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)

PLACER COUNTY AIR POLLUTION CONTROL DISTRICT
COMMENTS ON PROPOSED DECISION RELATED TO POWER PURCHASE AGREEMENT CONTRACT TEMPLATE FOR FIT PROGRAM SUBMITTED MARCH 19, 2013

I. Introduction.

The Placer County Air Pollution Control District ("District") appreciates the opportunity to continue commenting on the CPUC FiT program, and more specifically the Power Purchase Agreement template that is currently under review in this proceeding. The District continues to work with other local, state and federal partners, as well as non-profit organizations, University of California Berkeley and industry groups to provide the most comprehensive ideas and solutions to support the development of <3 MW distributed generation forest biomass facilities within the state of California. The District also reminds the CPUC that in the early stages of this phase of this proceeding the IOUs were asked to begin with the PPA template used within the AB 1969 program as the starting place when it developed the PPA template for this new FiT program under SB 32, but they clearly started with the RAM PPA template and scaled that down. This is going to have the unfortunate side effect of intimidating smaller generators and those working with cutting edge technologies, especially those with projects under 1 MW. That is why the District supported the Clean Coalition's model PPA in the last round of comments.

Nevertheless, it appears that the CPUC is headed in the direction of using the PPA drafted by the IOUs, and as such the District would request that the IOU's have the burden of

justifying why they need high penalties, large amounts of data and incredibly one-sided contract terms relating to modification, assignment and cancellation when the amounts of energy per contract is so low. Making broad statements about inefficiency, rate payer cost exposure and grid reliability should not be enough; they should have some real data to support their suggestions for such significant changes from the currently used PPA template.

That being said, the District recognizes that there is another phase of this proceeding that will be beginning in earnest very soon relating to the implementation of SB 1122. The District provides comments within this proceeding that it has determined could be used to improve the FiT program for all participants, as well as save time within for all parties who will be participating in the SB 1122/legislative implementation phase. With that underlying intention, the District provides the following comments on the PD that relate to the FiT program that the District believes would also be consistent with the goals of the anticipated SB 1122 proceeding.

II. Added nuance to pricing mechanism needs further refinement

The District has reviewed the modifications to the FiT Megawatt allocation process and generally supports the changes made. The 10 MW requirement per IOU per offering period is a very simple approach that will help the program to be effective. The only issue that the District would like to point out is related to the slight change in the pricing mechanism that the District believes would lead to inequitable treatment for some projects.

The PD states that if enough projects "indicate that they would be willing to execute" a contract at the price amount offered within a specific period, and total capacity is reached (meaning more than 10 MW), then the price for the next period would decrease. The subtle

difference from the previous process is that in the previous version of the program, the price fluctuation was triggered based on contract execution; this PD suggests "indication" of the seller should be enough. The District understands that if there are enough bids to fully allocate a period, then the price should be lowered for the following period. Under this scenario whichever seller was the unlucky one to strike at the price, but nevertheless cannot enter into a contract because of a lack of available MW, should not be delayed by several months simply waiting for the price to go back to where it was when it accepted. If a seller strikes at a price, but there was only a partial amount of MW left in that period's allocation, then that seller should be allowed to enter into a contract at that higher price during the next period using that following period's MW allocation. Then, the remaining amount of MW for that period would be offered at the lower price. Otherwise, 2 or 3 MW sized-projects could look at months of delay waiting for prices to return to the place that they already accepted. Otherwise, the program should simply allow for the price to remain static unless full allocation occurs based on contract execution, rather than an indication to accept a price.

III. Seller concentration and minimum number of bidders in the queue

The PD has eliminated the seller concentration requirement due to the complexities and administrative challenges associated with the requirement. Also, the PD mentions that reliance on the three different product categories provides for sufficient market segments to participate, and we would add that the addition of SB 1122 categories allows for even more market opportunity. Additionally, we want to be sure that the elimination of seller

concentration does not negatively impact the important need to reduce the number of bidders within a product category queue that we will be discussing in detail within the next phase of the proceeding.

