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 SOLAR ENERGY INDUSTRIES ASSOCIATION ON THE THIRD REVISED PROPOSED STANDARD FORM CONTRACT AND THE PROPOSED DRAFT TARIFFS FOR THE SECTION 399.20 FEED-IN TARIFF PROGRAM

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In accord with the June 26, 2012 E-mail Ruling of Presiding Administrative Law Judge DeAngelis, the Solar Energy Industries Association (SEIA)[1] comments on the Third Revised Proposed Standard form Contract for the Section 399.20 Feed-In Tariff program (Joint PPA) submitted jointly by Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E) and Southern California Edison Company (SCE) (collectively the IOUs) and the associated proposed draft tariffs submitted individually by each IOU.

I. INTRODUCTION

In reviewing the IOUs draft tariffs to implement the feed-in-tariff program under SB 32 (Re-MAT) and the associated Joint PPA, SEIA bore in mind the legislative intent behind the program , *i.e.*, to encourage electrical generation from small distributed generation that qualifies as "eligible renewable energy resources" under the RPS Program with an effective capacity of 3 megawatts (MW). Thus, SEIA's comments on the tariffs and Joint PPA are primarily focused on provisions that have the potential for erecting barriers to participation by small generators in the

[1] The comments contained in this filing represent the position of the Solar Energy Industries Association as an organization, but not necessarily the views of any particular member with respect to any issue

program, such as unjustified costs and performance standards, lack of transparency, and provisions which could lead to market confusion. SEIA requests that the Commission bear this perspective in mind when reviewing its comments, and, accordingly, adopt the proposed modifications to the IOUs' respective tariffs and the Joint PPA recommended by SEIA herein.

II. COMMENTS ON DRAFT TARIFFS

A. Tariff Effective Date and Program Startup Period

Each of the three IOUs propose a different effective date and associated program startup period for the Re-MAT program:

- PG&E proposes an effective date of the first day of the calendar month following the latter of Commission approval of the Re-MAT tariff or the Joint PPA, with applicants being allowed to submit their program participation requests (PPR) and associated documentation five days after the effective date.
- SDG&E has proposed a more protracted effective date of sixty business days following a non-appealable Commission decision approving the tariff, with applicants being afforded the opportunity to submit PPRs and associated documentation during that 60 business day period; and
- SCE has left the determination of the tariff effective date up to the Commission, but provides that participation requests and associated documentation cannot be submitted until thirty days after the effective date.

SEIA submits that having different program start dates in each of the IOUs' service territories is unnecessary and will only result in confusion in the marketplace. The Re-MAT Tariff program is a statewide, legislatively mandated program. It should have one effective date, not three. In this regard, SEIA believes that the effective date proposal offered by PG&E provides the most certainty and expediency to the market, with its rapid effective date following Commission approval and its expeditious receipt of PPRs following that date. PG&E's proposed tariff effective date and program startup period should be approved and applied to all the IOUs.

In contrast, SDG&E and SCE's proposals would unnecessarily delay implementation of the program. While it is unclear what SDG&E intends when it keys the effective date of a "non-appealable" decision of the Commission, at minimum the sixty business day clock would not start until the period for filing applications for rehearing of the Commission decision approving the tariff has run (a minimum of thirty days after the Commission has approved the tariff). Also the use of "business days" rather than calendar days adds an additional three weeks to the period before the effective date. In short, SDG&E's proposal would have an effective date which is approximately four months after the tariff is approved by the Commission. This is unacceptable for a program which was approved by the legislature nearly three years ago but has yet to commence.

While SCE's proposed effective date is not as protracted as SDG&E's (assuming that the Commission selects an effective date that immediately follows approval of the tariff), its proposed startup period (30 days) is unnecessarily long. Again, the industry has been awaiting this program for an extended period of time. Potential applicants know what will be required in a PPR and the IOUs, which have been running AB 1969 feed-in-tariff programs for the past few years, have the infrastructure in place to process the PPRs.

