BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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

SUSTAINABLE CONSERVATION APPLICATION FOR REHEARING OF DECISION 12-05-035

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FOR Sustainable Conservation

June 29, 2012

TABLE OF CONTENTS

I. INTRODUCTION

In accordance with the Article 16 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission"), Sustainable Conservation submits this application for rehearing of Decision 12-05-035, "Decision Revising Feed-in Tariff Program, Implementing Amendments to Public Utilities Code Section 399.20 Enacted by Senate Bill 32, and Senate Bill 2 1X and Denying Petitions for Modification of Decision 07-07-027 by Sustainable Conservation and Solutions for Utilities, Inc." Sustainable Conservation has been an active party over many years in the Commission's proceedings regarding a feed-in tariff, starting with implementation of Assembly Bill 1969 in 2007 (R.06-05-027). Sustainable Conservation has consistently advocated throughout several proceedings for the environmental and economic benefits of biogas technology, w, particularly in the context of agriculture and related industries, and the goal of bringing more biogas online. The Commission has recognized Sustainable Conservation's contributions to these proceedings over many years.

The deliberations that culminated in Decision 12-05-035 have been characterized by the Commission as leading to a feed-in tariff, and a new program, the Renewable Market Adjusting Tariff ("ReMAT). Unfortunately, D.12-05-035 contains legal and technical errors that must be remedied by the Commission. Sustainable Conservation requests rehearing on the following issues:

- D.12-05-035 fails to comply with state law in its refusal to implement clearly stated, unambiguous mandates from the Legislature concerning environmental compliance costs and establishing relevant benchmarks;

- D.12-05-035 violates both the letter and spirit of its authorizing legislation by engaging in dubious exercises of statutory construction that result in both the failure to fulfill express statutory requirements and the creation of criteria and mechanisms not grounded in statute;
- D.12-05-035 fails to adequately address issues concerning the application of the Decision, including whether there is adequate capacity for all the technology types the Decision specifies, thereby making the successful implementation of the Legislature's intent highly questionable.

In preparing this application for rehearing, Sustainable Conservation has had the opportunity to review the several filings submitted in the last two weeks raising similar concerns. Sustainable Conservation particularly endorses and associates itself with the analysis presented in the Application for Rehearing from the Center for Energy Efficiency and Renewable Technologies.[1]

II. PROBLEMS WITH THE DECISION

D.12-05-035 suffers from two fundamental flaws. First, it fails to implement both the express mandates and larger intent enacted by the Legislature in Senate Bill 32. Second, it fails to consider the cumulative impact of existing capacity and projects under development on the availability of capacity under the newly ordered feed-in tariff. Both these issues were identified by parties during the course of the proceeding and not afforded appropriate weight in the final decision. The Commission must rectify this situation if the feed-in tariff is to stand any chance of

[1] *Application of the Center for Energy Efficiency and Renewable Technologies for Rehearing of Decision 12-05-035*, June 20, 2012, in R.11-05-005.

actually fulfill the Legislature's clear intent to bring additional distributed generation resources on line, particularly in any category beyond "peaking as-available."

A. *D.12-05-035 Fails to Fully Implement SB 32*

In setting forth the principles of statutory construction it proposes to apply to SB 32, D.12-05-035 states the following:

> The California Supreme Court has enunciated clear standards for courts or state agencies construing a statute. The Commission must act as follows:
>
> . . . look to the statute's words and give them their usual and ordinary meaning. The statute's plain meaning controls the court's interpretation unless its words are ambiguous. [2]

In passing SB 32, the Legislature was clear that the tariff developed pursuant to the legislation should both acknowledge the environmental attributes of renewable technologies and incorporate environmental compliance costs:

> The people of the State of California do enact as follows:
> SECTION 1. The Legislature finds and declares all of the following:[…]
> (e) A tariff for electricity generated by renewable technologies should recognize *the environmental attributes of the renewable technology*, the characteristics that contribute to peak electricity demand reduction, reduced transmission congestion, avoided transmission and distribution improvements, and in a manner that accelerates the deployment of renewable energy resources
>
> and
>
> 399.20 (d) (1) The tariff shall provide for payment for every kilowatt hour of electricity purchased from an electric generation facility for a period of 10, 15, or 20 years, as authorized by the commission. The payment shall be the market price determined by the commission pursuant to Section 399.15 and *shall include all current and anticipated environmental compliance costs, including, but not limited to, mitigation of emissions of greenhouse gases and air pollution offsets associated with the operation of new generating facilities in the local air*

[2] D.12-05-035, p. 14, citing *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387-388

pollution control or air quality management district where the electric generation facility is located [emphasis added].[2]

The legislation is clear that the payment "shall include all current and anticipated environmental compliance costs." This is an unambiguous statutory mandate that does not require any sophisticated exercise of the rules of statutory construction to understand – it means what it says. And yet, in D.12-05-035, the Commission failed to follow its own advice, cited above, and implement the clear and unambiguous language of the statute, suggesting instead that (1) the "ratepayer indifference" requirement and interest in cost containment somehow trump the direction to include environmental compliance costs, and (2) the Commission did not have sufficient evidence on specific environmental compliance costs to fulfill this mandate, even while acknowledging that parties submitted evidence on this.[3]

