

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Order Instituting Rulemaking to Develop Additional
Methods to Implement the California Renewables
Portfolio Standard Program.

Rulemaking 06-02-012
(February 16, 2006)

**PETITION OF THE
CENTER FOR ENERGY EFFICIENCY AND RENEWABLE TECHNOLOGIES
FOR MODIFICATION OF DECISION 11-01-025**

February 14, 2011

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The Center for Energy Efficiency and Renewable Technologies (CEERT) respectfully petitions the Commission for modification of Decision (D.) 11-01-025, which was issued in this rulemaking on January 13, 2011. This petition for modification (“Petition”) is timely filed and served pursuant to Rule 16.4 of the Commission’s Rules of Practice and Procedure.

I.

D.11-01-025 MUST BE MODIFIED TO RESOLVE INTERNAL CONFLICTS IN ITS ORDERS AND PROVIDE CLARITY AS TO ITS IMPACT ON THE RPS PROGRAM.

On January 13, 2011, the Commission issued D.11-01-025 to resolve petitions for modification of Decision (D.) 10-03-021 and to lift a stay and moratorium imposed on D.10-03-021 by D.10-05-018. D.10-03-021 authorized the use of renewable energy credits (TREC)s for compliance with the California Renewables Portfolio Standard (RPS) Program.

By D.11-01-025, the Commission denied the petitions for modification, making only certain, limited changes to D.10-03-021. These changes focus on the “sunset” date for the temporary limitations placed on TREC)s use and pricing and on the treatment of RPS contracts, approved by the Commission prior to D.10-03-021, which would be considered “REC only” based on D.10-03-021.

These modifications by D.10-03-021 by D.11-01-025 did not include any changes to D.10-03-021’s classification and definitions of “REC-only” and “bundled” contracts (D.10-03-

021, Ordering Paragraphs 6 and 7, at pages 97 to 98). These classifications have been challenged by CEERT on jurisdictional grounds in a timely application for rehearing of D.10-03-021, which has yet to be addressed by the Commission and, therefore, remains pending. That issue, however, is not the subject of this Petition.¹

Instead, by this Petition, as permitted by Rule 16.4 of the Commission's Rules of Practice and Procedure, CEERT seeks "changes to" D.11-01-025 that are much needed to reconcile conflicts in the discussion, appendices, and orders of D.10-03-021, as modified by D.11-01-025. In particular, these modifications are required to provide needed clarification of those orders to avoid their arbitrary implementation and provide adequate notice to all parties of the precise outcome and impact of these decisions on the RPS Program and on past and future RPS transactions.

Among other things, significant confusion regarding the treatment of both future and previously approved RPS contracts results from the conflicting language and orders in D.10-03-021, as modified by D.11-01-025. Further, these decisions provide no analysis or detail on precisely what contracts or megawatt hours (MWhrs) currently being delivered or expected to be delivered as RPS-compliant will be affected by these decisions and what, if any, RPS-compliant TRECs procurement is possible for any utility going forward. As of today, therefore, the impact of D.10-03-021, as modified by D.11-01-025, on RPS targets and a TRECs "market" remains unknown.

Why is a clear understanding of the "classifications," treatment of past and future transactions, and impacts of these decisions important? To begin with, without such clarification, renewable developers, which are the needed counterparty for RPS-obligated load

¹ On April 15, 2010, 4 applications for rehearing of D.10-03-021 were timely filed in R.06-02-012, including the one filed by CEERT. As of this date, none of these applications for rehearing has been addressed by the Commission.

serving entities (LSEs) to achieve RPS goals, have no idea what RPS-compliant electricity delivery options are available to them to facilitate cost-effective power purchase agreements. Such confusion is not resolved simply by the filing of “semi-annual compliance reports” by RPS-obligated LSEs, where designations of “REC only” and “bundled” transactions are left to the discretion of the filer and the impacts on the RPS Program of possible retroactive re-classification of approved contracts is not detailed. In fact, the current form provided by the Energy Division on the Commission’s website for that purpose merely repeats language from D.10-03-021, as modified by D.11-01-025, which, as CEERT indicates below, leaves to the imagination how that treatment will impact either the LSE’s 25% TRECs usage limit, their 1% annual procurement target (APT), or their overall 20% RPS goal.