SDG&E and SCE's proposed effective dates and program startup periods are needlessly drawn-out. They should be rejected and PG&E's proposal should be adopted for all IOUs.

B. Project Eligibility -- Criteria Seller Concentration Limit

One of the viability criteria adopted by the Commission for projects which desire to participate in the program is a seller concentration limit. Thus, the decision provides for seller concentration limit of 10 MW per seller and states that "[t]he definition of seller should be further explored in the standard contract phase of this proceeding." Accordingly, as part of their

tariff submissions, the IOUs have proposed means by which to measure and enforce the imposed limit. In general, each IOU is requiring that, along with each PPR, an applicant provide an attestation which includes the percentage interest an applicant and its affiliates have in each project related to an executed Re-MAT PPA with, or a submitted RE-MAT PPR to, the IOU in question.

While the IOUs have made an ardent attempt to address this issue of how "seller" should be defined for purposes of enforcing the seller concentration limit, a significant number of questions still remain. For example, how are Engineering Procurement and Construction Projects to be treated for purposes of applying the 10 MW cap? Similarly, how will tax equity investors be treated? In short, given the variety of financing constructs which are used to finance and build projects, the applicability of the 10 MW seller concentration level is of extreme importance to investors. Should the Commission determine to keep this criteria as part of the Re-MAT program,[2] then it must provide detailed specifications for its application.

C. Project Ineligibility

In its proposed tariff, SCE states it can deny a request for service under the tariff if it makes any of the following findings:

(a) The Eligible Electric Generation Facility does not meet the requirements of Public Utilities Code Section 399.20 or any applicable CPUC decision.

(b) The transmission or distribution grid that would serve as the point of interconnection is inadequate.

(c) The Eligible Electric Generation Facility does not meet all applicable state and local laws and building standards, and utility interconnection requirements.

[2] On July 31, 2012, SEIA filed a Petition for Modification of Decision 12-05-035 in which, among other things, it requested that the Decision be modified to remove the seller concentration limit. *See* Petition of the Solar Energy Industries Association for Modification of Decision 12-05-035, R. 11-05-005 (SEIA Petition) at pp. 11-12.

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(d) The aggregate of all electric generation facilities on a distribution circuit would adversely impact utility operation and load restoration efforts of the distribution system.

(e) The applicant will have an excess of 10 MW of executed and effective Re-MAT PPAs with SCE under this Schedule.

(f) The project appears to be part of a larger overall installation by the same company or consortium in the same general location.

(g) The applicant does not otherwise meet the requirements of this Schedule.

While SEIA recognizes that elements (b) through (d), above, are taken directly from Section 399.20 (n), it is unclear how SCE will make the required determinations under elements (b) and (d) in order to deny a service request. There should be some transparency around such process. The Commission should direct SCE to explain to the Commission and industry alike, how such determination will be made. Moreover, with respect to element (c), SCE should clarify that such requirement will not be interpreted as requiring the seller to have all applicable state and local permits in place prior to execution of the PPA.

Finally, element (f) -- "appears to be part of a larger overall installation by the same company" -- is too vague. At minimum, SCE should develop guidelines which will be utilized to determine whether a facility seeking eligibility under the tariff is simply a single part of a larger project in contravention of the Commission's determination against daisy chaining. The most practical resolution, however, for resolving the lack of clarity in SCE's proposed eligibility criteria (f), is for the Commission to require SCE to revise its tariff to provide for a provision comparable to that contained in PG&E's tariff addressing the issue of daisy chaining. Specifically, PG&E's draft tariff requires the applicant to provide PG&E an attestation that the project represents the only project being developed by the applicant on any single or contiguous pieces of property. Such an attestation should address SCE's concerns.

