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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration, and Consider Further Development, of California Renewables Portfolio Standard Program.	Rulemaking 15-02-020

DECISION MODIFYING SECTIONS 4.1 AND 4.2 OF THE BIOENERGY MARKET ADJUSTING TARIFF POWER PURCHASE AGREEMENT APPROVED IN DECISION 15-09-004

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Summary

This decision, which is being adopted on an expedited basis, modifies Sections 4.1 and 4.2 of the Bioenergy Market Adjusting Tariff (BioMAT) Power Purchase Agreement (PPA), approved in Decision 15-09-004, by removing the language "or any Laws" and "or any Law" from the attestation clauses found in Subsections 4.1.2 and 4.2.3, respectively. The need for this modification stems from the assertion made by the utilities and other parties that their ability to execute BioMAT contracts has been impaired by recent legal developments in the Renewable Energy Market Adjusting Tariff (ReMAT) realm. Thus, with this modification, the Commission addresses this perceived legal impediment so that that parties and contractual participants can move forward and execute pending BioMAT PPAs, thus enabling the BioMAT program to help meet California's environmental, air quality, and public safety priorities.

1. Background

1.1. The BioMAT Program

Senate Bill (SB) 1122 (Rubio, 2012) added a requirement to California's Renewables Portfolio Standard (RPS) program[1] for 250 MW of RPS-eligible procurement from small-scale bioenergy projects that commence operation on or after June 1, 2013.[2] In Decision 14-12-081 and Decision 15-09-004, the Commission implemented SB 1122 by adopting the BioMAT program. In Decision 16-10-025, the Commission implemented several changes to the BioMAT program in response to the tree mortality emergency identified in Governor Edmund G. Brown's October 30, 2015 Proclamation of a State of Emergency and SB 840 (Trailer Bill, 2016).[3] Most recently in D.17-08-021, the Commission implemented changes to the effective capacity limitation of projects in the BioMAT program pursuant to Assembly Bill (AB) 1979 (Bigelow, 2016).[4]

1.2. The BioMAT PPA

In Decision (D.) 15-09-004, the Commission *Approved, as Modified, Bioenergy Electric Generation Tariff, Standard Contract, and Supporting Documents to Implement Decision 14-12-081 on Bioenergy Feed-In Tariff for the Renewables Portfolio Standard Program*. D.15-09-004 authorizes the investor-owned electric utilities to file a tariff, standard contract, and ancillary documents that comply with the determinations made in that decision regarding the draft documents.

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[1] The California RPS program was established by Senate Bill (SB) 1078, and has been subsequently modified by SB 107, SB 1036, SB 2 (1X), and SB 350. See SB 1078 (Sher, Chapter 516, Statutes of 2002); SB 107 (Simitian, Chapter 464, Statutes of 2006); SB 1036 (Perata, Chapter 685, Statutes of 2007); SB 2 (1X) (Simitian, Chapter 1, Statutes of 2011, First Extraordinary Session); SB 350 (de León, Chapter 547, Statutes of 2015).

[2] § 399.20.

[3] *Ibid*.

[4] *Ibid*.

As a result of D.15-09-004, PG&E, along with Southern California Edison Company and San Diego Gas & Electric Company, drafted a joint Bioenergy Market Adjusting Tariff Agreement.[5] Of note are Sections 4.1 (Representations and Warranties) and 4.2 (General Covenants), which provide as follows:

> 4.1. Representations and Warranties. On the Execution Date, each Party represents and warrants to the other Party that:
>
> 4.1.2. the execution, delivery and performance of this Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party ***or any Laws;*** (Bold and italics added.)
>
> 4.2. General Covenants. Each Party covenants that throughout the Term of this Agreement:
>
> 4.2.1. it shall continue to be duly organized, validly existing and in good standing under the Laws of the jurisdiction of its formation;
>
> 4.2.2. it shall maintain (or obtain from time to time as required, including through renewal, as applicable) all regulatory authorizations necessary for it to legally perform its obligations under this Agreement; and
>
> 4.2.3. it shall perform its obligations under this Agreement in a manner that does not violate any of the terms and conditions in its governing documents, any contracts to which it is a party, ***or any Law***. (Bold and italics added.)[6]

1.2.1. The *Winding Creek* Litigation

PG&E has recently raised a concern about its ability to make the

[5] By way of example, the link to PG&E's BioMAT PPA is as follows: www.pge.com/includes/docs/pdfs/b2b/wholesaleelectricsuppliersolicitation/BioMAT/BioMAT_PPA_Dec2016.pdf.

[6] Similar language appears in Southern California Edison Company and San Diego Gas & Electric Company's BioMAT PPAs.

representation with respect to, the "or any Laws" and "or any Law" language in Sections 4.1 and 4.2. PG&E questions whether the BioMAT program complies with the Public Utility Regulatory Policies Act of 1978 (PURPA), in light of a recent order of the U.S. District Court for the Northern District of California in *Winding Creek Solar LLC v. Peevey, et al.*, Case No. 13-cv-04934-JD (N.D. Cal. Dec. 6, 2017) (*Winding Creek*). In *Winding Creek,* the District Court concluded that the ReMAT Program's pricing mechanism and contracting limits violate PURPA. Although *Winding Creek* was specific to the Commission's ReMAT decisions, and despite the distinguishing characteristics of ReMAT and BioMAT, some Investor-owned Utilities are concerned that the language from *Winding Creek* is broad enough to impact the viability of the BioMAT program. PG&E's concern is memorialized in its Comments to Draft Resolution E-4922 (submitted March 12, 2018). As a result of this concern, PG&E is reluctant to execute BioMAT PPAs without modifying the standard language in the BioMAT PPA.

1.3. Resolution E-4922

The impact of the *Winding Creek* decision on the viability of the BioMAT program has continued to be a concern for certain parties despite the Commission's effort to put the matter to rest. In Resolution E-4922,[7] the Commission ordered the Investor-owned Utilities[8] to continue their BioMAT programs under current program rules, and to execute contracts with eligible Sellers that have been accepted and may in the future accept prices offered as part of the BioMAT program.

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[7] *Commission order to continue the Bioenergy Market Adjusting Tariff program and to execute certain bioenergy contracts* (March 22, 2018).

[8] PG&E, Southern California Edison Company, and San Diego Gas & Electric Company.

Prior to the adoption of Resolution E-4922, several parties expressed varying opinions about the impact of the District Court's order in *Winding Creek* on the draft Resolution and the BioMAT program generally. The Commission considered those concerns but nonetheless found that *Winding Creek* did not apply to the BioMAT program. While the order enjoined the Commission from continuing to implement the Renewable Market Adjusting Tariff program, the *Winding Creek* complaint did not mention the BioMAT program. In the Commission's view, interpreting the District Court's order to apply to BioMAT would go beyond that order, would go beyond addressing the *Winding Creek's* operative complaint, and would inappropriately expand the scope of the order beyond what was issued by the Court.

1.4. The Assigned Commissioner's Ruling and Party Comments

Despite Resolution E-4922's directive, requiring parties to BioMAT contracts to attest that the contracts were not in violation of any laws (as required by Sections 4.1 and 4.2) while the Winding Creek order was still pending resulted in continued party consternation that could impact important policy objectives.