Further, the “sunset” language for the “temporary” limits placed on TRECs use and pricing continues to exist at the discretion of the Commission, with the result that those limits may well become permanent before that sunset is reached. In addition, while D.11-01-025, like D.10-03-021, have adopted their TREC limits within the context of the *current* 20% RPS targets,² the commitment to alter those limits in response to an increase in RPS procurement by legislation or action of the California Air Resources Board (CARB) remains vague. D.11-01-025 only seems to commit to Energy Division “taking into consideration” such circumstances when it issues its report on the TRECs market at the end of 2012, and even the prospect of future RPS legislation remains speculative.³

The Commission and all stakeholders must, therefore, deal squarely with the RPS Program as it exists today and appreciate that the combined orders of D.10-03-021 and D.11-01-025 may be applicable to the RPS Program indefinitely, making clarity as to their meaning and

² D.11-01-025, at p. 12.

³ D.11-01-025, at pp. 21-22 (revisions to D.10-03-021).

impact a priority. In addition, the confusion that results from internal conflicts in the resulting orders, especially as to treatment of previously approved RPS contracts; the failure to quantify the impact of those orders and their adopted limits on the RPS Program; and the vague “commitment” to a sunset date, undermines the Commission’s conclusion in D.11-01-025 that “D.10-03-021, as modified by this decision, authorizes a new market in TRECs.”⁴ It is unclear whether a “new market in TRECs” has actually resulted from D.11-01-025. To avoid such confusion and ensure a level and well-understood playing field for the *expected* new TRECs market, CEERT offers the following recommended modifications to D.11-01-025.

**II.
THE TREATMENT, DEFINITION, AND NEXT STEPS GOVERNING
TREC TRANSACTIONS IN D.11-01-025 ARE VAGUE AND CONFLICTING
AND MUST BE MODIFIED TO AVOID ARBITRARY
IMPLEMENTATION AND CONFUSION IN THE “NEW TRECS MARKET.”**

If D.10-03-021, as modified by D.11-01-025, had simply placed a limit on procurement by RPS-obligated LSEs of “only a REC (and not the underlying energy)” on a *prospective* basis, the procurement affected by such a limit would have been clear and accounting for such procurement could have been achieved on a transparent basis. What muddles the TRECs “usage” limit and accounting for that procurement in these two decisions are internal conflicts within the decisions, their orders, and appendices as to two other “types” of transactions that affect the TRECs usage limit: (1) transactions entered after March 2010 “conveying both RECs and energy” and (2) transactions approved as bundled prior to March 2010 that would be considered “REC only” after that date.

In the first case, the ordering paragraphs of D.10-03-021, as modified by D.11-01-025, which determine that a transaction “conveying both RECs and energy” will be counted as a TRECs, do not define that transaction by what it is, but rather by what it is not. Namely, this

⁴ D.11-01-025, at p. 24.

TRECs transaction is any transaction that “does not meet the Commission’s criteria for considering a procurement transaction a bundled transaction.”⁵ Ordering Paragraph 7, however, does not include any such criteria, but instead only lists two types of “transactions,” joined by the word “and” (not “or”) that will be “treated as bundled transactions.” These transactions are identified as those that deliver energy to an identified first point of interconnection *and* “dynamically” transfer energy to a California balancing authority area.

Yet, in Appendix B to D.11-01-025, specifically incorporated in D.11-01-025 as Ordering Paragraph 5, a “REC-only transaction” that conveys RECs and energy is in fact defined by what it is:

“These REC-only transactions *currently* include all procurement from generators of RPS-eligible energy for which the first point of interconnection with the WECC interconnected transmission system is not a California balancing authority, and the transaction does not make use of dynamic transfer arrangements in a California balancing authority area.”⁶

This language not only contributes to confusion about what “these” REC-only transactions must be (potentially requiring a specific point of interconnection *and* dynamic transfer), but now adds further uncertainty by leaving the door open as to what transactions *may* be *added* to this definition. Neither D.10-03-021 nor D.11-01-025 detail how the RPS-obligated LSE, the Energy Division, or even the Commission will confirm that the “right” transactions are going to be counted toward the TREC usage limit.

