Further, the Commission is instructed to require that this *standard tariff shall* provide for *payment* for every

[15] SB 32, Section 1 (a)-(f); PU Code §399.20.
[16] Stats. 2011, ch. 1.
[17] SB 32, Section 1(a) – (f); emphasis added.
[18] PU Code §399.20(b).

kilowatthour purchased *and* that, significantly, the payment under this tariff "*shall include* all current and anticipated environmental compliance costs, including, but not limited to mitigation of emission of greenhouse gases and air pollution offsets associated with the operation of new generating facilities in the local air pollution control or air quality management district where the electric generation facility is located."[19]

It is important to note that the Commission was given *no discretion* to implement these provisions other than *as written*, to create its own "guidelines" unrelated to those identified by the Legislature for Section 399.20, or to prioritize provisions or its own guidelines in a way that would undermine, diminish, or even eliminate the Legislature's intent or specific provisions of Section 399.20. Regarding the importance of the specific "rate" to be paid to eligible facilities, the Governor's signing statement for Section 399.20 makes that clear:

> "I am signing Senate Bill 32, which would revise and expand the feed-in tariff (FIT) program from 1.5 MW to 3 MW for eligible renewable electric generation facilities *and authorizes the Public Utilities Commission (PUC) to adjust the rate* to *reflect the value of the electricity and other attributes.* In order to *meet our greenhouse gas emission reduction goals* and a Renewable Portfolio Standard of 33% by 2020, we will need to use all of the tools available under our existing programs to get to that goal." (Emphasis added.)

As detailed below, D.12-05-035 does not follow either the law or the intent of Section 399.20. The result is the adoption of a pricing mechanism that should *not be* applied or used in the Renewable FIT Program until it is corrected.

B. D.12-05-035 Fails to Follow and Comply with the Plain Language of Section 399.20 and The Legislative Guidelines Established for the Renewable FIT Program.

As in D.11-12-052 (RPS "content categories"), D.12-05-035 faced the same task of "implementing new statutory provisions," namely, the amendments of Section 399.20 enacted by Senate Bill (SB) 32, as modified by SB 2 1X. To the extent that any "interpretation" of this

[19] PU Code §399.20(d)(1); emphasis added.

statutory language was required, the Legislature, in Section 1 of SB 32, which was not changed by SB 2 1X, expressly included the findings and intent to be applied to *guide* the Commission in implementing the amendments of Section 399.20.

D.12-05-035 does in fact reference "rules of statutory construction," including the following: "If there is no ambiguity in the language of the statute, 'then the legislature is presumed to have meant what it said, and the plain meaning of the language governs.'"[20] In a revision to the Proposed Decision on which D.12-05-035, D.12-05-035 also claims that Section 1 of SB 32 is the foundation of its adopted "five core policy guidelines which underlie our adoption of a revised §399.20 FiT Program price."[21] However, neither is the case – D.12-05-035 *ignores and fails to implement the "plain language"* of Section 399.20 and follows "guidelines" for which SB 32, Section 1, could *not* have been the "foundation." By doing so, D.12-05-035 makes critical errors in failing to implement Section 399.20 *as written* and intended and must be corrected immediately.

Specifically, D.12-05-035 adopts a "pricing mechanism" for the Section 399.20 Renewable FiT called a "Renewable Market Adjusting Tariff" or "Re-MAT."[22] The 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."[23] Accepted projects will be paid a "time-of-delivery adjustment," but no other adders are included, no consideration is given to the value of

[20] D12-05-035, at p. 15, citing *Smith* v. *Rae-Venter Law Group* (2002) 29 Cal.4th 345, 358.
[21] D.12-05-035, at p. 18.
[22] D.12-05-035, at p. 2.
[23] D.12-05-035, at pp. 2-3.

the "environmental attributes" of the targeted generation, and no "payment" is provided for "environmental compliance costs."