Given the urgency of addressing the tree mortality crisis in California[9] and the State's priority in utilizing high fire hazard zone fuel, on April 16, 2018, the Assigned Commissioner issued his *Ruling Ordering Party Comments on Proposed Modification on Language in Sections 4.1 and 4.2 of the BioMAT Power Purchase Agreement* (*April 16, 2018 ACR*). On April 26, 2018, the following parties filed comments: PG&E, San Diego Gas & Electric Company, Southern California

[9] Governor Brown's Tree Mortality Emergency Proclamation: https://www.gov.ca.gov/wp-content/uploads/2017/09/10.30.15_Tree_Mortality_State_of_Emergency.pdf.

Edison Company, The Bioenergy Association of California, The California Biomass Energy Alliance, The Agricultural Energy Consumers Association, The Office of Ratepayer Advocates, Placer County Air Pollution Control District, and Phoenix Energy. As will be seen in the summary of the comments, the parties were divided on whether BioMAT should be modified, with some parties offering alternative modifications.

1.4.1. PG&E

PG&E supports the proposed modifications in the *April 16, 2018 ACR*. PG&E writes that "removing this language would mitigate PG&E's concerns and allow PG&E to move expeditiously to execute the outstanding BioMAT contracts."[10]

1.4.2. San Diego Gas & Electric Company (SDG&E)

SDG&E opposes the proposed modifications. They continue to be concerned that continuing the BioMAT tariff would violate federal law, and they write that their legal concerns are "not at all obviated" by the modifications proposed in the Ruling.[11] If *Winding Creek* were upheld on appeal, SDG&E writes that a party "would challenge the legality of BioMAT in court, and successfully move for summary judgment given the common operative facts of BioMAT and ReMAT."[12] In that scenario, the Commission and parties would have to determine whether, and if so, how to unwind the new BioMAT contracts in light of the *Winding Creek* holding, which would be a disruptive and resource-consuming process that would exacerbate the tree mortality crisis rather than

[10] PG&E Comments at 1.

[11] SDG&E Comments at 2.

[12] *Ibid*.

help it. SDG&E also writes that it is unfair for the Commission to order IOUs to enter in contracts that they believe to be illegal under federal law.[13]

SDG&E also writes that removing the phrase "or any law" would remove safeguards they rely on to protect its customers from counterparties that might act in an unlawful manner. For example, they write that under this proposal, a seller would not be required to represent, warrant, or covenant that it is in compliance with: Market-based Rate Authority from the FERC; Safety statutes and regulations; Labor and Wage ordinances and statutes; Local zoning and permitting requirements; or Applicable provisions of the California Commercial Code. Removing "or any law" would remove SDG&E's ability to terminate the PPA if the seller acted illegally.[14]

SDG&E recommends two temporary, partial solutions to their concerns. The partial solutions are: [15]

1. Exclude only PURPA from among the laws referenced in Sections 4.1 and 4.2; or
2. Allow IOUs, as buyers under the BioMAT PPA, not to be subject to the PPA's requirements as to representation, warranties, and covenants.

SDG&E caveats that their recommendations are intended to "help the Commission and parties find an appropriate solution to managing the BioMAT contracting issues until the wider legal issues are resolved," and they do not "fully resolve either the wider concerns raised by *Winding Creek* or the

[13] SDG&E Comments at 3.

[14] SDG&E Comments at 3-4.

[15] SDG&E Comments at 5-6.

representations, warranties and covenant sections of the BioMAT PPA."[16] Overall, they maintain that the Commission's best course is to not require further BioMAT contracting.

1.4.3. Southern California Edison Company (SCE)

SCE is concerned that the proposed modification would have the unintended consequence of alleviating a party of its obligation under the BioMAT PPA to comply with all applicable laws. SCE believes that such an obligation is appropriate and necessary.[17] Instead of deleting references to "or any Laws" in the BioMAT PPA, SCE proposes a modification to add the following language at the end of Section 4.2.3 of the BioMAT PPA: [18]

> "Buyer makes no representation, warranty or covenant with respect to the legality of the Bioenergy Market Adjusting Tariff program or any Buyer's [*sic*] actions required pursuant to such program."

And while SCE points out that no court has found BioMAT to be non-compliant with PURPA, they write that PG&E's concerns are legitimate in that a court could find that BioMAT's Commission-mandated avoided-cost methodology is not PURPA-compliant and that such a finding, post-PPA execution, could have adverse impacts, including cost recovery impacts.[19] To allay the concerns regarding cost recovery in the event of a successful challenge of BioMAT under PURPA, SCE recommends that the Commission amend

[16] SDG&E Comments at 6.

[17] SCE Comments at 1.

[18] SCE Comments at 2.

[19] *Ibid*.

Resolution E-4922 or order the modification of the BioMAT tariffs to expressly state as follows:[20]

> "The costs of all purchases under BioMAT contracts, which contracts are entered into pursuant to legally enforceable obligations and imposed by the Commission under PURPA Section 210, have been found to be prudent by the Commission, and thus all costs associated with such purchases are recoverable as a matter of law under PURPA Section 210(m)(7)."

1.4.4. The Bioenergy Association of California (BAC)

BAC supports the proposed modification to the BioMAT PPA if PG&E agrees to execute BioMAT contracts upon adoption of the modification.[21] After writing that further delays in contract executions will impede the state's efforts to reduce wildfire impacts and to reduce emissions of Short-Lived Climate Pollutants,[22] BAC points to Rule 14.6 of the Commission's Rules of Practice and Procedure, which allows for an expedited decision where parties stipulate to the decision or where there is no objection to it. If no party objects, they ask the Commission to adopt the *April 16, 2018 ACR's* modifications at the next possible business meeting to avoid further contract delays.[23]

BAC also urges the Commission to require that utilities execute pending BioMAT contracts within two business days of the Commission's Decision adopting the proposed modification. Given that Resolution E-4922 required the IOUs to execute within 30 days of adoption of that Resolution, and the proposed

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[20] *Ibid*.

[21] BAC Comments at 3.

[22] BAC Comments at 2-3.

[23] BAC Comments at 3.

modifications in the *April 16, 2018 ACR* consists of deleting a few words from the PPA, BAC does not see why more time would be needed to finalize and execute the pending BioMAT contracts.[24]

Finally, BAC recommends that the threat of a legal challenge should be addressed in the Energy Division's BioMAT program review, and urges the Commission to move forward as quickly as possible with the BioMAT program review to address this and other issues that are preventing successful implementation of the BioMAT program.[25]

1.4.5. The California Biomass Energy Alliance (CBEA)

CBEA supports the *April 16, 2018 ACR's* proposed modifications, and writes that they do not believe that BioMAT projects would be hurt by the proposed decision.[26]

CBEA also supports BAC's letter to Commission Executive Director Alice Stebbins, which opposed PG&E's request for an extension of time to comply with Resolution E-4922. CBEA writes that the *April 16, 2018 ACR* should not be used as an excuse to further delay the signing of BioMAT contracts.[27]

1.4.6. The Agricultural Energy Consumers Association (AECA)

AECA requests that a ruling or order be issued as soon as possible, so that the IOUs can begin executing pending BioMAT contracts, and resuming BioMAT procurement. They note that ongoing delays cause economic harm to the dairy

[24] BAC Comments at 4.