The uncertainty created by such a vague “standard” or criteria is exacerbated by conflicting language on how previously approved transactions will be counted toward or impact the IOUs’ 25% TREC usage limit. Not only does such vagueness and conflict leave the door open for arbitrary implementation, but, with no findings of fact on impacts of the Commission’s

⁵ D.10-03-021, Ordering Paragraph 6, at p. 97 (not changed by D.11-01-025).

⁶ D.11-01-025, Appendix B, at p. 1; emphasis added.

orders in either D.10-03-021 or D.11-01-025, no party to date has any idea whether there is now, or will be, any “room” within the IOUs’ 25% TREC usage limit for any future REC-only transactions, including those that convey both RECs and energy.

Thus, D.11-01-025 maintains, with one minor modification, the following language of Ordering Paragraph 18 of D.10-03-021:

“18. The temporary limit on the use of tradable renewable energy credits for compliance with the California renewables portfolio standard shall not be applied to deliveries to a load-serving entity obligated under the California renewables portfolio standard from contracts that are classified by this decision as contracts for renewable energy credits only, but were approved by the Commission prior to the effective date of this decision, if such deliveries would cause that load-serving entity to exceed the annual limit on the use of tradable energy credits for compliance with the California renewables portfolio standard. In this circumstance, the load-serving entity may not use any tradable renewable energy credits associated with contracts that were not approved by the Commission prior to the effective date of this decision for compliance in that year that would exceed the 25% annual limit.”⁷

One possible reading of this language is that those transactions approved as bundled, that would be considered REC only after D.10-03-021, would continue to be treated as bundled if to do otherwise would cause the LSE to exceed its TREC usage limit. This interpretation, however, is undermined by the language that follows that, in fact, directs the LSEs to apply these deliveries to their TREC usage limit and, if that limit is exceeded, use those deliveries to prohibit any further TREC transactions.

This latter result conflicts both with the Commission’s discussion in D.11-01-025 and another, *unchanged* ordering paragraph from D.10-03-021. Specifically, the Commission offers the following justification in D.11-01-025 of its reasons for concluding that subsequent modifications to the expiration date or deliveries in “approved contracts” will subject the

⁷ D.11-01-025, at p. 43.

additional “incremental” deliveries to treatment according to the definitions adopted in D.10-03-021:

“That is, if a contract that is given bundled treatment is subsequently amended to extend the expiration date or to increase the maximum allowable deliveries, the incremental deliveries after the effective date of the contract amendment will be treated according to the then-applicable classification of REC-only and bundled deliveries, as of the date the amendment is effective.... Implementing these caveats will preserve the intent of treating approved contracts as bundled, while allowing existing contracts to be amended to meet future contingencies. Since the legitimate commercial expectations of the parties to contracts approved before the effective date of this decision do not, by definition, extend to transactions after that date, the incremental deliveries secured by amending the contract do not need the shelter of the safe harbor granted to the original contract.”⁸

This language evinces a clear intent that contracts previously approved by the Commission are *not* subject to the “classifications” adopted in D.10-03-021 if neither identified modification is made to those contracts after March 2010. However, that conclusion is undermined by the Commission retaining language in Ordering Paragraph 18 that appears to count previously approved contract deliveries toward the LSE’s TREC limit.

Such an outcome is the converse of the Commission’s intent in D.11-01-025 to in fact provide the “shelter of the safe harbor granted to the original contract” by *not* changing its classification *unless* it is or has been modified *after D.10-03-021* in one of two ways to create additional, incremental deliveries. It also conflicts squarely with *retained* Ordering Paragraph 6 of D.10-03-021, which states: “All deliveries from transactions described in subsection b, above [considered as REC only by D.10-03-021], made prior to the effective date of this decision will be *counted as bundled deliveries* of both renewable energy credits and energy for purposes of compliance with the California renewables portfolio standard.”⁹ This language and intent *not to transmute previously approved contracts* based on D.10-03-021 classifications are further

⁸ D.11-01-025, at p. 17.

