BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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

PLACER COUNTY AIR POLLUTION CONTROL DISTRICT RESPONSE TO PROPOSED CONTRACT TEMPLATE FOR FIT PROGRAM SUBMITTED JULY 18, 2012

I. Introduction

These comments are in response to the third revised proposed form Joint IOU Power Purchase Agreement ("Joint IOU PPA") submitted on July 18, 2012 in response to the *Joint Assigned Commissioner's and Administrative Law Judge's Ruling Setting Workshop On A Utility Standard Form Contract for Section 399.20 Feed-In Tariff Program*, issued on January 10, 2012 in this proceeding, as revised on June 26, 2012 by Administrative Law Judge ("ALJ") DeAngelis.

Comments address provisions of the Joint IOU PPA (PPA) that would present challenges to small-scale renewable energy producers, and in particular biopower generation facilities utilizing forest biomass as fuel (forest biopower facilities). The District realizes that this draft is essentially written by the IOUs, and as such the contract is drafted in such a way that benefits them, as the buyer, at the expense of the seller (renewable energy producers). The District expects that the CPUC will take a close look at the provisions in order to ensure an equitable contract that is consistent with the intent of SB 32 and the State Constitution that enumerate the responsibilities of the CPUC.

II. Comments on proposed contract template that are modifiable

A. Comments to Section 2.8 Expected Commercial Operation Date; Guaranteed Commercial Operation Date.

The provisions of Section 2.8.2 regarding guaranteed Commercial Operation Date could present a significant challenge to developers of small-scale forest biopower facilities. These facilities represent relatively new technology being developed in rural areas where the County and/or other responsible entities lack experience in the speedy permitting of industrial facilities. For that reason it is recommended that the provisions regarding period of extension of the Commercial Operating Date, the reasons allowable as permitted extension and the damages for such extension be relaxed as follows:

> 2.8.2 Seller shall have demonstrated Commercial Operation by the "Guaranteed Commercial Operation Date," which date shall be no later than the date that is twenty-four (24) months (720 days) after the Execution Date; provided that the Guaranteed Commercial Operation Date may be extended on a day-to-day basis for a cumulative period of not more than ~~six~~ twelve (~~6~~12) months for the following reasons ("Permitted Extensions"):
>
> 2.8.4 Notwithstanding anything in this Agreement, the Guaranteed Commercial Operation Date shall be no later than the date that is thirty-six (36~~0~~) months after the Execution Date.

B. *Comments related to damages associated with failure to begin operations by the Guaranteed Commercial Operation Date* under section 2.8.2.4.

The essential problem with this type of damages provision is that it may prevent financing of these small programs. Liquidated damages clauses are problematic to lending institutions and provisions such as Section 2.8.2.4 of the contract should be replaced with another type of damages amount that is a fixed amount, or sets a capped amount that would be determined by the value of the contract.

C. Comments related to Notice of permitted extension length of delay dates.

For the same reasons listed above in Section A, the dates within Section 2.9.1 should be changed as follows:

2.9.1 In order to request a Permitting Delay or Transmission Delay (individually and collectively, "Delay"), Seller shall provide Buyer with Notice of the requested Delay by the later of (a) the date that is twenty-two (22) months (660 days) after the Execution Date and (b) within three (3) Business Days of the date that Seller becomes aware of, or reasonably should have become aware of, the circumstances giving rise for the applicable Delay, which Notice must clearly identify the Delay being requested, the length of the Delay requested (up to twelve~~six~~ (~~6~~12) months (365~~180~~ days)), and include information necessary for Buyer to verify the length and qualification of the Delay. Buyer shall use reasonable discretion to grant or deny the requested extension, and shall provide Seller Notice of its decision within ten (10) Business Days of Notice from Seller.