The current requirement for five minimum bidders to be in the queue for a product category pricing mechanism to begin is a prohibitive requirement that would prevent the program from beginning. The District is aware that these issues will be further discussed in the subsequent phase, but nevertheless the District is compelled to remind the CPUC of the legislature's overall goal related to SB 1122, and that is to enable i) the successful subscription of 250MW at a reasonable and competitive price, ii) from reliable, financeable developers that will actually build and implement the projects, and iii) result in high quality long term projects that are properly permitted upfront with quality on-going operations that in compliance with all laws. These projects should also be good neighbors that deliver other benefits to their communities such as odor and methane destruction (dairies), fire safety and reduction in air pollution (forestry), land fill diversion (food waste).

These new bioenergy industries don't have diverse numbers of project developers at this time. They can be found all around the world and some in other states, but currently there is not a commercial industry in California operating at the < 3MW scale. The legislature sees the value in changing this, and has directed the FiT program to instigate projects in three bioenergy areas. In order for these projects to be successful, there needs to be a viable price point that investors can be reasonably rely on. Placing a requirement on the program that at least five projects from different sponsors complete all requirements,

invest the estimated $150,000 to get into the queue (site control, financial models, System Impact Study, CEQA Compliance, legal documents etc. can easily reach this amount) and be ready in the queue *before* the price rises will prevent the pricing structure from providing investors with enough assurances, and will ultimately lead to program failure. There are simply not enough projects far enough along in development within each of the subcategories to meet this requirement.

At this time in the development of the bioenergy industry in California, there are very few developers of the technology used to produce waste to energy. There simply aren't enough developers to warrant a need for regulations that require diverse sponsors. Efforts to 'encourage competition' through regulation could stifle momentum and prevent program success. CPUC authority to modify its own programs would allow for future changes to the FiT program if there are signs that multiple developers were emerging and there was a need to intervene and level the playing field.

Safeguards can prevent collusion, such as the IOU handbrake provision within the Re-MAT, general CPUC authority to modify its own programs, or the addition of a price cap. Also, the concept that project developers will collude to raise the price is also mollified by the fact that with each two month period that a developer sits and waits, they are without an active project, and as such they are delaying the onset of their project and not generating revenue. Also, the success of the program is at the heart of all of the developers self interest; in a small industry such as this, professional reputation matters. From a political or long term business perspective, this would not be a successful business model.

Also, the District would be open to replacing the seller concentration requirement with a slight modification (we would recommend the project eligibility criteria requiring a maximum seller concentration can serve the purpose of ensuring competition and project viability and allow for program success, such as requiring diverse sponsors to make up only a percentage of total projects, for example no one sponsor could have over 25% or 33% of total in bucket –or over all three SB 1122 buckets-or even within entire FiT program). The District believes that the current cap of 10 MW per project sponsor, however, will be too restrictive given the small numbers of project sponsors in California. Nevertheless, if the replacement of some kind of seller concentration requirement would make it easier to reduce the number of bidders required within the queue to trigger the price adjustment, then the District would support replacing the seller concentration cap, at least in the context of the SB 1122 projects.

In summary, the goal of the Legislature is to jump start this new bioenergy industry. The CPUC should assist by creating regulations that prevent collusion and encourage competition, but at the same time are balanced with the need to have the program succeed.

IV. Strategic Location should allow for seller buy down option

The District supports the definition of strategic location as offered within the BAC comments, and further notes that pro forma agreements approved within (D.) 12-11-016 allow for buy down provisions of network upgrade costs (transmission, not distribution associated costs) when those costs are over $300,000.00. The District also notes that a buy

down provision is a part of the termination rights section within the PPA template. As such, a buy down mechanism should be an easy addition to the definition of strategic location.

V. PPA Template Comments

a. Delays in beginning operation.