The Decision not only fails to apply the clear and unambiguous language of SB 32 on environmental compliance costs – it actually makes the somewhat breathtaking assertion that "[i]n terms of compliance with state law, we find that our proposal meets the requirements of § 399.20."[4] This is manifestly not the case. In the absence of specific authorization by the Legislature, the Commission does not have the authority to unilaterally decide which parts of a duly enacted statute it chooses to implement, and which it chooses to ignore. The California Supreme Court has ruled that "[a]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void..."[5] It can be argued that D.12-05-035 effectively makes a *de facto* amendment to SB 32, because it treats the environmental compliance costs provision in §399.20(d)(1) as if it said that the payment "*may* include all current and anticipated

[2] Senate Bill 32, Chapter 328, Statutes of 2009.
[3] D.12-05-035, pp. 52-54.
[4] D.12-05-035, p. 40.
[5] *Morris v. Williams* (1967) 67 Cal. 2d 733, 748.

environmental compliance costs," despite the fact that the statute says "*shall*." Willfully leaving an unambiguous statutory mandate out of an implementing decision is no less an alteration, and an impairment of the intended scope of the law, than inserting a requirement not found in the statute would be.

The Decision attempts to justify its cherry-picking approach to implementation through the use of a set of five "core principles," one of which - "administrative ease" – appears to be the basis for not following the statutory mandate to include environmental compliance costs in the tariff. This "principle" appears nowhere in SB 32, and seems to be a creation of the Commission staff. At no point in the Decision is an argument made that the environmental compliance costs provision of SB 32 is impossible to implement due to irresolvable conflicts with other provisions of SB 32 or other law. No effort is made to apply accepted standards of statutory construction to reconcile the mandate to include environmental compliance costs with the ratepayer indifference requirement or the desire for cost containment. Instead, this clear mandate from the Legislature is dismissed more or less out of hand since it would not provide "administrative ease." The Commission has no authority to choose to ignore a provision of a duly enacted statute because it would be "too much work" to implement it.

B. *The Pricing Benchmark is Not Based on a Comparable Relevant Resource*

D.12-05-035 bases prices for small renewable projects, under 3 MW, on the results of an auction for projects up to 20 MW. Sustainable Conservation provided analysis in comments on the Proposed Decision of the woefully small percentage of the statewide renewable portfolio that biogas is expected to comprise under current policies, and as evidenced by the utilities' RPS compliance filings.[6] Putting aside objections to the structure of the ReMAT and the use of an

[6] *Comments of Sustainable Conservation on Proposed Decision Revising Feed-in Tariff and Related Issues,* April 9.

auction-based pricing mechanism, D.12-05-035 uses a price benchmark that is wholly inadequate because it is based on projects significantly larger than the projects that are the target for the ReMAT program. The record in this proceeding includes evidence that, of the 241 projects that bid into the November 2011 auction whose results will form the basis of ReMAT pricing, only six, or less than 2%, were from baseload technologies. Further, very few of the baseload projects that bid were under 3 MW, and the only baseload project to be awarded a contract (out of 241 bids) is 14 MW.[7]

D.12-05-035 disregards evidence and legal briefings that the Commission should use a relevant benchmark in establishing prices. Fuel Cell Energy provided extensive analysis on this:

> The problem is that the Staff Proposal's pricing recommendation refers generally to the "renewable market" rather than specifically to the market for resources comparable to SB 32 resources. The distinction has *very* important implications for pricing. In its most recent opinion providing guidance regarding feed-in tariff pricing under PURPA, FERC reaffirmed the states' authority to base renewable resource pricing on comparable resources:
>
> > [I]t is the *states* that have the authority to dictate a utility's actual purchase decisions. Because avoided cost rates are defined in terms of costs that an electric utility avoids by purchasing capacity from a QF, and because a state may determine what particular capacity is being avoided, the state may rely on the cost of such avoided capacity to determine the avoided cost rate. Thus, the avoided cost rate may take into account the cost of electric energy from the generators being avoided, e.g., generators with certain characteristics. As explained in the Clarification Order, where a state requires a utility to procure energy from generators with certain characteristics, generators with those characteristics constitute the sources that are relevant to the determination of the utility's avoided cost for that procurement requirement.
>
> All of FERC's recent statements regarding FIT pricing under PURPA take particular care to acknowledge that "renewable generation" is not a single reference point for pricing. FERC consistently refers to "generators being

2012, pp. 2-4.

[7] *Ibid.*, pp. 5-6.