Further, D.12-05-035 rejects multiple parties' requests for a set aside of allocated capacity for specific technologies as "inconsistent with the technology-neutral language of the statute" and as otherwise addressed by the adopted "product types."[24] Yet, at no point in D.12-05-035 does the Commission ever examine whether its adopted Re-MAT, based on the November 2011 RAM Solicitation, especially when *coupled with* its integration of the existing AB 1969 FIT Program contracts in the program cap, will in fact be "technology-neutral" or reach the market targeted by Section 399.20. It must be noted that RAM is a procurement mechanism in which the Commission has had only "only limited experience"[25] and, by the Commission's own determination, is distinct from, and not, a feed in tariff. [26] In addition to differences between the RAM and FIT, the advice letters filed by the utilities for the RAM solicitation on which the Re-MAT is based confirm that these solicitations basically only yielded *one resource type* (solar photovoltaic) and cannot claim to be "technology-neutral."[27] D.12-05-035 sheds no light on why the RAM, a Commission administrative construct, or its November 2011 solicitation results will in fact attract the specific and diverse renewable resources the Legislature intended to reach by Section 399.20.

Further, the Commission in D. 12-05-035 never examines the impact on this program of its decision to restrict the overall program size to 750 MWs statewide, inclusive of the existing 250 MWs in the existing AB1969 FIT Program *less* slightly more than 250 MWs reserved to

[24] D.12-05-035, at p. 81.
[25] Draft Resolution E-4489, at p. 5.
[26] D.10-12-048, at p. 2.
[27] 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).

publicly owned utilities.[28] The result is a program for new projects that could be as little as 250 MWs, and, depending on the "products" already subscribed in the existing AB 1969 FIT Program, may limit or eliminate procurement from certain "product" categories.

In making these decisions, the Commission in D.12-05-035 chose to be guided by "five" core principles that do *not* follow Section 1 of SB 32, but instead inject a completely different framework that requires a "price based on quantifiable ratepayer avoided costs that will stimulate market demand" and ensures "administrative ease and lower transaction costs for the buyer, seller, and regulator."[29] Neither of these principles are anywhere to be found in Section 1, and, one – "administrative ease" – appears to be the basis for rejecting the Commission's obligation to follow the law in one key respect – providing a Renewable FIT payment that reflects "environmental attributes" of the targeted resources and "includes" "environmental compliance costs."[30]

The Commission, however, cannot ignore statutory provisions or legislative intent simply to achieve an outcome that it considers easier to implement. Certainly, *no such authority* is provided by the Legislature to the Commission in Section 399.20.

Yet, the Commission in D.12-05-035 completely fails to follow the law and commits reversible error by rejecting its responsibility to include "environmental compliance costs" in the Renewable FiT payment as mandated by Section 399.20(d). This provision was not some recent addition resulting from SB 2 1X, but has been part of the law since the enactment of SB 32 in *2009*. Despite repeated efforts by multiple parties, including CEERT, asking that the Commission examine the issue of avoided environmental costs, the Commission and its staff

[28] D.12-05-035, at pp. 74-79.
[29] D12-05-035, at p. 19.
[30] SB 32, Section 1(e); PU Code §399.20(d)(1).

have refused. Thus, it is not just a matter of the Commission ignoring its obligation, but a worse case of an active effort to defeat the law itself.

In this regard, it is of note that the Commission *never included consideration of this payment* in the Proposed Decision and never, at any time, sought to correct the October 13, 2011 Renewable FIT Staff Proposal ("staff proposal"), which guided and limited party comment on the Renewable FIT and also failed to include either the requirement of including "environmental compliance costs" in the Renewable FIT payment *or* any consideration of "environmental attributes." Given a Proposed Decision, which equally ignored these factors, the late recognition of the actual provisions of Section 399.20(d)(1) by D.12-05-035 appears as no more than an afterthought.