C. Queue Ranking

On the issue of project queue, Decision 12-05-035 provides that "[o]nce the participation request form is deemed complete, the utility will establish a queue on a first-come-first-served basis for each product type."[3] In order to effectuate this directive, each of the IOUs' tariffs provide that if multiple PPRs are deemed complete on the same day, then their respective positions in the queue will be based on the time and date at which their PPRs *were received* by the IOU. While the IOUs' proposed means for addressing the situation in which multiple program participation requests are deemed complete on the same day appears to meet the Commission's directive, it also creates the potential for the situation in which one applicant receives queue priority over another by virtue of the fact that its PPR was received one minute earlier. Given the limited number of MW available in the program, queue placement is critically important. Affording priority to an applicant which "pushed the send button" one minute earlier does not affect an equitable manner of assigning queue priority.

Rather, in such a situation a criteria more substantive than a time stamp should factor into queue rank. In this regard, SEIA submits, given the critical role which interconnection plays in ensuring a project meets a timely on-line date, and the resources which a developer must expend to achieve a timely interconnection, that if "deemed complete" applications are submitted on the same day in an IOU's feed-in-tariff program, then the application that is ranked earlier in the interconnection queue should receive the priority position in the IOU's feed-in tariff queue. Such process will honor the first-come first serve principle (deemed complete projects will still be ranked by date of submission) but also inject a degree of equity into the process by using an

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3 Decision 12-05-035 at p. 45.

objective, yet substantive criteria for ranking projects deemed complete on the same day. The IOUs should be directed to modify their tariffs accordingly.[4]

D. Process for Incomplete Program Participation Requests

Each of the IOUs have established a process for addressing incomplete PPRs. Thus, SCE would afford the applicant, upon notice from SCE, ten business days to cure the deficiency. Similarly, PG&E would afford the applicant five business days. In contrast, SDG&E does not provide for a definitive cure period, but simply states that if the PPR is incomplete, then the applicant will be asked to resubmit. Again, this is an area in which consistency among the IOUs would help to diminish confusion in the market. In addition, establishing a definitive time period for resubmission of deficient PPRs would serve to assure that originally submitted PPRs are for concrete projects which meet the required project viability criteria, with any deficiency in the PPR being more in the realm of a minor technicality rather than a substantive problem with the project eligibility. The proposal set forth by SCE -- allowing ten business days to cure a deficiency -- effects the right balance between (1) providing the developer sufficient time to correct the noted shortcoming in its PPR and (2) assuring that the cure period does not become a period in which to attempt project overhaul to meet eligibility requirements. SCE's proposal should be adopted and applied to all three IOUs.

E. Acceptance of Price

Each of the IOUs have proposed varying procedures for acceptance of price and execution of the standard PPA by an applicant. However, while SCE and PG&E would have such process be comprised of three steps, SDG&E would achieve a better result utilizing only two steps. Specifically, SDG&E proposes to post the current Re-MAT price on its website on the first business day of each bi-monthly period, allowing applicants fifteen business days from the

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[4] SEIA addressed this issue in its Petition for Modification. *See* SEIA Petition at p.8.

Re-MAT price posting to contact SDG&E to accept the Re-MAT price for that bi-monthly period *and* to submit an executed PPA. If an applicant fails to meet the 15 business day deadline then it will be deemed not have accepted the contract price and it will maintain its queue position. For those respondents that have submitted executed PPAs, SDG&E will offer a countersigned PPA to each project in order of queue position until the sum of PPAs offered meets the available nameplate capacity offered for that bi-monthly period.

In contrast to SDG&E, the other two IOUs propose a three part process -- (1) notice to the IOU by applicants of willingness to accept the bi-monthly Re-MAT price, (2) awarding of PPAs to the applicants returning the notice until the Bi-Monthly Product Type Allocation is met, and (3) return to the IOU of an executed PPA. This three part process requires effecting additional procedures for situations which will not occur under the SDG&E proposal; namely, how to address applicants which, having accepted the bi-monthly Re-Mat price, fail to return an executed contract and what to do with the capacity associated with the non-executed contracts (i.e., how should it be reallocated). Utilizing a process such as SDG&E has proposed, wherein the applicant provides notice of its intent to accept the bi- monthly Re-MAT price through execution of the PPA and the IOU then signs PPAs equivalent to the nameplate capacity available for that month for each product type, will negate the occurrence of such situations.

