BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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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 REPLY TO AUGUST 15,2012 COMMENTS ON PROPOSED CONTRACT TEMPLATE FOR FIT PROGRAM SUBMITTED JULY 18, 2012

I. Introduction.

These reply 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. These reply comments explain the District's general support for the model PPA that was filed by Clean Coalition on August 15, 2012, subject to a few changes that the District will describe. The District strongly believes that the Clean Coalition Model PPA should serve as the basis for the contract for this FiT program, as qualified by the District. If the CPUC decides to continue using the PPA proposed by the IOUs, the District would refer back to the District's comments dated August 15, 2012, for the specific changes that would be needed to that document. Finally, the District encourages the CPUC to incorporate imminent legislative changes of SB 1122 to the FiT program as the next step in this process, rather than creating a template that would immediately need changes when the new version of the law takes effect (in January 2013).

II. Problematic PPA template proposed by IOUS.

There are many troubling provisions of the Joint IOU PPA (PPA) offered by the IOUs 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). As stated in our August 15 comments, 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. To emphasize this point, the District has asked for the input of financial advisors Westhoff, Cone & Holmstedt and Mark Lerdal with MP2 Capital, LLC who have opined that the use of the PPA template as suggested by the IOUs would have a dampening effect on the ability of small facilities to get financing (See Attachments A and B). As such, the District strongly urges the CPUC to start from a different place when drafting the PPA template for small renewable energy facilities within this program.

III. Recommendations of small changes to the Model PPA proposed by Clean Coalition.

After Discussions with Clean Coalition, they are in agreement with the following five changes to the model template that they submitted on August 15, 2012. With these changes, the District believes the CPUC is well on its way to having a fair and adequate PPA template for use within the FiT program.

A. Delays in beginning operation.

The provisions of Section 2.2.3 govern consequences of failure to begin operations by the Guaranteed Commercial Operation Date. The District agrees with the Clean Coalition's concept that delays that are beyond a party's control should not be grounds for breach of contract, but the District also realizes that an unlimited extension may be unreasonable and could hold up the distribution of megawatts to other projects. As such, the District believes that a three-year period of time would be a reasonable limitation related to permit delays (as defined within the Clean Coalition Model PPA). As for delays related to interconnections (as defined within the Clean Coalition Model PPA), the District is strong in its position that the parties should be held to the same standard in relation to delay and that both parties to the contract should be

subject to whatever consequences are described within the contract if either causes interconnection delay.

Specifically, Section 2.2.3. should read:

2.2.3. Extension. Subject to the terms of the Agreement, the Commercial Operation Date may be modified by **the Parties** ~~Seller~~ from time to time after the Execution Date. Extension shall be granted **by the Party that is not in delay** in the following instances and for the following durations:

2.2.3.1. Where delay occurs by fault of ~~Seller~~ **either Party**, the Commercial Operation Date shall be extended as needed on a day-to-day basis. ~~Seller~~ Parties shall give notice ~~to buyer~~ of this type of delay at least 45 days before the Commercial Operation Date. For every day extended, ~~Seller~~ **delaying Party shall compensate non-delaying Party** using Liquidated Damages, which are calculated as 2% percent of the Seller deposit per day. Extension shall continue day-to-day until the deposit is exhausted. A Termination Event shall occur if Commercial Operation has not been attained by exhaustion of Seller deposit;

2.2.3.2 Where a Seller has taken all commercially reasonable actions to obtain permits necessary for the construction and operation of the Facility, but is unable to obtain such permits due to delays beyond reasonable control (a"Permitting Delay"), the Seller shall have a maximum of 18 months of extensions. After such time, damages shall be owed to the Buyer as described in Section 2.2.3.1.

Then, a new section 2.2.3.3 should be added:

Both the Seller and the Buyer will use their best effort to ensure the Facility is physically interconnected to the state grid, operator grid, or to the Transmission/Distribution Owner's distribution system, and to complete all Electric System Upgrades needed, if any, in order to interconnect the Facility. If either fail to secure any necessary commitments and delays occur then extensions shall be permitted on an unlimited basis to either Party.

B. Sale of Power to Other Buyers.

A facility's ability to sell power or other material can act as an economic driver for further development in distressed communities. This type of incentive can assist with the industrial

development in low-income, high unemployment communities. It is also allowed under the law. As such, the District suggests that the Clean Coalition Model PPA state the following:

4.3.7~~4.3.7.1.~~ 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; ~~and~~

~~4.3.7.2. Seller will not~~ nor start-up, ~~or~~ operate, or sell Product, to any third party, except to third parties as allowed under Public Utilities Code Section 218, without subjecting Seller to regulation as an "electrical corporation" as described under that Section.