D. Sale of Power to Other Buyers.

Section 5.3.9 of the proposed template limits the Seller's rights to sell power from their facility to any entity other than the utility company which is the primary buyer. This would curtail the facility's ability to act as an economic driver for further development in distressed communities by offering low rates on power to other businesses which co-locate with the facility on the same site. This type of incentive can assist with the industrial development in low-income, high unemployment communities. Also, there is a significant problem with financing these small renewable power ventures when their economic viability is limited by such conditions. While it is clear that the IOUs have a legitimate business interest in limiting competition for power, these small facilities should at least be able to offer power to facilities onsite, or on contiguous parcels, or other entities that are at least 1% owners in the facility. The District suggests the following changes:

5.3.9 As of the Execution Date and throughout the Term: (a) Seller will not convey, transfer, allocate, designate, award, report or otherwise provide any or all of the Product, or any portion thereof, or any benefits derived there from, to any party other than Buyer with the exception that the Seller's Product may be sold:

(1) through an "excess use" agreement as approved by the CPUC;

(2) ~~to~~other businesses located onsite or located on contiguous parcels,

(3) or to entities that are at least 1% owners of the facility. ~~and (b) Seller will not start-up or operate the Facility per instruction of or for the benefit of any third party, except as required by other Laws;~~

E. Comments related to Contract Quantity

The District believes that the provision is limiting changes to once each contract year, but the provision is vague. The provision should be changed to reflect this intent more clearly. Our suggested modification is:

> 3.2 Contract Quantity. The "Contract Quantity" during each Contract Year is the amount set forth in the applicable Contract Year in the "Delivery Term Contract Quantity Schedule," set forth below, which amount is net of Station Use, and, for excess sale arrangements, Site Host Load. Seller shall have the option to update the Delivery Term Contract Quantity Schedule one (1) time each year, to the extent such a change is necessary based upon any adjustment to the Contract Capacity based on the Demonstrated Contract Capacity and the definition of "Contract Capacity," within ten (10) Business Days of Buyer's Notice of such adjustment to the Contract Capacity or the date of the Engineer Report, as applicable, which adjusted amounts shall thereafter be the applicable "Contract Quantity."

F. Modifications to Facility

Section 6.14 of the proposed template disallows any modifications to the facility except by consent of the Buyer. This provision would create a disincentive for modifications that could boost productivity to these facilities, and could prevent sellers from making much needed changes when IOUs do not respond timely to such requests. This provision should be stricken from the contract. The issue of modifications to the facilities is not an area in which the IOUs need to be involved, since there are other provisions of the contract that properly ensure that the seller will meet the essential requirements of the agreement.

If the CPUC decides to maintain the provision, the District requests that the CPUC and IOUs more clearly justify why such control is warranted. The following edits would be recommended if the provision is not stricken:

6.14 Modifications to Facility. During the Delivery Term, Seller shall not modify, alter or repower the Facility in a way which would impact the facility's ability to provide Product as set forth in this Agreement without the written consent of Buyer, which written consent will not be unreasonably refused~~is at Buyer's sole discretion~~. Seller shall provide to Buyer Notice not less than ninety (90) days before any proposed modification, alteration or repowering occurs describing the modification, alteration or repowering and seeking Buyer's written consent. Buyer will respond to this request within thirty (30) days.

G. Guaranteed Energy Production

Section 12 should be stricken in its entirety. There is no good rationale for making Seller pay liquidated damages for less than projected production when the Buyer only needs to purchase a replacement product on the wholesale market (which may well cost less than from the Seller). Moreover, liquidated damages would punish the Seller twice, because Seller would also forego payments for power production – incentive enough to ensure that Seller produces.

Section 12 requirements are also burdensome where financing is concerned. While the utility might only require a $50,000 standby Letter Of Credit, the banks would look to the full exposure, which would run between $200,000 and $850,000 for a 1MW facility that shuts down. The impact on a facility that spends $4M in development, but then has to hold nearly another million in reserve is severe, and will be a disincentive to the development of new renewable power facilities. The District suggests striking this section. If a cap is used then Section 13.2 should be stricken (as it relates to the application of Section 12.)

If Section 12 stands, the District strongly urges the CPUC to consider placing a cap on damages within Appendix G, as previously discussed in Section B above, and Appendix H should be changed to set one consistent methodology (rather than requiring these small businesses to comply with three different procedures for the LLC) and the reference to New York state law be changed to reference California State law.

H. Administrative Provisions

Various sections of the PPA impose administrative requirements which would be overly burdensome to small-scale generation facilities. Most small scale facilities do not have the personnel or financial resources available to comply with various requirements. Two such examples of over burdensome requirements are described below.

1. Administrative logs

Small scale facilities do not keep daily logs. The reasonable business practice would require that the facilities keep accurate logs that reflect information listed within the provision, but it is unreasonable to expect that records be made daily, particularly when no changes or actions listed have occurred. Also, the three IOUs have different procedures for notating and describing the information listed within Section 6.5.1.