One of the goals of the SB 32 program is simplicity. SDG&E's proposal effects price acceptance and contract execution in a relatively straightforward manner, absent the complications which could arise under the SCE and PG&E proposals. SDG&E's procedures for acceptance of price and execution of the standard PPA should be adopted by the Commission and applied to all three IOUs.

F. Allocation of Program MW

In accounting for the allocation of program MW in each bi-monthly period, PG&E's tariff provides that " If the Contract Capacity of the next Applicant, in Queue Number order, for a Product Type is larger than the remaining Bi-Monthly Product Type Allocation, the Bi-Monthly Product Type Allocation will be deemed to be fully subscribed." In other words, the next project in the queue will not be awarded a contract. SCE's proposed tariff has a comparable provision, while SDG&E's proposed tariff is unclear on this matter.

Decision 12-05-035 did not address this particular issue. However, it is not apparent from the Decision that the bi-monthly product allocations were intended to be rigid barriers to a smoothly operating program. In this regard, under the model proposed by PG&E and SCE, a significant amount of MW could go unallocated in each bi-monthly period,[5] and, under the current program construct as determined by the decision, would be re-allocated to the end of the second program period (i.e., after 24 months). The only thing accomplished by such a result is an unnecessary delay in the interconnection of viable renewable projects.

Rather than achieve such a result, the IOUs should be directed to procure above the bi-monthly product allocation to account for the actual size of the next project in the queue that would fulfill (and then exceed) that allocation.[6] The IOUs tariffs should be modified accordingly.

In addition, PG&E's tariff addresses a situation which is not addressed by the other two IOUs and was not contemplated by the Decision – namely, how MW associated with either AB 1969 contracts or Re-MAT contracts which are terminate will be added back into the bi-monthly allocation. Specifically, PG&E provides that any capacity associated with such contracts which

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5 For example, if the IOU has approximately 3 MW to allocate to a product type in each bi-monthly period and the majority of its queued projects for that product type are in the 2 MW range, then it will be leaving approximately 1 MW per bi-monthly period unallocated.

6 SEIA addressed this issue in its Petition for Modification. *See* SEIA Petition at pp. 5-6.

are terminated during the initial 12 months of the program will "be allocated by PG&E to one or more Product Types and Bi-Monthly Program Periods during the Second Program Phase." It further provides that any capacity associated with such contracts "that [is]terminated during the Second Program Phase will not be re-allocated." Both of these proposals appear to be in conflict with the letter and/or spirit of the Commission's directed allocation procedures.

First, any MW which are "freed up" as a result of a contract termination in the AB 1969 program or in the Re-MAT should immediately be added back to the amount of MW available during the first 12 months of the Re-MAT program (*i.e.*, these MW should not be held and only made available for contract after the initial 12 month program). Such a reallocation is consistent with the initial Re-MAT program MW allocation -- *i.e.*, if the MW had not been under contract as part of an IOU's AB 1969 program or subsequent Re-MAT program, then they would have been available for allocation to a viable project during the initial 12 month period.[7]

Second, PG&E's proposal that any MWs which are associated with contracts terminated during the second program period will not be reallocated is contrary to program requirements. As stated in the Decision -- "If a contract is terminated at a future date, then the utility is obligated to re-contract for that capacity."[8] The provision in PG&E's proposed tariff to not reallocate MW associated with contracts terminated during the second program period must be stricken.

G. Interconnection

Decision 12-05-035 directs the IOUs to provide generators the option of choosing the interconnection process set forth in the existing Rule 21 or the FERC interconnection procedures under the Wholesale Distribution Access Tariff until the Commission issues its final decision in Rulemaking 11-09-011 on the Revised Rule 21 Tariff. While SCE and SDG&E specifically

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[7] SEIA addressed this issue in its Petition for Modification. *See* SEIA Petition at pp. 6-7

[8] Decision 12-05-035 at p. 77.

include this optionality in their respective proposed tariffs, PG&E does not. For consistency between the tariffs and added clarity in the market, PG&E should be directed to add comparable language regarding choice of interconnection procedures to its tariff.