[25] *Ibid*.

[26] CBEA Comments at 1.

[27] *Ibid*.

industry; put investment in BioMAT projects, project financing, and grants at risk; and delay efforts to achieve dairy-related greenhouse gas reductions.[28]

AECA writes that PG&E continues to avoid executing contracts with participants who have accepted offered prices, and has also ceased holding new BioMAT program periods, accepting new BioMAT applications, and executing new BioMAT contracts, and that PG&E's inaction is contrary to program rules, Energy Division's November 2017 letter to the IOUs, and Resolution E-4922.[29]

AECA does not believe that the proposed modifications are necessary. They write that "the Commission thoroughly and appropriately addressed PG&E's concerns in Resolution E-4922," and that nothing has changed since the Resolution was issued.[30] However, AECA does not object to proposed modifications because "the critical path is to resume the BioMAT program."[31] Accordingly, whether or not the Commission determines to modify the BioMAT PPA, AECA recommends that the Commission act as quickly as possible to avoid further delays.

1.4.7. The Office of Ratepayer Advocates (ORA)

ORA does not consider the proposed modifications to sufficiently protect ratepayers from the risk of default,[32] and requests the Commission consider the potential effects of the *April 16, 2018 ACR* proposed modifications on ratepayers in greater detail.[33]

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[28] AECA Comments at 1-2.

[29] AECA Comments at 2-3.

[30] AECA Comments at 4.

[31] *Ibid*.

[32] ORA Comments at 1.

[33] ORA Comments at 3.

They write that the *April 16, 2018 ACR* presented a narrow set of facts that did not make clear how removing the phrase "or any laws" would limit ratepayer exposure to the costs of liability. Because the underlying concerns over the legitimacy of the BioMAT program and ratepayer impacts were not addressed, ORA is concerned that ratepayers may be unprotected from any future law or court decision holding BioMAT in violation of PURPA, and that ratepayer funds from previously authorized contracts will be left stranded and that ratepayers may incur additional costs such as litigation expenses. Finally, ORA writes that it is unclear whether removing the "or any laws" language will create additional, non-PURPA related liability, and thus, additional costs for ratepayers.[34]

ORA also points out that the use of High Hazard Zone (HHZ) fuel is not a requirement to participate in BioMAT, and that the Commission's Bioenergy Renewable Action Mechanism (BioRAM) program, which does have a requirement to utilize HHZ resources, was specifically implemented to address the Governor's October 2015 Emergency Order on Tree Mortality.[35] Thus, BioMAT is not the only mechanism to address tree mortality, and, as such, "the Ruling mischaracterizes the role BioMAT plays in addressing the State's tree mortality crisis and fails to provide for further development of a record to rely on, or a forum to assess ratepayer impacts."[36]

[34] ORA Comments at 2.

[35] ORA Comments at 2-3.

[36] ORA Comments at 3.

1.4.8. Placer County Air Pollution Control District (PCAPCD)

PCAPCD supports the *April 16, 2018 ACR's* proposed modifications.[37] While they disagree with the assertion by PG&E that *Winding Creek* has any relevance to the BioMAT program, they respect the effort of the Commission to ameliorate the situation through the PPA revision. They also write that the IOUs should comply with Resolution E-4922, and that they support Energy Division's program review as long as BioMAT stays in place and remains viable while changes are considered and implemented.[38]

1.4.9. Phoenix Energy

Phoenix Energy supports the *April 16, 2018 ACR's* proposed modifications.[39] They suggest that the Commission enforce resolution E-4922 and order PG&E to execute pending BioMAT contracts with the current PPA language with the acknowledgement that the contracts may be revised to address PG&E's concern. They write that this action is necessary because contract execution delays are causing uncertainty in the market, and this would be justified because SCE has continued to execute BioMAT contracts and because no court has invalidated the BioMAT decision.[40] Phoenix Energy writes that PG&E has provided written documentation that they have what they need to issue the PPAs awarded in October 2017, and that Phoenix will not be changing any of the data that they provided in their Program Participation Request (PPR) forms. [41]

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[37] PCAPCD Comments at 2.

[38] PCAPCD Comments at 2-3.

[39] Phoenix Energy Comments at 2.

[40] Phoenix Energy Comments at 3.

[41] Phoenix Energy Comments at 3-4.

In order to resolve this uncertainty, Phoenix Energy asks to Commission to set a fixed deadline for contract execution. Phoenix Energy asserts that a deadline is needed because delays are causing projects to fail, and the California Energy Commission has issued stop work notices to some projects, threatened cancelation of grants to others due to PPA delays, and private funding sources are teetering because of the uncertainty around whether PPAs will be issued at all.[42] Like BAC, Phoenix Energy points to Rule 14.6 of the Commission's Rules of Practice and Procedure, and asks the Commission to adopt the *April 16, 2018 ACR's* modifications at the next possible business meeting to avoid further contract delays.[43] Phoenix Energy also asks the Commission to order PG&E to execute pending BioMAT contracts within 72 hours of the final decision adopting the modification.[44]

Finally, Phoenix Energy writes that PG&E is imposing new requirements to maintain BioMAT eligibility. For example, on April 26, 2018, PG&E sent an e-mail to Phoenix Energy saying that "moving forward, BioMAT participants in the queue are required to actively attest that they still meet the eligibility criteria. This attestation is in the form of a check box on the price selection screen. If the attestation and price selection are not completed, participants will be assumed to be no longer eligible and may lose their position in the BioMAT queue." Phoenix Energy writes that this is a unilateral alteration by PG&E outside of the proceeding and that it should not be allowed.[45]

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[42] Phoenix Energy Comments at 4.

[43] Phoenix Energy Comments at 4-5.

[44] Phoenix Energy Comments at 5.

[45] Phoenix Energy Comments at 6.

2. Discussion

2.1. The Commission has the Authority to Shorten or Waive the Comment Period in order to Issue Decisions on an Expedited Basis

Normally, proposed Commission decisions are served on the parties 30 days in advance of the date of the Commission Voting Meeting where the subject proposed decision will be voted on either as part of the consent agenda or as part of the regular agenda.[46] With the 30 day advance, opening comments are filed within 20 days of the date the proposed decision is served on the parties, and reply comments may be filed within five days after the last day for filing opening comments.[47]

The Rules permit the Commission to shorten or waive the comment period. Pursuant to Rule 14.6(a), the time to comment may be shortened or waived in "an unforeseen emergency situation." Alternatively, pursuant to Rule 14.6(c), the Commission may shorten or waive the comment period in certain non-emergency situations. Rule 14.6(c)(10) provides that in a proceeding where no hearings were conducted, the time may be shortened or waived where "public necessity" in having the Commission act in a time frame shorter than the 30-day period "outweighs the public interest in having the full 30-day period for review and comment." "Public necessity" includes situations where the failure to adopt a decision before the expiration of the 30-day review and comment period "would place the Commission or a Commission regulatee in violation of applicable law, or where such failure would cause significant harm to public health or welfare."

[46] Pub. Util. Code § 311.

[47] Rule 14.3.