~~4.3.8. Product will be conveyed *only* to Buyer;~~

C. QF Status.

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. Because Section 3.5.2, 4.8 and 5.3.6 within the IOU PPA model all failed to recognize this provision of law, we would recommend that an explicit reference to this section be added to the Clean Coalition Template in the following way:

"3.7. FERC Qualifying Facility Status. Seller shall take all actions, including making or supporting timely filings with the FERC necessary to obtain, or maintain a FERC waiver of, the Qualifying Facility status of the Facility throughout the Term **consistent with Section 18 C.F.R. § 292.203**; provided, however, that this obligation does not apply to the extent Seller is unable to maintain Qualifying Facility status using commercially reasonable efforts because of (a) a change in PURPA or in regulations of the FERC implementing PURPA occurring after the Execution Date, or (b) a change in Laws directly impacting the Qualifying Facility status of the Facility occurring after the Execution Date."

D. 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 **use agreements** ~~sale 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, heat outside the context of cogeneration, and emissions reductions credits associated with the removal of waste from the environment.**

E. Definitions.

The District suggests that the Appendix A of the IOU proposed PPA be used in conjunction with the Clean Coalition Model PPA, with the incorporation of the changes suggested by the Clean Coalition in its redline revisions of Appendix A in its August 15 comments. The District agrees with all Clean Coalition changes, except that for the definition of Site Load Owner the District believes that a reference to PUC Section 218 is appropriate. The District feels that the IOU proposed Appendix A is thorough and will be helpful for all parties.

IV. Comments on non-modifiable provisions of the contract.

The District has reviewed the definition of Green Attributes and has determined that it does not need to pursue a change in that term as long as the Commission is clear with the IOUs within this process that Green House Gas credits, or other air emissions reduction credits, associated with the removal of forest biomass from the forest ecosystem are not included within the definition of "Green Attributes." As the removal of the wood waste is not a part of the

electrical energy production, the District sees this as an obvious conclusion, but would prefer to make it explicitly clear within this contract, and as such will not need to pursue changes in the definition of green attributes at this time of if the CPUC changes the definition of Product appropriately.

V. Conclusion.

PLACER COUNTY AIR POLLUTION CONTROL DISTRICT respectfully requests the CPUC redirect the conversation related to the PPA template to be used within this proceeding and base it on the template proposed by the Clean Coalition with the changes described in this Reply. If it chooses to continue to use the IOU template, then the District urges the CPUC to carefully consider its comments related to the contract template submitted on August 15, 2012, and make changes that will support small renewable energy facilities.

DATED: September 10, 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 10th day of September, 2012, at Auburn, California.

CHRISTIANA DARLINGTON
General Counsel

EXHIBIT A

Commissioner Mark J. Ferron
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

September 6, 2012

RE: CPUC R11-05-005; Comments regarding third revised proposed form Joint IOU Power Purchase Agreement ("Joint IOU PPA") submitted on July 18, 2012.

Commissioner Ferron:

This letter is respectfully submitted by MP2 Capital, LLC to provide comments regarding the July 28, 2012 draft of the Joint IOU Power Purchase Agreement currently under review by the CPUC. MP2 Capital, LLC is a San Francisco based renewable energy investment and development company, and our employees have significant experience in the structuring, developing, and financing of solar, wind, gasification, and other renewable generator facilities. We have extensive experience throughout North America beginning with the SO4 contracts in the 1980's. We are supporters of promoting a streamlined Standard PPA contract to facilitate new projects and the objectives of implementing SB 32.

We believe that the overly complex power purchase agreement submitted by the IOUs would shift such a disproportionate amount of financial and administrative burden to small developers and operators resulting in the end of the distributed generation market. These new requirements were not present in previous "Small Renewable Generator PPAs" that we've negotiated or executed and, based on our own experience, the new Joint IOU PPA would seem to be more reflective of a contract for a utility-scale facility.

We respectfully request that the CPUC work with both the IOU's and State offices who are already promoting renewable projects and lending money to such projects (such as the California Energy Commission, Cal Recycle/RMDZ, etc.) to modify the language, and remove the additional administrative burdens and cost obligations to promote the financing of new renewable facilities in California, not prevent them.