Further, while the original Proposed Decision was more dismissive of party efforts to correct the errors of the Staff Proposal, D.12-05-035 offers little improvement on this topic, despite widespread and vigorous comment by multiple parties seeking to ensure Commission compliance with Section 399.20. D.12-05-035 now includes the statutory requirement of a payment inclusive of "environmental compliance costs" in both a footnote[31] and text,[32] but the result is the same – *the Commission rejects its obligation to implement this section.* Instead, the Commission, without reference to the Legislature's intent for the Renewable FIT tariff to "recognize environmental attributes," dismisses "party" comments, which urged that this language, at the least, required "environmental adders" to reflect the value of "the reduction in emission of methane," or the "value of reduced air emission from wildfires, mitigated fire

[31] D.12-05-035, n. 46, at p. 34.
[32] D.12-05-035, at pp. 50-51.

suppression costs, and public safety benefits"[33] as incorrectly interpreting the statutory language and, in turn, having no value for that purpose.[34]

Instead, D.12-05-035 places faith in its "price adjustment mechanism," despite its conflict with the law, as being sufficient to "account for varied resource costs within a produce [sic] type," promising only to "monitor the program to ensure its success."[35] D.12-05-035 also relies on the "ratepayer indifference requirement in §399.20(d)(3) and our goals of cost containment within the RPS Program" as further reasons "to refrain from general environmental adders even in those instances, such as biogas and forest biomass, where the environmental and public safety qualities of the renewable generation technology is promising."[36] D.12-05-035 *presumes*, without support, that "biogas and forest biomass will successfully bid into baseload" without support for such a presumption and without any consideration of whether the integration of the existing AB 1969 Program will even leave room for such procurement in the "new" program.[37]

Only after this discussion does D.12-05-035 finally reach the mandate of §399.20(d)(1) as to the *required* payment under the Section 399.20 Renewable FIT. In this regard, the Commission concludes that "a few parties submitted evidence" on "environmental compliance costs," but that the Commission "found much of this data to reflect general environmental costs and not, as specified by the statute, the cost of environmental compliance."[38] The Commission concludes that it is "mindful of the importance of quantifying this costs and find it essential for the Commission's compliance with the statute," but takes *no* steps to do so other than to

[33] D.12-05-035, at p. 51.
[34] D.12-05-035, at pp. 51-52.
[35] D.12-05-035, at p. 52.
[36] D.12-05-035, at p. 52.
[37] D.12-05-035, at pp. 52-53.
[38] D.12-05-035, at p. 53.

conclude that "[t]oday" there is "insufficient evidence in the record" to adopt an "adder reflecting the cost of environmental compliance under §399.20(d)(1)."[39]

Despite a vague promise to "prioritize this issue in this proceeding," absolutely no date is set to do so and no provision is made to await resolution of that issue before launching this program.[40] Further, no acknowledgement of the Commission's obligation in this regard is part of any Ordering Paragraph of D.12-05-035, and reference to "environmental compliance costs" is missing from all findings, conclusions, and orders.

Just like the Proposed Decision on which it was based, D.12-05-035 makes a fundamental error in its implementation of Section 399.20(d)(1) - the responsibility to fulfill the mandates of SB 32 does *not* fall on *parties to a proceeding*, 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 or disregard by the Commission of party input. *If* the Commission believes, as D.12-05-035 states, that further "evidence" was required to be adduced to complete its 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.

Instead, as noted above, the staff proposal offered for party comment never references nor requires as part of its price proposal that "environmental compliance costs" be included and considered and certainly never references the legislative guidance of Section 1 of SB 32 that the "tariff" recognize, among other things, the "environmental attributes" of the resources to be targeted by the Section 399.20 Renewable FIT. As CEERT said in response to that Proposal:

> "The 'staff proposals' contained in the October 13, 2011 Renewable FIT Staff Proposal, result in a ruling that is *dispositive* of the issue of Sec. 399.20 implementation, especially as to key 'elements' such as 'a. Pricing.' In this regard, the October 13, 2011 Renewable FIT Staff Proposal, including the 'Proposal

[39] D.12-05-035, at p. 54.
[40] D.12-05-035, at p. 54.