The District, BAC and the Clean Coalition agree that changes to this section are needed. The District recommends that the timing allowed for "permitted extensions" be extended from six months to twelve months. As mentioned in the BAC filing, in at least two recent projects developed by Phoenix Energy (which is a member of BAC) in Modesto and Merced Counties, PG&E has been unable to provide interconnection for 10 to 11 months after completion of construction and permitting. These real life examples demonstrate a one year extension period for COD is reasonable.

b. Contract quantity changes during term of contract

The District supports the BAC comments on this matter and refers to the many specific examples of why changes over time may justify allowing for more than one change in contract quantity over the life of the contract. Also, the District would ask that the CPUC compel the IOUs to explain what real damage to the ratepayer would ensue if contracts were allowed to be modified.

c. Guaranteed Energy Production

The District accepts that the CPUC has determined that including provisions relating to GEP are appropriate for the FiT program, but has one suggestion that

would improve the equity of the provision. The damages provision found within Appendix G should place the cap of the amount of damages at 50% of the total contract price, rather than 75%. The producers within this program are developing cutting edge technologies on a small distributed scale. Overly high damage provisions will serve as a disincentive to participate in the FiT program. Also, while the District will concede that calculating actual damages would be too onerous within these contracts, we would note that there is no evidence offered by the IOUs that describes any measurable scale of loss to their shareholders or the rate payers when violations of the GEP occur. The IOUs should be asked to better justify damage provisions that could devastate a business to the point of bankruptcy.

To better explain our position that costs are unacceptably high under the current scenario, the District offers this example:

"If a biomass gasification operator produced only 3,000 MWh out of a projected 7000 MWh in his first year of operation, and the contract MPR price of $110/MWh, this would have resulted in the following scenarios.

min C-D = $20

todays actual C-D = $34

max C-D = .75*110 = 82.50

A-B = (7000)-3000 = 4000

Damages would have been payments under today's prices of $136,000.00, which would have equated to approximately 2 years of projected cash flow on top of the loss already incurred through reduced revenue because it did not produce expected energy. The amount of $136,000.00 represents an amount that would reduce profitability of such a facility to such a low level that it could undermine meeting needed targets to continue operation."

The District concludes that such losses could devastate the industry, but at the same time no estimates of actual damages have been offered by the IOUs.

The District also notes that there may be other changes to the GEP section of the PPA that will be needed for bioenergy specifically; the District will continue to assist the CPUC on this topic within that phase of the proceeding.

d. Telemetry

The District requests that the CPUC consider deleting the telemetry requirements for baseload energy providers as Appendix F does not refer to information that is relevant to baseload energy production. Rather, Section 6.5.1 and other requirements within Section 6, with changes as recommended by BAC, should suffice for the purposes of providing the IOUs adequate information about the environment in which the product, as defined within the contract, is being produced. As such, the District recommends that the Contract clarify Appendix F is not applicable to baseload technologies.

e. Modification of facilities

The District supports the conclusions and request for changes within the PD pertaining Section 6.14 of the template that remove the requirement that IOUs must consent to changes made to facilities. The District will provide whatever information is needed to continue support of this change within the reply comment period if needed.

f. **Sale of Power to Other Buyers and the definition of "product"**

The PD recognizes that excess sales agreements cannot be prevented by this PPA. The PD suggests that the current version of Section 5.3.9 is sufficient to ensure such arrangements can occur. The language, however, does not recognize sales that are allowed under state law. The section is not explicit enough to ensure that the IOUs will not attempt to block such arrangements. The IOUs could claim that only excess energy sales that are "required under law" are allowed under the contract. The seller should not be asked to contract away their ability to sell excess product that they may have consistent with State PUC Section 218 and federal law.