Very truly yours,

Mark Lerdal
Chief Executive Officer

EXHIBIT B

Commissioner Mark J. Ferron
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

RE: CPUC R11-05-005; Comments regarding third revised proposed form Joint IOU Power Purchase Agreement ("Joint IOU PPA") submitted on July 18, 2012.

Dear Sir,

This letter is respectfully submitted in regards to the recent draft of the Joint IOU PPA dated July 18, and currently under review by the CPUC. We are concerned that the language, as currently written, could have a negative consequence for efforts to promote new renewable generator facilities. **Westhoff, Cone & Holmstedt is a** boutique investment banking firm located in Walnut Creek, California. Our firm has a long history of financing landfill, biomass, and other renewable efforts primarily within California, but also in other states (giving us a broad perspective). We strongly support efforts to promote a more streamlined Standard PPA contract to facilitate new small generator projects and the objectives of implementing SB 32. However, our firm, along other banks and financing entities we engage with, are deeply concerned that the Independent Operating Utilities are shifting such a large amount of financing burden and administrative costs upon small developers and operators that it will actually slow down project development in the 3-Megawatt and below renewable market. These new requirements were not present in previous "Small Renewable Generator PPAs" that our clients have executed, and the new Joint IOU PPA would seem to be more reflective of a contract for a venture capital funded and large staffed utility-scale facility.

We have read and strongly support the comments submitted by Placer County and The Clean Coalition, respectively, on August 15. We would, therefore, like to elaborate on a few key points from the perspective of financing these facilities:

1) The new "Guaranteed Energy Production" requirement in Section 12 along with collateral and liquidated damages in Section 13 and Appendices G/H are likely to cause a much larger exposure than the $50,000 Letter of Credit collateral might imply. Further, these liquidated damages doubly punish the Seller. These facilities usually take on significant debt (usually up to 75% of the construction cost) with personal guarantees attached to those loans, so the Seller has every incentive to hit its power production targets. What the CPUC should also know is how a banker would view the new GEP liquidated damages. When lenders look at a project, they assume a "worst case" scenario, such the plant closing, to insure there is adequate coverage to repay the debt. Under the new IOU PPA, this worst case would be two years of production given the replenishing nature of the stand-by LOC and the IOU's formula for liquated damages. For a 1 MW facility, this could be a $800-900,000 exposure, and most banks would probably require an additional reserve (collateral) to cover that exposure. For a facility which may cost $4-5 million to build, having to keep 20% of its cash or equity in escrow would render most projects as financial unviable.

   Therefore, we ask that the CPUC either eliminate this new provision or significantly cap the exposure in order to promote adequate financing.

2) We would also recommend that the CPUC require more explicit language in Section 5.3.9 to allow third party PPA's under an excess-sale agreement. We were surprised there is no definition of "excess-use arrangements" in Appendix A or other sections (despite such language being included in previous PPAs

from PG&E) and there is no reference to CPU Code Section 218 (b) in Section 3 or 5 which would explicitly allow such sales. These omissions might seem minor, but we'd stress the inclusion of such language for the sake of clarity. While primary debt coverage would assume a base case where the Seller only sells product to the IOU, when a bank's loan approval committee looks at the overall viability of a project, the ability to enter a third-party PPA is very attractive and increases the probability of financing approval. Lastly, similar restrictions on third-party PPA by IOU's in Florida slowed down financing in that state, and we would hate to see a similar freeze in California.

3) There seems to be a series of new administrative procedures and costs in the new IOU PPA that we believe will impede the operation and financing of most small renewable facilities – both in terms of personnel and expenses. From a banker's perspective, these higher costs reduce the debt coverage of the project and thus decrease the probability of loan approval and increase repayment risk. These administrative burdens include new telemetry requirements, daily forecasting, monthly reporting, invoicing, etc. that are not the norm within prior Small Generator PPAs, but were present in PPAs for utility-scale projects. In regards to insurance, the banks also require sufficient General Liability coverage, but the other policy requirements in Sections 10.1.2,3, and 4 seem over-reaching. If there is any additional insurance that banks would like to see or reasonably require, it would be some form of Business Interruption protection, to insure the facility can still pay its obligations during such a period.

We respectfully request that the CPUC work with the IOU's, along with the California Energy Commission and other State agencies that have been lending money to renewable projects (such as CalRecycle/RMDZ), to modify the language as previously mentioned, and either delete these additional cost obligations or modify them significantly to promote renewable project financing, not inhibit or prevent it.

Sincerely,

Mark Holmstedt

Westhoff, Cone, & Holmstedt