> avoided" and "generators with certain characteristics" in the plural, and recognizes that these generators entail "actual procurement requirements, and resulting costs." Thus, in determining avoided cost, the Commission can and should start by carefully identifying the characteristics and costs of the "generators being avoided" under SB 32.
>
> The Commission cannot ensure that prices for SB 32 resources accurately reflect the IOUs' avoided cost of procuring generators with the "particular characteristics" identified above unless the Commission actually focuses on the relevant generators. In other words, before approaching the nuts and bolts of SB 32 pricing, the Commission should state clearly that the relevant point of comparison is what it would otherwise cost the IOU to procure a diverse portfolio of small renewable DG resources. (Footnotes omitted)
>
> D.12-05-035 acknowledges that the adopted benchmark starting point is not relevant.
>
> "The market segments covered by RAM and § 399.20, however, are not the same. RAM covers renewable projects sized up to 20 MW. The § 399.20 FiT Program covers renewable projects sized up to 3 MW. Other renewable procurement programs include the RPS Annual Solicitation and bilateral contracting process, which generally result in contracts greater than 20 MW and as large as 1,000 MW, with an average size of about 100 MW. Nevertheless, while not identical, the RAM Program presents the closest comparison and, as such, we find it reasonable to define Re-MAT…"

As is the case with environmental compliance costs, the Commission cannot simply throw up its hands and say "this is too hard." The Commission has other alternatives, suggested in the record, for pricing, including setting prices for each technology type. If the Commission insists it must rely on auctions, notwithstanding the analysis cited above, it could design an auction for each technology type. The Commission has adopted a benchmark that is wholly inappropriate because it does not rely on comparable resources.

C. *Significant Uncertainty Exists Regarding Program Viability*

In the last week, the Commission has received numerous filings that question the viability of the program as adopted in D.12-05-035. In addition to the application for rehearing from CEERT referenced above, the Placer County Air Pollution Control District has submitted

analysis that shows that after the contracts from the AB 1969 contract are rolled into the SB 32 program there will be no baseload capacity available in PG&E's service territory.[8] The Commission could have anticipated this, as the possibility was raised in comments last fall. "If these projects [AB 1969] advance to the contractual stage before the completion of this proceeding, then it is conceivable that the SB 32 program would be sold out (in some utility territories) before it opens."[9]

Southern California Edison submitted a motion that calls out a gap in availability of the contract.[10] SCE notes that D.12-05-035 calls for the existing feed-in tariff program established in 2007 pursuant to AB 1969 to end on the effective date of the D.12-05-035. SCE asserts this requires any project in the queue to submit applications on which they have been working with very short notice. Several parties have filed comments in support of SCE's motion. The responses to SCE's Motion, most of which are from developers with projects in the AB 1969 queue, support the premise of the Placer County Air Pollution Control District Motion that there will be very little capacity actually available under the program approved in D.12-05-035.

The Commission also has yet to approve tariffs and a contract vehicle, or to rule on the settlement pending in the transmission OIR (R.11-09-001). All of these are important to the implementation of SB 32, as projects cannot proceed without a contract, and the current interconnection process has consistently failed small biogas projects, among others.[11] A June 21 Scoping Memo in the transmission OIR (R.11-09-011) indicates a Proposed Decision on the

[8] *Motion of Placer County Air Pollution Control District to Reopen the Record and Motion for Official Notice of Fact Regarding January 2012 PG&E, SCE, and SDG&E Small Power Production Semi-Annual Report*, June 21, 2012.
[9] Vote Solar Comments, November 2, 2011, p. 3
[10] *Motion Of Southern California Edison Company (U 338-E) For Clarification Regarding Status Of Existing Assembly Bill 1969 Feed-In Tariff Program Under Decision 12-05-035*, June 21, 2012.
[11] See Rulemaking 11-09-011. "However, the success of these procurement programs may be enhanced by timely and cost-effective interconnection to the distribution system. By this rulemaking, we seek to address the key policy and technical issues essential to timely, non-discriminatory, cost-effective and transparent interconnection." (p. 4)

settlement will be released in the third quarter of 2012. Implementing the program ordered in D.12-05-035 is premature if the Commission does not have all the pieces in place for the program to succeed. The ReMAT includes provisions whereby capacity in one category can be reallocated to another category if the first category is undersubscribed over a specified time period. The issues identified above could adversely impact certain types of projects, particularly baseload, if there is not availability in that category or if it is not possible to interconnect because the transmission issues have not been addressed.

III. CONCLUSION

D.12-05-035 must be reheard. The Decision fails to implement either the letter or the spirit of SB 32, and creates unintended consequences that will render the program inaccessible to certain technology types. After waiting two and a half years for SB 32 to be implemented, California deserves more in the way of a program that will truly bring diverse distributed renewable resources online.

Respectfully submitted,

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June 29, 2012

Verification

I am the representative for the Sustainable Conservation. Sustainable Conservation is absent from the County of Alameda, California, where I have my office, and I make this verification for Sustainable Conservation for that reason. The statements in the foregoing document 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.

Executed June 29, 2012, at Oakland, California.

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Jody London
FOR Sustainable Conservation