2.2. The Public Necessity to Act Quickly by Shortening the Comment Period on this Decision Outweighs the Need for a 30-day Comment Period

The BioMAT program helps to achieve important public policy objectives, and any further delay in the contracting process would frustrate the Legislature's expressed directives. Since SB 1122's passage and implementation, complementary and related statewide policies have been enacted that reinforce the importance of small bioenergy facilities in achieving statewide climate, waste diversion, and public safety goals. Senate Bill (SB) 1383 (Lara 2016) requires the California Air Resources Board (CARB) to approve and begin implementing a comprehensive strategy to reduce Short Lived Climate Pollutants (SLCPs) in the state. The law includes requirements to reduce methane emission 40% below 2013 levels by 2030, reduce methane emissions from livestock and dairy manure management operations by up to 40% below 2013 levels by 2030, and achieve a 50% reduction in the statewide disposal of organic waste in landfills from 2014 levels by 2020 and a 75% reduction by 2025. Category 1 and 2 BioMAT-eligible projects will contribute to meeting these goals.

In addition, the Governor's October 2015 Emergency Order on Tree Mortality set environmental, air quality and public safety priorities to which Category 3 BioMAT-eligible facilities can contribute, and specifically directed the Commission to facilitate contracts for these facilities in the BioMAT program.[48]

[48] The Governor's Emergency Proclamation Order addresses bark beetle and drought caused tree mortality and the hazards such tree mortality creates for the State of California. The Emergency Proclamation orders the CPUC to evaluate changes to the BioMAT program to facilitate contracts for bioenergy facilities that utilize feedstock from "high hazard zones" (HHZ) for wildfire and falling trees. Changes to-date include Decision 16-10-025 approved in 2016, which implemented SB 840, and streamlined interconnection requirements for biomass projects and accelerated price adjustments for BioMAT Category 3, Decision 17-08-021, issued in August of 2017, which implemented

Footnote continued on next page

In March 2017, CARB adopted a Short-Lived Climate Pollutant Reduction Strategy that sets a goal of 40% reduction of methane emissions by 2030, which explicitly mentions BioMAT as a program that provides important market signals and potential revenue streams to support projects to reduce short-lived climate pollutant emissions.[49] Most recently, on May 10, 2018, Governor Brown issued Executive Order B-52-18 in order to protect communities from wildfires and climate impacts. Directive 16 requests that the Commission "review and update its procurement programs for small bioenergy renewable generators to ensure long-term programmatic certainty for investor-owned utilities and project developers, as well as benefits to ratepayers."[50] In view of the Governor's directive, the Commission's action is both timely and appropriate.

But because of the *Winding Creek* order, the BioMAT program has experienced delays in the execution of PPAs since December 2017, and these delays have been confirmed by some of the parties who filed comments to the *April 16, 2018 ACR*.[51] For example, Phoenix Energy states on pages 3 and 6 of its comments:

> PGE has provided written documentation to our firm that they have what they need to issue the PPAs awarded in October 2017. We state openly for the record that we will not

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AB 1923, which increased the facility size limit for Category 3 facilities, and other actions targeting the deployment of HHZ biomass energy generation.

[49] *Short-Lived Climate Pollutant Reduction Strategy*. California Air Resources Board, March 2017. <www.arb.ca.gov/cc/shortlived/meetings/03142017/final_slcp_report.pdf>

[50] The link to the text for the Executive Order can be found in the Governor's Press Office release dated May 10, 2018.

[51] BioMAT program uncertainty also resulted from PG&E's December 1, 2017 filing of the Motion of Pacific Gas & Electric Company to Suspend BioMAT Program Procurement, which was denied on December 18, 2017 in ALJ's Ruling Denying Pacific Gas & Electric Company's Motion to Suspend BioMAT Procurement Program.

> be changing any of our now several reiterations of the same data we provided in our PPR forms.
>
> We have written confirmation from the Utility that they have what they need. PGE has no need to confirm for the third or fourth time what is in our submitted paperwork. We will not be modifying anything. We urge the Commission not to wait another fire season.

AECA expressed similar urgency on page 4 of its comments:

> There are important reasons and need for the IOUs to expeditiously resume signing BioMAT contracts with developers that have accepted an offered price, and hold new BioMAT program periods, accept new BioMAT applications, and execute new BioMAT contracts. Repeated delays in BioMAT implementation are impeding progress toward the state's GHG goals, creating uncertainty for developers seeking to participate in a legislatively mandated program, and jeopardizing investments in and the award of grants for dairy projects.

As such, prompt action on this Decision is essential to end the delays in contract execution that are causing hardships and creating uncertainty for numerous BioMAT projects, so the public benefits identified above may be realized.

The Commission believes that the elimination of the "or any law" and "or any laws" language from Sections 4.1 and 4.2 from the approved BioMAT PPAs will achieve two related objectives. First, it will remove the concern that PPA signatories are making an attestation regarding the purpose and effect of the *Winding Creek* order. Second, it will clear the way for utilities such as PG&E to move forward with its BioMAT contracts, thus getting the BioMAT program back on track to achieve the State's environmental, air quality, and public safety priorities.

In light of the need for the Commission to act expeditiously, this decision orders that opening comments be served by May 21, 2018, and that any reply comments be served by noon on May 25, 2018. No party will be prejudiced by a shortened comment period. The parties were already put on notice when the *April 16, 2018 ACR* was served that the assigned Commissioner was thinking of proposing this modification to the full Commission. All parties were given a previous opportunity to comment, and a number of parties did serve comments by the April 26, 2018 deadline. As the decision makes the modification that the *April 16, 2018 ACR* proposed, the Commission does not believe that the parties need a full 30 days to file additional comments. Instead, the shortened time frame for comments will give the parties sufficient time to make any supplementary positions known to the Commission.

2.3. Response to Party Comments to the April 16, 2018 ACR

In reaching the conclusion to modify the BioMAT PPA, we have considered the various arguments that the parties raised in the comments to the *April 16, 2018 ACR*. Preliminarily, we reject those arguments that were made previously to the proposed adoption of Resolution E-4922 as certain parties are improperly attempting to reargue matters that have already been considered and found lacking. Yet we highlight those additional arguments in this section that are germane to the proposed modification and explain why the Commission does not find them persuasive. First, we reject the alternative solutions that some parties have proposed be made to the BioMAT PPA. For example, SDG&E first proposes that Subsections 4.1.2. and 4.2.3. be revised so that instead of removing "or any Laws" and "or any Law," the Commission insert "with the exception of

PURPA."[52] We find this solution to be both ambiguous as to the language's meaning and uncertain as to its scope. PURPA has various components so it not clear what SDG&E's proposal intends by the phrase "with the exception of PURPA." Alternatively, SDG&E proposes that the language be revised so that only the seller and not the buyer be required to make the attestations required by Sections 4.1 and 4.2.[53] We reject this solution because the attestation obligation should be reciprocal, rather than imposed only on one party to the BioMAT PPA.

We also reject the argument by ORA and SDG&E that removing "or any Laws" and "or any Law" may result in unintended consequences. SDG&E claims that a seller would not be required to represent, warrant, or covenant that it is in compliance with Market-based Rate Authority from the Federal Energy Regulatory Commission; safety statues and regulations, labor and wage ordinances and statutes; local zoning and permitting requirements; and applicable provision of the California Commercial Code. Yet SDG&E cites to no authority that would somehow excuse the seller from *complying* with these laws if the Commission adopts the proposed language modification. Further, we note that all contracting parties have an obligation to comply with applicable laws and regulations, regardless of whether a contract expressly states as such. This is a legal *maxim* that has been recognized and debated by philosophers and legal scholars since the time of Plato.[54] Thus, the Commission's modification does not

[52] SDG&E Comments at 5.