In order to clarify that excess sales outside the context of the contract can occur, the District recommends the following changes to the section:

> "Section 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 the amount ~~any or all~~ of the Product subject to the terms and conditions of this contract, or any portion thereof, or any benefits derived there from, to any party other than Buyer; 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~~ allowed by other Laws, including but not limited to CA PUC Section 218(b)-(e).~~;~~"

Also, the District agrees that the definition of product should be further explored and clarified within the upcoming phase of the proceeding, and that such changes would not be relevant to the entire program.

g. **Administrative requirements and <3 MW providers**

The District supports the comments made within the BAC filing on this matter.

h. **Transmission Costs and Termination Rights**

The District recognizes that the CPUC specifically references the need to address the issues of "fixed-location" generation within Section 14.9 of the PPA within the SB 1122 phase of the proceeding. Consistent with our overarching goal of providing improvements that could be considered for the entire program, we make the following suggestion now.

The Section 14.9.1.1 is designed to allow for IOU's to terminate a PPA contract if after 60 days past the delivery of an Interconnection Study the Seller has not agreed to pay "Excess Network Upgrade Costs" and entered into an interconnection agreement. "Excess Network Upgrade Costs" is defined as the Aggregate Network Upgrade Costs that exceed the 300,000.00 cap. The term "Aggregate Network Upgrade Costs" is defined as new transmission upgrades or facilities. First, the District would like to point out that in order for the program to be consistent, the buy down provision that is allowed to avoid a contract termination rights should be reflected in the definition of strategic location, and further justifies why a buy down provision makes sense within that definition.

Second, the District has specific first-hand knowledge of why more than 60 days is typically needed for a small generator and an IOU to come to an agreement on

costs associated with interconnection. As mentioned in the BAC filing and earlier in these comments, in at least two recent projects developed by Phoenix Energy (which is a member of BAC) in Modesto and Merced Counties, PG&E has been unable to provide interconnection for 10 to 11 months after completion of construction and permitting.

A reasonable negotiation period should be agreed upon before the IOU can take control and be given a right to cancel. The balance of negotiating power is significantly skewed if two parties are expected to negotiate over costs, but one has a right to cancel if an answer is not arrived upon within a short period of time. This inequity of bargaining power is again an example of why the CPUC has been asked by the State to manage the relationships between the IOUs and the small power generators within the FiT program. The District recommends 120 days as a more reasonable amount of time before the IOU is given a right to terminate if interconnection issues have not been agreed upon between the parties.

i. **Assignment of Contract**

The District recognizes that the assignment of a contract is an important issue when contract terms can span two decades. The District also notes that an IOU may have concerns if a contract is assigned, and as a result a new operator is running a facility or other major changes are made. As such, the District would recommend that in the case of assignments of financial rights only the seller need only notify the IOU, but if the assignment goes beyond that scope, then the seller

would notify both the CPUC and the IOU, but it would be the CPUC that would approve of the assignment. Or, at a minimum, the CPUC should at least receive notification and retain some oversight of the IOUs' right of approval in these cases. Ultimately, it should be the responsibility of the CPUC to regulate these contracts and ensure that assignment approval is not unreasonably withheld. Sellers have no assurance that a reasonable assessment of the assignment will occur if the CPUC is not at least somewhat involved in the decision making. The District asks that the CPUC direct the IOUs to change the language as recommended within Section 17 of the PPA.

VI. Green Attributes

The District appreciates the recognition made by the PD that the definition of Green Attributes may be outdated. The District would appreciate a specific commitment to a proceeding, or phase of this proceeding, in which this issue will be discussed. The District looks forward to working with the CPUC on this issue.

VII. Conclusion.

PLACER COUNTY AIR POLLUTION CONTROL DISTRICT respectfully requests the CPUC consider the modest changes that the District and BAC have requested within these comments that will improve the program for all renewable energy producers participating in the FiT program, and consider the issues related to the legislative update phase of the proceeding, as all parties prepare for that endeavor.

DATED: April 8, 2013

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 8th of April, 2013, at Auburn, California.

CHRISTIANA DARLINGTON
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