More importantly, the level of documentation required within this contract is overly detailed for a contract between two corporations. Within other provisions of this contract there are onerous damages provisions that apply to the seller if they fail to produce the power called for in these contracts. What more value do these logs provide to the IOUs? Requiring daily logs seems to be punitive in nature and should be stricken.

If it is not stricken, the District recommends the following changes:

6.5.1 Operations Logs. Seller shall maintain a complete and accurate log of all material operations and maintenance information that relate to this contract. ~~on a daily basis~~. Such log shall include, but not be limited to, information on power production, fuel consumption (if applicable), efficiency, availability, maintenance performed, outages, results of inspections, manufacturer recommended services, replacements, electrical characteristics of the generators, control settings or adjustments of equipment and protective devices. Seller shall provide this information electronically to the CPUC within twenty (20) days of CPUC's~~Buyer's~~ request. If buyer would like to review this information it can request it through the CPUC.

2. List of WMDVBE

Under section 6.12.3, Seller shall provide a report listing all WMDVBEs that supplied goods

or services to Seller during such period, including any certifications or other documentation of such WMDVBEs' status as such and the aggregate amount paid to WMDVBEs during certain periods of time. This is a requirement that is not clearly articulated, and the acronym is not defined in the contract. There is no apparent legal requirement on the part of the Seller to provide this information, and it is burdensome. If the IOUs want this information, there should be some consideration to the Seller for the time and resources needed to produce it. This section should reflect that the Seller can be reimbursed for administrative time providing this information to the Buyer.

H. FERC Qualified facilities references within Section 4.8 and 5.3.6

Relevant law states that "Any applicant seeking QF status or recertification of QF status for a generating facility with a net power production capacity greater than 1000 kW must file a self-certification or an application for Commission certification of QF status, which includes a properly completed Form 556. Any applicant seeking QF status for a generating facility with a net power production capacity 1000 kW or less is exempt from the certification requirement, and is therefore not required to complete or file a Form 556." See 18 C.F.R. § 292.203.

Both sections 4.8 and 5.3.6 fail to recognize that there will be many facilities using this contract template that are under 1000 kW of production. Both sections need to be modified to reflect current law.

I. Definition of Product.

The District suggests that the definition of 'Product' be amended to add language that makes it explicit that other bi-products produced at facilities that are not 'electric energy' do not become the property of the buyer under these agreements. The District recommends the following changes:

"Product" means all electric energy produced by the Facility throughout the Delivery Term ~~,~~ (net of Station Use, electrical losses from the Facility to the Delivery Point, and, in the case of excess ~~sale~~ use agreements~~arrangements~~, any Site Host Load); all Green Attributes; all Capacity Attributes, if any; and all Resource Adequacy Benefits, if any; generated by, associated with or attributable to the Facility throughout the Delivery Term. Product does not include non-electric energy items produced by the facility, including but not limited to biochar and heat.

III. Comments on non-modifiable provisions of the contract

The District believes that the term "Green Attributes" within section 4.1 of the contract is outdated. The District is considering filing for consideration of modification of this term pursuant to the prior Decisions of the CPUC, and will do so in accordance with the procedures described in applicable law.

IV. Conclusion

PLACER COUNTY AIR POLLUTION CONTROL DISTRICT respectfully requests the CPUC carefully consider its comments related to the contract template submitted on July 18, 2012, and make changes that will support small renewable energy facilities. The District would also like to acknowledge that it reviewed the Comments of the Clean Coalition, and it supports on the record such comments.

DATED: August 15, 2012

Respectfully submitted,

/s/ Christiana Darlington

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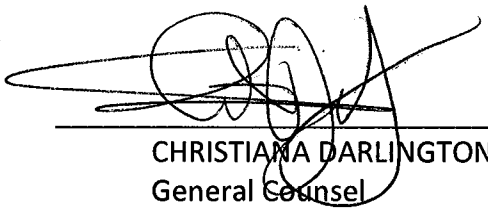
VERIFICATION

I am an officer of the non-profit organization herein, and am authorized to make this verification on its behalf. 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 under the laws of the State of California that the foregoing is true and correct.

Executed this 15th day of August, 2012, at Auburn, California.



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