III. COMMENTS ON JOINT IOU POWER PURCHASE AGREEMENT

A. Expected Commercial Operation Date

Section 2 8.1 of the Joint PPA requires that the "Seller shall provide Notice to Buyer of the latest expected Commercial Operation Date of the Facility no later than sixty (60) days before such date." The requirement that such notice be afforded 60 days in advance is impracticable. Projects often do not have a clear vision of potential delays this far ahead of the anticipated Commercial Operation Date and there is no provision comparable in the current feed-in-tariff program PPAs. That said, SEIA recognizes that the IOUs would want to have adequate notice of when a facility would come on-line. In order to recognize the needs of both the developer and the IOU, SEIA recommends that the 60 day requirement in Section2.8.1 be reduced to three days, but an additional provision be added to the PPA such that the developer is required to update the IOU monthly on progress towards meeting the anticipated Commercial Operation Date.[9]

B. Resource Adequacy Requirements

Section 399.20(i) states "the physical generating capacity of an electric generation facility shall count toward the electrical corporation's resource adequacy requirement for purposes of Section 380." Recognizing the extreme burden which would be placed on generators in order to

[9] SEIA proposes that the following language be added to the PPA "2.8.1.1 In addition to the requirements set forth in Section 2.8.1, on the first Business Day of each calendar month after the Execution Date and before the expected Commercial Operation Date, Seller shall provide a Notice to Buyer describing Buyer's progress relative to the development, construction, and startup of the Generating Facility, as well as a Notice of any anticipated change to the Commercial Operation Date."

obtain the full deliverability status necessary for its output to be counted for resource adequacy purposes, the Commission determined not to require generators participating in the SB 32 to become resource adequate, but to make it optional. The IOUs would differentiate between those generators providing resource adequacy benefits and those who did not through the application of differing time of delivery (TOD) factors. In adopting this solution the Commission found it "reasonable" as it "*allows generators to choose* to pursue a deliverability study if they want to receive a higher time-of-delivery adjusted price. It also removes the burden of pursuing deliverability if the costs and timing are too burdensome."[10]

For the most part, the Joint PPA recognizes the optionality of providing resource adequacy benefits, with the exception of Section 4.4.3 which states that:

> Seller shall cooperate in good faith with Buyer to pursue and obtain any and all Capacity Attributes and Resource Adequacy Benefits to the extent that Laws, including as may be changed after the Execution Date, allow for any Capacity Attributes or Resource Adequacy Benefits to be obtained other than by the completion of Deliverability Upgrade.

This section takes the decision of whether to pursue resources adequacy benefits out of the hands of the generator and requires the generator to pursue such under certain circumstances. This section is inconsistent with the Commission Decision and should be removed from the Joint PPA. If, in the future, a process is put in place to obtain resource adequacy benefits absent completion of a Deliverability Upgrade, the IOUs can petition the Commission to modify their determination in Decision 12-05-035 that pursuit of resource adequacy benefits is the option of the generator. Until that time, Section 4.4.3. must be removed from the Joint PPA.

C. Time of Delivery Factors

As noted above, the IOUs were directed to differentiate between those generators providing resource adequacy benefits and those who did not through the application of differing

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[10] Decision 12-05-035 at p. 56.

time of delivery factors. In Appendix C to the Joint PPA, the IOUs set forth their proposed TOD factor for energy only projects and full capacity deliverability (FCD) projects. There is no illustration as to how these factors were derived and whether the TOD for FCD projects reflects the true value of resource adequacy to the various IOUs. Accordingly, SEIA requests that the Commission require the IOUs to substantiate the basis for their proposed TOD factors.