[53] SDG&E Comments at 5.

[54] *See, e.g*. Lefkowitz, David. "The Duty to Obey the Law" (2006). *Philosophy Faculty Publications*. Paper 64. *See also* Civil Code § 3548: "The law has been obeyed[;]" and *In re Neilson's Estate* (1962) 57 Cal.2d 733 ("It is presumed that a person obeys the law.")

eliminate that longstanding obligation considered integral to the orderly functioning of civilized societies.

ORA's argument regarding ratepayer exposure is equally unpersuasive. It claims that the modification potentially leaves ratepayers unprotected if the BioMAT program is suspended and ratepayer funds utilized for previously authorized contracts may be left stranded. But ratepayers are protected by, at a minimum, Pub. Util. Code § 451 which provides that all charges demanded or received by any public utility must be just and reasonable. In the unlikely event that a court voids a contract funded by ratepayer monies, there would be an opportunity for the Commission to audit, or for the utility to provide a true up of, ratepayer dollars expended to determine if they pass the reasonableness test, or if any refunds, credits, or offsets are warranted.

Comments on Proposed Decision

This decision was served on the parties on May 14, 2018. Pursuant to Rule 16.6 (c)(10), opening comments were due on May, 21 2018. Reply comments were due by noon on May 25, 2018.

The following parties filed comments on May 21, 2018. SDG&E, SCE, ORA, BAC, CBEA, ACEA, Green Power Institute (GPI), and Phoenix Energy. The following parties filed reply comments on May 25, 2018: ORA and AECA. We explain below why the comments that are in opposition to this decision are not persuasive.

Response to SDG&E's Comments

The modification of Sections 4.1 and 4.2 will not adversely impact ratepayers and the IOUs.

SDG&E re-iterates its concerns that removing the phrase "or any law" would remove safeguards they rely on to protect their customers from

counterparties that might act in an unlawful manner, including violations of environmental and safety laws, and would remove SDG&E's ability to terminate contracts if the seller acts illegally. They write that the decision does not address the point made by SDG&E and ORA that "ratepayers will no longer be protected from **any** illegality of a counterparty, including illegal actions that undermine the benefits of the BioMAT PPA or cause ratepayers additional expense."[55] They claim that this could cause the IOUs to take civil legal action against counterparties, which would be expensive and time-consuming, and would not "terminate any illegality unless and until it is resolved in the courts." In SDG&E's estimation, that perceived outcome would be inferior to the current protections that would be eliminated by the decision, and the decision errs by ignoring that concern and its centrality to SDG&E's position.[56]

SDG&E's argument is flawed for several reasons and, therefore, carries no weight. From a factual perspective, the "parade of horribles" argument is wholly speculative. SDG&E offers no facts to support the claim that without the removed language a counterparty may act in an illegal manner that is contrary to the terms and purposes of the PPA. Nor does SDG&E explain how either party would be prevented from seeking to terminate the PPA in the event of the other party's default, a right which we will explain, *infra*, both contracting parties retain even with the modification that the Commission adopts herein.

Moreover, SDG&E's position runs contrary to the law regarding the severability of contracts. A contract can remain enforceable despite a provision being removed or deemed void provided that the stricken phrase does not

[55] SDG&E Comments at 5.

[56] SDG&E Comments at 5-6.

change the purpose for which the contracted was created. That is the situation that the Commission is faced with here. The removal of the language from the attestation clauses, does not alter the purpose behind the creation of the BioMAT PPAs—to facilitate the procumbent from RPS-eligible procurement from small-scale bioenergy projects.[57] In fact, SDG&E's BioMAT PPA contains a severability clause which states that impairment of the ability to enforce any provision does not invalidate the remainder of the agreement:

> If any provision in this Agreement is determined to be invalid, void or unenforceable by the CPUC or any court having jurisdiction, such determination shall not invalidate, void, or make unenforceable any other provision, agreement or covenant of this Agreement. Any provision of this Agreement held invalid or unenforceable only in part or degree will remain in full force and effect to the extent not held invalid or unenforceable.[58]

Not only is the remainder of the BioMAT PPA still enforceable, but so is the remainder of the attestation clauses that are unaffected by this decision. Thus, the remaining contractual obligations of the parties to a BioMAT PPA remain in effect. There are various other provisions of the BioMAT PPA that are still applicable even if the "or any Law" and "or any Laws" attestations are removed. They include, at a minimum, eligibility criteria, capacity allocation among the IOUs, pricing methodology, program participation requests, queue

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[57] See SB 1122, discussed in Decision (D.) 14-12-081 and Decision (D.) 15-09-004.

[58] SDG&E BioMAT PPA, Section 19.1. Severability.

https://sdgebiomat.accionpower.com/biomat/documents.asp?Col=DateDown&strFolder=a.%20Bio-MAT%20Tariff%20and%20Power%20Purchase%20Agreement/2.%20PPA/&filedown=&HideFiles=

management,[59] as well as the remaining attestation requirements in Sections 4.1 (Representations and Warranties) and 4.2 (General Covenants).

But what is more troubling about SDG&E's argument is the underlying suggestion that in authorizing the BioMAT PPAs, the Commission somehow vested the IOUs with the unfettered authority to terminate the contract in the event the seller allegedly engages in illegal conduct. SDG&E fails to point to any such authority in D.15-09-004, and we do not find any such indication in our prior decisions in this matter. In fact, SDG&E's argument is undercut when its BioMAT PPA is viewed in its entirety. Section 18 of SDG&E's BioMAT PPA requires the parties to (1) negotiate in good faith to resolve any claim or controversy arising out of or relating the PPA; (2) if the dispute cannot be resolved, the parties must submit to an arbitration process; and (3) the California Superior Court of the City and County of San Diego may enter judgment upon any award that the arbitrator renders. Even though there is a provision in the PPA entitled EVENTS OF DEFAULT AND TERMINATION (Section 13) which protects both parties to the contract, a party that seeks to terminate the contract pursuant to Section 13 would still be subject to the dispute resolution process described above, in accordance with Section 2.4 (Term of Agreement; Survival of Rights and Obligations), Subsection 2.4.2.[60] Thus, the removal of "or any Law" and "or any Laws" does not eliminate the other carefully drafted remedies in

[59] D.15-09-004 at 5.

[60] "Notwithstanding anything to the contrary in this Agreement, the rights and obligations that are intended to survive a termination of this Agreement are all of those rights and obligations that this agreement expressly provides survive any such termination and those that arise from Seller's or Buyer's covenants, agreements, representations, and warranties applicable to, or to be performed, at or during any time before or as a result of the termination of this Agreement including…(i) the dispute resolution provisions set forth in Section 18."

place to protect either party in the event there has been a claimed breach of a material condition.

