

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)

**OPENING COMMENTS OF THE OFFICE OF RATEPAYER ADVOCATES
ON THE ADMINISTRATIVE LAW JUDGE'S RULING SEEKING COMMENTS
ON STAFF PROPOSAL ON IMPLEMENTATION OF SENATE BILL 1122
AND ACCEPTING CONSULTANT REPORT INTO THE RECORD**

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December 20, 2013

I. INTRODUCTION

The Office of Ratepayer Advocates (ORA) respectfully submits these opening comments and responses to the questions posed in the November 19, 2013 *Administrative Law Judge's Ruling Requesting Comments on Staff Proposal on Implementation of Senate Bill 1122 and Accepting Consultant Report into the Record* (Ruling).

Senate Bill (SB) 1122 (Rubio 2012) amended Public Utilities Code § 399.20 to require the California Public Utilities Commission (Commission) to direct the investor-owned utilities (IOUs or utilities) to procure an additional 250 megawatts (MW) of Renewables Portfolio Standard (RPS)-eligible energy from bioenergy facilities under a feed-in tariff (FIT) structure.¹ The bill's goal is to "promote diversity in resource technologies" which its author believed to be missing from the existing FIT program.² Differentiating small renewable biomass and biogas projects from other renewable distributed generation may help to reduce methane pollution and generate more clean energy.³

The Commission retained Black & Veatch to study implementing the bioenergy FIT pursuant to SB 1122. Black & Veatch issued a draft report in April 2013. The parties discussed the report in a May 2013 workshop and on October 31, 2013, Black & Veatch issued its final report. The Ruling accepts the report into the record of this proceeding.

The Ruling includes an Energy Division staff proposal to implement SB 1122 and poses a series of questions on the proposal. ORA addresses some but not all of those

¹ Feed-in tariffs provide a standard contract and price to reduce transaction costs and development timelines of renewable projects. The current feed-in tariff in California, the Renewable Market Adjusting Tariff, is available to projects 3 MW or lower. SB 1122 adds a bioenergy feed-in tariff to the current set of programs.

² Assembly Floor Analysis, August 24, 2012, "Author's Statement." http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1101-1150/sb1122_cfa_20120824_204842_asm_floor.html.

³ *Id.*

questions below. ORA reserves the right to discuss in reply comments the questions it does not address here.

ORA generally supports the staff proposal but recommends the following modifications:

- The Commission should require a liquidated damages provision in the SB 1122 power purchase agreements (PPAs) to ensure that the contracted facility meets its category requirements throughout its contract term;
- Pre-time-of-day (TOD) starting price for the program should be based on pre-TOD bid prices in the renewable auction mechanism (RAM); and
- Stakeholders should review allocations among utilities and categories after some experience with the program.

ORA supports the staff proposal's fuel and reporting requirements and agrees that an SB 1122 generation facility may use fuel from a source outside the utility's service territory.

I. DISCUSSION

A. To prevent overlap between programs, SB 1122 projects should be ineligible to participate in the non-bioenergy FIT. (Question 1, Eligibility)

ORA agrees with the staff proposal that the existing non-bioenergy FIT not allow projects which are eligible under the SB 1122 FIT.⁴ Given the variety of California's renewable programs, the Commission should avoid overlap between programs. Allowing projects to participate in multiple programs encourages "forum shopping" where a developer would simply select the highest-priced option its facility is eligible for. For example, if bioenergy projects are able to participate in both the SB 1122 FIT and the non-bioenergy FIT, they could game the market by waiting to see which program generates higher prices and then subscribing to that program. Ratepayers would then be paying more for facilities that could have been contracted at lower prices simply because

⁴ Ruling, Attachment B: Staff Proposal (Referred to hereafter as "Staff Proposal"), p. 11.

the two tariffs were structured in an overlapping manner. This structural flaw could prevent the functioning of a truly competitive renewable market.

B. ORA supports the staff proposal’s fuel and reporting requirements. A liquidated damages contract provision will ensure that the IOUs meet the bioenergy category. (Question 10, Compliance with Bioenergy Category)

ORA supports the staff proposal requiring (1) a bioenergy facility to procure 80% of its fuel from resources that fall within the resource category of the contract and (2) generators to file annual reports regarding the fuels used. The 80% requirement provides bioenergy facilities some flexibility in case of variations in available fuel resources but ensures that the majority of a facility’s fuel is sourced from its bioenergy category. Annual reporting is a reasonable method to ensure that the 80% requirement is being met.

In addition, ORA recommends that the PPAs include a liquidated damages provision as a tool to ensure compliance and performance. A liquidated damages provision requires that parties agree in advance that a certain sum of money is conclusively presumed to represent the amount of damage that will be caused by a specified breach of the contract.⁵ Liquidated damages allow the utility to enforce the seller’s obligation to deliver the contracted-for biofuels, thus ensuring that the supplier procure fuel in its bioenergy category.

The Commission has recognized liquidated damages as a vehicle to ensure contractual performance. In Resolution E-4546, the Commission approved Southern California Edison Company’s (SCE) request to use fixed liquidated damages as a means to enforce contractual obligations under the RAM program, determining that it is reasonable for a utility to expect a seller to meet its contractual obligations pursuant to a PPA.⁶ The same reasoning applies here, and will provide a useful tool in conjunction with annual reporting to ensure compliance with the 80% requirement.