> Questions' posed for party comments, *presume* adoption of this proposal. Thus, as an example, 'Proposal Questions' do not seek input on alternative legal or factual approaches, but rather *presume* that 'RAM Pricing' and the 'Pricing Adders' 'proposed' by Staff will in fact be adopted, with comment limited to circumstances when both might be adjusted.4 In addition, discussion in the October 13, 2011 Renewable FIT Staff Proposal on the statute at issue and 'guiding principles' completely neglect applicable rules of statutory construction and treat the law's implementation as a matter of discretion by the Commission."[41]

While CEERT and other parties attempted to expand this record by later motion filed in December 2011, no action was taken on that motion, and it was denied in D.12-05-035 on the claim that parties had "ample opportunities" to present their pricing proposals.[42] The Commission simply cannot have it both ways – claiming that the record was "insufficient" when the issue at hand was never allowed to be addressed adequately or at all in the first place and leaving mandated statutory language to be "resolved" in some vague "future" that may well not come in time to achieve a Renewable FIT Program compliant with Section 399.20.

C. Rehearing of D.12-05-035 Must be Granted Immediately To Correct Its Significant Legal Errors Before the Launch of the Section 399.20 Renewable FIT Program.

D.12-05-035 simply does not comply with Section 399.20 as written or intended. Further, nothing in that statute or any Commission-adopted "policy guidelines" for its decision excuses Commission compliance with its applicable statutory mandates. 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. Further, by failing to implement this provision and reflect the targeted resources' "environmental attributes" *as part of the Re-MAT pricing*, the Commission has implemented a program in D.12-05-035 that the Legislature did not intend. It must be remembered that a key *legislative guideline* for this law, as signed by the

[41] CEERT Comments on Sec.399.20 Renewable FIT Staff Proposal (November 2, 2011), at p. 2; footnotes omitted.
[42] D.12-05-035, at p. 105.

Governor, was to achieve a program that would "recognize the environmental attributes of the renewable technology," especially as a means to reduce GHG emissions.[43]

Thus, by substituting its own "desires," including "administrative ease," for legislative mandates in D.12-05-035, the Commission has completely failed to construe Section 399.20 holistically and consistently with its language and purpose. In this atmosphere, parties should in fact be congratulated, not chided as D.12-05-035 does, for their heroic efforts to try to repeatedly steer the Commission in the right direction. The Staff Proposal, Proposed Decision, and, now, D.12-05-035 reflect a clear indication that these efforts fell on deaf ears.

Again, as stated above, the Commission has not demonstrated in any way in D.12-05-035 that its "Re-MAT" will in fact reach the projects and technology types that Section 399.20 procurement mechanism was targeting. D.12-05-035 continues to ignore 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 *integrating* existing AB 1969 FIT projects and reducing the Renewable FIT Program cap by its allocations to the existing program and Publicly Owned Utilities. 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.

By the Commission putting off consideration of "environmental compliance costs" and examination of price "adjustments" that may be needed to attract "various resources" until sometime in the "future," there is a significant likelihood that the Renewable FIT Program will be subscribed long before such actions will ever be taken, *a fact acknowledged by the Commission in D.12-05-035*. Thus, the Commission has already confirmed in D.12-05-035:

[43] SB 32, Section 1 (e).

"We are sensitive, however, to the fact that the program's MW may quickly be subscribed."[44] Such a concession makes it imperative for the Commission to grant immediate rehearing of D.12-05-035 to correct its errors before the Renewable FIT Program is launched.

IV.
CONCLUSION

The foregoing makes clear that the Commission erred significantly in D.12-05-035 in acting without, or in excess of, its powers or jurisdiction and in failing to proceed in the manner required by law. Based on these grounds, CEERT respectfully requests that the Commission grant rehearing of D.12-05-035 and comply with Section 399.20, as written and intended by the Legislature, as indicated herein. This action should be taken immediately before the standard contracts, which are part of this program, are reviewed and approved and participation begins.

Respectfully submitted,

June 20, 2012

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[44] D.12-05-035, at p. 76.

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 Application of the Center for Energy Efficiency and Renewable Technologies for Rehearing of Decision 12-05-035 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 June 20, 2012, at San Francisco, California.

Respectfully submitted,

/s/ SARA STECK MYERS

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