The existence of this dispute resolution provision also serves to undercut SDG&E's argument that ratepayrers will no longer be protected from any illegal actions committed by a party to the contract, including illegal actions that undermine the benefits of the BioMAT program. Contrary to SDG&E's position, that protective process will still be available to SDG&E and any other aggrieved party to the BioMAT PPA that claims the other party is in breach. The expense to utilize the process will not be any more exorbitant by the modification of the BioMAT PPA that the Commission adopts herein. As such, the existing remedies available to the contracting parties are not affected by the Commission's action.

The Commission is legally obligated to comply with the Legislature and Implement the BioMAT Program

SDG&E disagrees with the decision's assessment of *Winding Creek* and claims to be unaware of any legal analysis from the Commission explaining why BioMAT contracting may proceed. SDG&E writes that they have not seen legal analysis for why, in light of the Winding Creek decision, BioMAT does not violate PURPA. Further, SDG&E is "concerned that the Commission has overlooked, and the decision errs by not addressing, the principle of *stare decisis* relative to *Winding Creek* and the principle of considering and applying precedent, which is widely acknowledged as foundational not only in a tribunal's rendering of federal and state law, but also with state and federal administrative agencies."[61] They also note that the California Supreme Court explained *stare decisis* in *People v. Birks* and add that "following precedent is

[61] SDG&E Comments at 7.

required, as is rendering consistent opinions."[62] They write that the Commission has not explained why BioMAT is being treated differently than ReMAT following *Winding Creek*, why the current treatment of BioMAT is consistent with its treatment of ReMAT, based on currently applicable law, and claim that "these omissions represent legal error and violate the doctrine of stare decisis." SDG&E warns that if the current decision is issued "BioMAT contracting parties will have no assurance of certainty, predictability and stability and, indeed, will have no 'reasonable assurance of the governing rule of law.'"[63]

Moreover, SDG&E's argument displays a misunderstanding of the duties and obligations imposed on the Commission to implement the will of the Legislature. That duty is found in Article III, Section 3.5 of the California Constitution:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

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62 *Ibid*.

63 SDG&E Comments at 8.

In *Burlington Northern & Santa Fe Railway Company v. Public Utilities Commission* (2003) 112 Cal.App.4th 881, 887, the Court explained the scope of Article III, Section 3.5, as it relates to the Commission's authority to refuse to enforce a statute: "The constitutional provision only restricts the PUC's use of two sources as justification for refusing to enforce a statute: the state Constitution and federal law." In other words, until such time as a California appellate court weighs in on the constitutionality of a California statute, the Commission is bound to follow that statute in so far as it dictates how the Commission must regulate utilities that are subject to its jurisdiction.

Article III, Section 3.5, of the California Constitution is controlling here. As noted above, the Legislature added the BioMAT program to the RPS program via SB 1122, and the Commission implemented SB 1122 through D.14-12-081 and D.15-09-004. The BioMAT program is also codified in Pub. Util. Code § 399.20. To date, no appellate court has determined that the BioMAT program is unenforceable. Thus, in accordance with Article III, Section 3.5 of the California Constitution, the Commission must continue to implement the BioMAT program.

<u>The Commission has previously distinguished between the BioMAT and ReMAT programs, and has explained why the Winding Creek order does not apply to BioMAT</u>

SDG&E takes issue with the decision's assertion of the "distinguishing characteristics of ReMAT and BioMAT." They claim that the Commission's omission of any factual support in the decision for its finding that ReMAT and BioMAT are materially distinguishable represents legal error, leaving contracting parties unaware of the Commission's considerations that deem a particular

program, or contract pursuant to that program, to be enforceable and valid, or unenforceable and invalid.[64]

SDG&E also goes on to say that if the Commission had analyzed the applicability of Winding Creek to BioMAT, the Commission would have likely determined that BioMAT is flawed under federal law for the same reasons that ReMAT was determined to be flawed. That is why SDG&E urges the Commission to require no further BioMAT contracting until Winding Creek makes its way through the federal court, and claims that the Commission errs by requiring more contracting without this analysis in the PD.[65]

But as SDG&E well knows, the Commission dealt with these concerns previously when it addressed and resolved party comments in the March 22, 2018 Resolution E-4922. Therein we stated:

> Several parties express varying opinions about the impact of the District Court's order in *Winding Creek Solar LLC v. Peevey* on this Resolution and the BioMAT program generally.[66] Allco Renewable Energy Limited (Allco), a party to the Winding Creek case, argues that the Draft Resolution was directly contrary to the *Winding Creek* order. PG&E and SDG&E wrote that *Winding Creek* raises legal questions about BioMAT that should be addressed in the Resolution. SCE points out that Winding Creek could eventually have legal implications for the BioMAT program, but the order did not address BioMAT and so the Resolution does not contradict the order. The Bioenergy Association of California (BAC), Phoenix Energy, Aries Clean Energy, and AECA assert that the District Court's order does not apply to or affect BioMAT.

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64 SDG&E Comments at 8-9.

65 SDG&E Comments at 9.

66 Case No. 13-cv-04934-JD.

> More specifically, SCE also highlights that "no enforcement petition concerning BioMAT has been brought to FERC [the Federal Energy Regulatory Commission], no petitioner yet has standing to challenge it in federal district court, and BioMAT was not before the *Winding Creek* court."[67] BAC adds in its comments that "the U.S. Supreme Court has held consistently that injunctive relief is an extraordinary and drastic measure that should be limited to the specific relief requested by the plaintiff and not applied more broadly."[68]
>
> We agree that Winding Creek does not apply to the BioMAT program. The District Court's order granted some of the plaintiff's prayers for relief and determined that the Commission's ReMAT Orders (D.12-05-036, D.13-01-041 and D.13-15-034) violate the Supremacy Clause of the Constitution and enjoined the Commission from continuing to implement the ReMAT Program as set forth in those Orders. The operative complaint in Winding Creek does not, however, seek any relief regarding the BioMAT Program; BioMAT is not even mentioned. The lack of an enforcement action at FERC also raises a serious standing issue. BAC, moreover, is correct that the *Winding Creek* order "should be limited to the specific relief requested … and not applied more broadly."[69] Interpreting the District Court's order to apply to BioMAT would go beyond that order, would go beyond addressing the Winding Creek's operative complaint, and would inappropriately expand the scope of the order beyond what was issued by the Court.

While we do not wish to relitigate issues resolved previously, we have quoted the text from Resolution E-4922 at length to remind SDG&E, as well as any other

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[67] SCE Comments at 3.

[68] BAC Comments at 2.

[69] *Ibid*.

party opposed to this decision, that these objections have been disposed of previously in a comprehensive manner.

SDG&E Fails to Provide Factual Support for its Alternative Modifications to Sections 4.1 and 4.2.

SDG&E proposed to retain the "or any Laws" and "or any Law" text, and append to it "with the exception of PURPA." Yet, this decision rejected this solution as "both ambiguous as to the language's meaning and uncertain as to its scope." In its latest comments, SDG&E finds this reasoning for its summary rejection of SDG&E's suggestion to be "unsupported and illogical, and contrary to the public interest." They write that their exemption is narrower the PD's "infinitely broader exemption," and is more protective of ratepayers.[70] Yet as we pointed out, *supra*, PURPA has various components so it is not clear what SDG&E's proposal intends by the phrase "with the exception of PURPA." As such, we see no reason to change are decision to reject SDG&E's alternate proposal.