⁵ *Allen v. Smith* (2002) 94 Cal.App.4th 1270, p. 1278

⁶ Resolution E-4546, p. 4-10

C. ORA supports creating a single statewide price for each category of bioenergy, but recommends using a pre-TOD price average from the first three RAM auctions to set the starting price. (Questions 1-5, Pricing)

ORA supports the staff proposal to establish a single price for each of the three categories of bioenergy, rather than a utility-specific price for each of the three categories resulting in nine different prices.⁷ SB 1122 establishes three categories of bioenergy: (1) wastewater treatment, municipal organic waste diversion, food processing, and codigestion; (2) dairy and other agricultural bioenergy; and (3) byproducts of sustainable forest management.⁸ Bioenergy categories are not equally distributed among the utilities' service territories.⁹ Requiring the establishment, and bimonthly adjustment¹⁰, of nine different prices could unreasonably drive up certain prices. Dividing all projects across nine price categories will mean fewer projects in each individual category, making price increases and therefore higher prices more likely. Consolidating what are essentially several smaller markets into a few larger ones should increase competition and help protect ratepayers from high pricing.

ORA also generally supports the concept behind the staff's proposed starting price – to use the average of bioenergy bids into RAM – but disagrees with the way staff proposes to implement that concept. Staff proposes using the weighted-average bid price of bioenergy projects bid into the first three RAM auctions as the starting price.¹¹ That price is \$124.66/MWh after TOD adjustments (post-TOD). Staff then proposes that this

⁷ Staff proposal, p. 36.

⁸ P.U. Code § 399.20(f)(2)(A).

⁹ Staff proposal, p. 28.

¹⁰ In the ReMAT mechanism, a subscription MW limit is set for each bimonthly period. If the number of developers willing to execute a contract in that period at that period's price exceeds this limit or is below a certain threshold, the price will adjust downward or upward, respectively. In successive periods this price adjustment will increase up to a fixed limit if the price adjustment is in the same direction. A minimum number of developers need to be in the queue in order for the ReMAT mechanism to be active; otherwise the price will not change.

¹¹ Staff proposal, p. 39.

number be the pre-TOD starting price for the purposes of the SB 1122 program. This seems inconsistent because the TOD adjustment changes a facility's payment to reflect the value of the energy it produces during different times of the day and different seasons. Using a post-TOD price to set a pre-TOD starting price – which will then be TOD-adjusted – would double-count TOD factors.

D. Although SB 1122 requires that projects be located in the utility's service territory, their fuel may be sourced from elsewhere. (Question 4, Other Issues)

ORA agrees with staff's interpretation of the locational requirement to allow a SB1122-eligible generation facility to use fuel stock from a source outside a utility's service territory. Bioenergy is not equally distributed among the utilities' service territories and can be a costly renewable energy resource. Allowing a utility to procure bioenergy from outside its service territory will distribute costs among all ratepayers more equitably because an overall increase in access to bioenergy will likely lower costs due to larger resource availability.

E. The allocations among utilities and SB 1122 categories are reasonable but should be reviewed after some experience with the program. (Questions 1-3, Allocations Among Categories)

ORA generally supports staff's proposed allocation of bioenergy-required capacity among the IOUs because it fairly balances several competing concerns: establishing achievable goals, reducing administrative burdens, achieving SB 1122 targets with the resources available, and equitably distributing costs among ratepayers.

However, ORA remains concerned that despite these steps, the market for small-scale bioenergy in California may be limited or non-existent, as indicated in the Black and Veatch report.¹² Either case may result in high prices compared to other RPS procurement or only a small number of contracts executed through the SB 1122 program.

¹² Ruling, Attachment 1: Black & Veatch Consultant Study, p. 1-1.

In particular, the staff proposal recommends San Diego Gas & Electric Company (SDG&E) procure 24 MW of Bioenergy Category 1 product (Wastewater treatment, municipal organic waste, food processing and codigestion),¹³ which is approximately 92 percent of the estimated technical potential (26 MW) in SDG&E's territory.¹⁴ Since SB 1122 requires utilities to contract projects only with generation facilities sited in their own service territory, SDG&E may be tasked with a difficult undertaking. ORA is concerned that mandating such a high percentage of the estimated technical potential may lead to high prices resulting from market power or market manipulation. To address this and other potential issues, ORA recommends that the Commission convene a workshop to review the SB 1122 program's progress and make any adjustments to maximize procurement of reasonably priced bioenergy one year after it implements the program.

II. CONCLUSION

ORA supports the staff proposal with modifications based on the recommendations in these opening comments.

Respectfully submitted,

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¹³ Staff proposal, p. 31.

¹⁴ Ruling, Attachment 1: Black & Veatch Consultant Study, p. 1-4. Technical potential is total potential and unused resource availability without considering permitting, economic, or other constraints.

VERIFICATION

I, Iryna A. Kwasny, am counsel of record for the Office of Ratepayer Advocates in proceeding R.11-05-005, and am authorized to make this verification on the organization's behalf. I have read the **OPENING COMMENTS OF THE OFFICE OF RATEPAYER ADVOCATES ON THE ADMINISTRATIVE LAW JUDGE'S RULING SEEKING COMMENTS ON STAFF PROPOSAL ON IMPLEMENTATION OF SENATE BILL 1122 AND ACCEPTING CONSULTANT REPORT INTO THE RECORD** filed on December 20, 2013. 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 are true and correct.

Executed on December 20, 2013 at San Francisco, California.

/s/ IRYNA A. KWASNY

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