D. Compliance Expenditure Cap

The concept behind a Compliance Expenditure Cap is to cap the developer's exposure to increased costs as the result of changes in law or regulation subsequent to the execution of the PPA. The Proposed PPA is loaded with various reporting and compliance requirements (*e.g.*, Section 4.3 Issuing and Tracking of WREGIS certificates associated with RECS; Setion 4.5, Obtaining and Maintaining CEC Certification and Verification; Section 4.7 EIRP Requirements; Section 6.11 Greenhouse Gas Emissions Reporting). Absent a Compliance Expenditure Cap, the risk of a change law with respect to any of these requirements would fall solely on the seller.

While, upon the recommendation of several parties to the proceeding, including SEIA, the IOUs added a Compliance Expenditure Cap to the Joint PPA, the provision continues to place an inordinate amount of risk on the developer. First, the Joint IOUs have crafted the cap so it is only applicable to obtaining and maintaining the necessary CEC certification and verification. The IOUs fail to take into account the myriad changes of law or regulation after contract execution, the risk of which, under the IOUs formulation of the Compliance Expenditure Cap, would be placed solely on the seller. Moreover, the IOUs have set a high annual cap of $25,000. Thus the seller has to be out of pocket $25,000 in one year as a result of a change in law associated with maintaining CEC certification/verification prior to seeking relief.

To more equally balance the risk of change of law or regulation between the IOU and the seller, the Compliance Expenditure Cap should be structured to encompass other notice and

compliance requirements, such as those referenced above. Moreover, the amount of the annual cap should be lowered and keyed off the size of the project. SEIA recommends that Compliance Expenditures that the Seller shall be required to bear during the Delivery Term should be capped annually at ten thousand dollars per MW of Contract Capacity and in the aggregate throughout the Delivery Term at twenty thousand dollars per MW of Contract Capacity.

E. Insurance

The insurance provisions of the Joint PPA (Section 11) would require the generator to obtain the following insurance coverage:

- Commercial general liability insurance -- combined single limit per occurrence and annual aggregate of not less than one million dollars ($1,000,000.00)
- Workers' compensation insurance -- $1,000,000.00 per accident / disease per employee
- Commercial automobile liability insurance -- $1,000,000.00 per accident
- Umbrella/excess liability insurance -- $4,000,000.00 per occurrence

Given the size of the projects that can participate in the SB 32 program, the level of insurance which the Joint IOUs would require is excessive and could create a financial burden for the project, especially those on the lower end of the project MW range, which would render them unable to participate in the program.

In this regard, SEIA submits that, in determining the appropriate level of insurance to require, the Commission should look to insurance provisions in comparable program PPAs . For example, SCE's current PPA for its CREST program requires *only* general liability insurance which is graduated depending on the size of the project but never exceeds $2,000,000. Similarly, the PPA for PG&E's solar program for projects up to 3 MW requires *only* general liability insurance of $1,000,000 per occurrence. The Commission should require the IOUs to amend the

Joint PPA to incorporate insurance provisions comparable to those contained in their current feed-in-tariffs.

IV. CONCLUSION

For the reasons set forth herein, SEIA respectfully requests that the Commission direct the IOUs to make the recommended changes to the Joint PPA for the Re-MAT program and the associated IOU tariffs.

Respectfully submitted this 15th day of August, 2012 at San Francisco, California.

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VERIFICATION

I am the attorney for the Solar Energy Industries Association (SEIA) in this matter. SEIA is absent from the City and County of San Francisco, where my office is located, and under Rule 1.11(d) of the Commission's Rules of Practice and Procedure, I am submitting this verification on behalf of the SEIA for that reason. I have read the attached "Comments of the Solar Energy Industries Association on the Third Revised Proposed Standard Form Contract and the Proposed Draft Tariffs for the Section 399.20 Feed-in-Tariff Program." I am informed and believe, and on that ground allege, that the matters stated in this document are true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 15th day of August 2012, at San Francisco, California.

/s/ Jeanne B. Armstrong
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