SDG&E also complains that the decision "pays short shrift" to their other suggestion that only the seller and not the buyer be required to make the attestations required by Sections 4.1 and 4.2, rendering their suggestion untenable. SDG&E writes that their comments to the *April 16, 2018* ACR noted that "[b]ecause California's IOUs are jurisdictional to the Commission, and BioMAT is a Commission-promulgated program, the Commission has authority to address and remedy any issues regarding unlawful representations, warranties, or covenants made by an IOU…." SDG&E writes that the decision fails to justify how it could be even conceivable that a jurisdictional IOU that

[70] SDG&E Comments at 9-10.

misrepresents, for example. would not be subject to the same liabilities as a non-jurisdictional liability. Thus, SDG&E writes that the decision misrepresents their position and thereby commits legal error in basing its rejection of SDG&E's proposal on an incorrect assessment of SDG&E's proposal.[71]

But contractual reciprocity is a concept that we believe is important regardless of SDG&E being subject to the Commission's jurisdiction. As we have explained, *supra*, disputes regarding whether a party violated the attestation clause and is in default of the BioMAT PPA is a scenario that would be subject to the dispute resolution process set forth in Section 18 of the the BioMAT PPA. Pursuant to Section 18.3, the dispute will be arbitrated not in front of the Commission, but before a "JAMS [Judicial Arbitration and Mediation Services] panel" administered in accordance with the "JAMS Commercial Arbitration Rules." Both parties to the contract should be on equal footing to claim at the arbitration that the other party is in breach of the representations and warranties, as well as the general covenants. We see no logical reason to give the buyer, in this case SDG&E, an unequal contractual advantage over the seller.

Response to SCE's Comments

SCE reiterates concerns that they raised in their *April 16, 2018 ACR* comments that the proposed modifications are not sufficiently narrow in scope, introduce risk for the utility and its customers by eliminating the representation, warranty and covenant from the PPA counterparty to comply with "any Laws" in performing under the PPA, and remove SCE's ability to terminate the PPA should the counterparty fail to comply with "any Laws."[72] SCE elaborates that

[71] SDG&E Comments at 10-11.

[72] SCE Comments at 1-2.

the right to seek an immediate cure of a breach of any representation, warranty or material covenant, and/or to terminate a PPA, including if the breach is not timely cured, is a contractual right that is included in virtually all – if not all – commercial contracts in the U.S.[73] SCE is concerned that they will no longer have the ability to declare an "Event of Default" under the contract – or to demand a cure and/or terminate the PPA if the counterparty fails to comply with applicable laws. They write that this is an unreasonable outcome that does not address the "perceived legal impediment" to executing pending BioMAT PPAs, which is what the decision sets out to do.[74]

As noted in their *April 16, 2018 ACR* comments, SCE would prefer to strike only the utility's representation, warranty and covenant to comply with "any Laws", and keep the counterparty's representation, warranty and covenant intact. They explain that counterparties face less risk by eliminating the utility's representation because the utility is subject to the Commission's broad regulatory authority, including the ability to enforce the utility's compliance with applicable laws.[75]

Finally, SCE reiterates their concern that if a court were to find that BioMAT is not PURPA-compliant that such a finding, post-PPA execution, could have adverse impacts, including cost recovery impacts. To address this concern, SCE requests that the decision be amended to state that:[76]

> The costs of all purchases under BioMAT contracts, which contracts are entered into pursuant to legally enforceable

[73] SCE Comments at 2.

[74] SCE Comments at 3.

[75] *Ibid*.

[76] SCE Comments at 4.

> obligations and imposed by the Commission under PURPA, have been found to be reasonable and prudent by the Commission, and thus all costs associated with such purchases are recoverable as a matter of law pursuant to the Commission's jurisdiction to determine just and reasonable rates.

We have considered these positions and rejected them, as we believe that the approved revisions to the PPAs are more narrowly focused, and adding the language suggested by SCE is not necessary. We note that the *Winding Creek* order issued in December 2017 had no impact on previously executed ReMAT PPAs. This would likewise be the case with respect to BioMAT PPAs.

Response to ORA's Comments

ORA Fails to Distinguish between Prohibited Retroactive Ratemaking and Authorized Prospective Rate Adjustments

ORA writes that the decision's determination that the Commission may issue refunds, credits, or offsets to ratepayers to compensate them for previously-approved contracts would violate the rule against retroactive ratemaking. They write that "while the Commission has the authority to suspend and/or modify BioMAT, it may not reclaim monies which it already authorized in a ratemaking capacity" as described in *Ponderosa Telephone Co. v. Public Utilities Commission.* ORA argues that any rate collected as part of the IOUs' efforts to abide by the terms of a contract cannot be reclaimed from the IOUs, and that in this instance, ratepayers are not protected by Pub. Util. Code Section 451.[77]

[77] ORA Comments at 3.

ORA also writes that removing the "or any laws" clause would provide no relief to IOUs or ratepayers if a court rules that BioMAT violates PURPA. They argue that the IOUs "already forfeited any argument that they are unaware of the potential legal effects of *Winding Creek* because they have made formal and public statements articulating their legal concerns."[78] Furthermore, given the PD's conclusion that all parties already have an obligation to obey applicable laws, "the PD undercuts the objective of removing the 'or any Laws' clause by affirming the parties' obligation to obey all laws regardless of a contract's explicit language, or omission thereof."[79] Therefore, ORA argues that a court order about BioMAT and PURPA would apply to the IOUs regardless of the language of BioMAT PPAs, and that the decision does not alleviate any ratepayer risks since, "absent the ability to claw-back previously authorized revenue, ratepayers will be left with stranded contract costs if BioMAT contracts are void."[80]

But the Commission's ability to make adjustment to future rates does not constitute retroactive ratemaking. The Commission's authority to do the former is provided by Pub. Util. Code § 728:

> Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules, practices, or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix, by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force.

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78 ORA Comments at 4.

79 *Ibid*.

80 *Ibid*.

Our Supreme Court construed Pub. Util. Code § 728 in *Southern California Edison Co. v. Public Utilities Commission* (1978) 20 Cal.3d 813, wherein the Commission required SCE to amortize by 36 months of billing credit to its customers, the over collections generated by operation of its fuel cost adjustment clause. The Court ruled that requiring SCE to mitigate the windfall at hand by adjusting SCE's rates in the future to offset the past over collections did not constitute retroactive ratemaking. Thus, the Commission's ability to make future rate adjustments in the unlikely event that BioMAT contracts are deemed illegal does not run afoul of the retroactive ratemaking prohibition.

ORA Fails to Overcome the Exigent Circumstances that Justify the Commission's Decision to Act Expeditiously

Finally, ORA argues that the decision provides insufficient justification for shortening the comment period, which undercuts transparency, abrogates parties' due process rights, and indicates that parties' comments on both the ACR and the Proposed Decision are irrelevant.[81] First, ORA points out that BioMAT is not the only program that accomplishes the climate, waste diversion, and public safety goals described in the decision. ORA notes that BioMAT contracts do not require the use of High Hazard Zone fuel, and that the BioMAT program has not been shown to reduce greenhouse gas emissions when the associated emissions from transporting BioMAT resources and energy generation are considered. Therefore, ORA argues that the decision's claim that a delayed vote on the decision could cause significant harm to public health or welfare is specious on its face.[82] Second, ORA notes that parties only had ten

[81] ORA Comments at 6-7.

[82] ORA Comments at 6.

calendar days to file comments on the *April 16, 2018* ACR, comments were limited to ten pages, and parties were not allowed to file reply comments. ORA argues that the *April 16, 2018* ACR's notice "does not negate the unnecessarily short period which parties are allowed to respond." [83]

But ORA overlooks the factors that justify the need to move quickly so that the BioMAT program is not further delayed. While HHZ fuel use is not a BioMAT requirement, in D.16-10-025, the Commission modified BiioMAT to address the Tree Mortality Emergency Order. The Decision included high hazard zone fuelstock to be part of eligible fuelstock. Thus, BioMAT is clearly a tool to address HHZ issues. Finally our decision today does not characterize BioMAT as the only solution. But, BioMAT is the only current procurement option because the IOUs are not holding solicitations (as approved in the 2017 RPS Plans)[84] and there is no more BioRAM procurement. Thus, BioMAT is the only IOU procurement mechanism currently available, hence the urgent need for the Commission to resolve the parties' concerns so the contract can be let.

Assignment of Proceeding

Clifford Rechtschaffen is the assigned Commissioner, and Anne E. Simon, Robert M. Mason III, and Nilgun Atamturk are the assigned Administrative Law Judges in this proceeding.

Findings of Fact

1. In Decision (D.) 15-09-004, the Commission *Approved, as Modified, Bioenergy Electric Generation Tariff, Standard Contract, and Supporting Documents to*

[83] *Ibid*.

[84] [84] *See* Decision 17-12-007, Findings of Fact 1, 2, and 3.

Implement Decision 14-12-081 on Bioenergy Feed-In Tariff for the Renewables Portfolio Standard Program. D.15-09-004 authorizes the Investor-owned Utilities (IOUs) to file a tariff, standard contract, and ancillary documents that comply with the determinations made regarding the draft documents.

2. As a result of D.15-09-004, PG&E, along with Southern California Edison Company and San Diego Gas & Electric Company, drafted a joint Bioenergy Market Adjusting Tariff (BioMAT) Agreement. Of note are Sections 4.1 (Representations and Warranties) and 4.2 (General Covenants), which provide as follows:

> 4.1. Representations and Warranties. On the Execution Date, each Party represents and warrants to the other Party that:
>
> 4.1.2. the execution, delivery and performance of this Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any Laws; (Bold and italics added.)
>
> 4.2. General Covenants. Each Party covenants that throughout the Term of this Agreement:
>
> 4.2.1. it shall continue to be duly organized, validly existing and in good standing under the Laws of the jurisdiction of its formation;
>
> 4.2.2. it shall maintain (or obtain from time to time as required, including through renewal, as applicable) all regulatory authorizations necessary for it to legally perform its obligations under this Agreement; and
>
> 4.2.3. it shall perform its obligations under this Agreement in a manner that does not violate any of the terms and conditions in its governing documents, any contracts to which it is a party, ***or any Law***. (Bold and italics added.)

3. In *Winding Creek Solar LLC v. Peevey, et al.,* Case No. 13-cv-04934-JD (N.D. Cal. Dec. 6, 2017) (*Winding Creek*), the District Court concluded that the Renewable Energy Market Adjusting Tariff (ReMAT) Program's pricing mechanism and contracting limits violate the Public Utility Regulatory Policies Act of 1978.

4. Although *Winding Creek* was specific to the Commission's ReMAT decisions, and despite the distinguishing characteristics of ReMAT and BioMAT, some IOUs are concerned that the language from Winding Creek is broad enough to impact the viability of the BioMAT program.

5. Several parties expressed varying opinions about the impact of the District Court's order in *Winding Creek* on the draft Resolution E-4922 and the BioMAT program generally.

6. On March 22, 2018, the Commission issued Resolution E-4922, ordering the IOUs to continue their BioMAT programs under current program rules, and to execute certain bioenergy contracts with eligible sellers.

7. On April 16, 2018, the Assigned Commissioner issued his Ruling *Ordering Party Comments on Proposed Modification on Language in Sections 4.1 and 4.2 of the BioMAT Power Purchase Agreement (April 16, 2018 ACR).*

8. On April 26, 2018, the following parties filed comments: PG&E, San Diego Gas & Electric Company, Southern California Edison Company, The Bioenergy Association of California, The California Biomass Energy Alliance, The Agricultural Energy Consumers Association, The Office of Ratepayer Advocates, Placer County Air Pollution Control District, and Phoenix Energy.

9. The BioMAT program helps to achieve important public policy objectives, and any delay in the contracting process would frustrate the Legislature's expressed directives.

Conclusions of Law

1. It is reasonable to conclude that there is public necessity in shortening the period for service of comments on the decision.

2. It is reasonable to conclude that the public necessity behind shortening the period comments outweighs the public interest in a full 30-day period for review and comment.

3. It is reasonable to conclude that the period for serving opening comments be shortened to seven days after this decision is served on the parties.

4. It is reasonable to conclude that the period for serving reply comments be shortened to noon on the fifth day after opening comments have been served.

5. It is reasonable to conclude that no party will be prejudiced by the shortened comment period that this decision adopts.

6. It is reasonable to conclude that the attestation provisions (Sections 4.1 and 4.2) in the approved BioMAT PPAs should be revised to eliminate the phrases "or any Laws" and "or any Law."

7. It is reasonable to conclude that contracting parties have an obligation to comply with applicable laws and regulations, regardless of whether a contract expressly states as such.

8. In order to allow BioMAT contracting to proceed expeditiously, this decision should be effective immediately.

O R D E R

IT IS ORDERED that:

1 Decision 15-09-004 is modified. The attestation clauses in the Bioenergy Market Adjusting Tariff Power Purchase Agreement are modified to

strike the language "or any Laws" and "or any Law" from Sections 4.1 and 4.2.

Sections 4.1 and 4.2 are revised to read as follows:

> 4.1. Representations and Warranties. On the Execution Date, each Party represents and warrants to the other Party that:
>
> 4.1.2. the execution, delivery and performance of this Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, or any contracts to which it is a party;
>
> 4.2. General Covenants. Each Party covenants that throughout the Term of this Agreement:
>
> 4.2.1. it shall continue to be duly organized, validly existing and in good standing under the Laws of the jurisdiction of its formation;
>
> 4.2.2. it shall maintain (or obtain from time to time as required, including through renewal, as applicable) all regulatory authorizations necessary for it to legally perform its obligations under this Agreement; and
>
> 4.2.3. it shall perform its obligations under this Agreement in a manner that does not violate any of the terms and conditions in its governing documents, or any contracts to which it is a party.

2. This decision ordered that opening comments be filed on May 21, 2018.

3. This decision ordered that reply comments be filed on May 25, 2018.

This order is effective today.

Dated May 31, 2018, at San Francisco, California.

MICHAEL PICKER
President
CARLA J. PETERMAN
LIANE M. RANDOLPH
MARTHA GUZMAN ACEVES
CLIFFORD RECHTSCHAFFEN
Commissioners