⁹ D.10-03-021, OP 6, at p. 97; emphasis added.

reflected in the Commission’s determination in D.11-01-021 that contracts “conveying renewable energy credits only” could only first be submitted by the IOUs effective April 1, 2010, *after* issuance of D.10-03-021.¹⁰

Thus, to leave the language of Ordering Paragraph 18 as is, with no findings of fact providing even an estimate of the impact of these previously approved contracts on the LSE’s TRECs usage limit, creates an unacceptable chill on REC-only transactions of any kind. It may well be that these “previously approved” contracts will result in the IOUs’ meeting or exceeding their TRECs usage limits now, with no room for future TRECs procurement. Again, the Commission simply cannot conclude that it has “authorize[d] a *new* market in TRECs” by D.11-01-025 when it has no proof that its adopted usage limit, coupled with the conflicting language of its orders, will even permit any TRECs transaction at any point in the near term or future.

This confusion and chill on TRECs transactions can and must be removed by the Commission. In addition, the Commission must reconcile its “definition” of REC-only transactions in D.11-01-025 between that included in its ordering paragraphs and its “summary” in Appendix B and do so in a manner that does not leave that definition open-ended or vague. Such an outcome will not only chill the “market for TRECs” and procurement generally, but will leave the door open to arbitrary implementation of the Commission’s rules.

To that end, CEERT recommends the following changes in D.10-03-021, as modified by D.11-01-025, with additions shown in bold and deletions shown in bold strike-through:

- (1) Ordering Paragraph 6 of D.10-03-021 should be modified as follows:
 6. As of the effective date of this decision, a transaction for purposes of compliance with the California renewables portfolio standard shall be considered a **REC-only** transaction, **which will count toward a load-serving entity’s 25% annual TRECs limit** ~~that procures only renewable energy credits~~ if that transaction either:

¹⁰ D.11-01-025, at pp. 29-39.

- a. Expressly transfers only renewable energy credits and not energy from the seller to the buyer; or
- b. Transfers both renewable energy credits and energy from the seller to the buyer **either by a transaction that does not require the first point of interconnection with the WECC interconnected transmission system to be a California balancing authority or by a transaction that does not make use of dynamic transfer arrangements in a California balancing authority area. but does not meet the Commission's criteria for considering a procurement transaction a bundled transaction for purposes of compliance with the California renewables portfolio standard.**

All ~~deliveries from~~ transactions described in subsection b, above, **made approved** prior to the effective date of this decision, **according to the terms of the transaction as approved**, will be counted as bundled deliveries of both renewable energy credits and energy for purposes of compliance with the California renewables portfolio standard **and will not count toward nor affect the LSE's 25% annual TREC usage limit.**

(2) Ordering Paragraph 7 of D.10-03-021 should be deleted in full.

~~7. The following types of transactions shall be treated as bundled transactions for purposes of compliance with the California renewables portfolio standard:~~

- ~~a. Transactions in which energy is acquired from a generator certified as eligible for the California renewables portfolio standard and the generator has its first point of interconnection with the Western Electricity Coordinating Council interconnected transmission system with a California balancing authority; and~~
- ~~b. Transactions in which energy is acquired from a generator certified as eligible for the California renewables portfolio standard and the energy from the transaction is dynamically transferred to a California balancing authority area.~~

(3) Ordering Paragraph 18, as modified by D.11-01-025, should be further modified as follows:

18. The temporary limit on the use of tradable renewable energy credits for compliance with the California renewables portfolio standard shall not be applied to deliveries to a load-serving entity obligated under the California renewables portfolio standard from contracts that are classified by this decision as contracts for renewable energy credits only, but were approved by the Commission prior to the effective date of this decision **(March 11, 2010), if such deliveries would cause that load-serving entity to exceed the annual limit on the use of tradable energy credits for compliance with the California renewables portfolio standard. In this circumstance, the load-serving entity may not use any tradable renewable energy credits associated with contracts that were not approved by the Commission prior to the effective date of this decision for compliance in that year that would exceed the 25% annual limit.**

To the extent that such previously approved contracts are modified after March 11, 2010, in one of the two following ways, the resulting additional, incremental deliveries will be treated according to the then-applicable classification of renewable energy credits-only and bundled transactions and associated rules, including any limitations on their use for RPS compliance: ~~;~~ ~~The load-serving entity also may not use any tradable renewable energy credits in that year that would exceed the 25% limit from incremental changes to approved contracts in the event that either of the following changes occurs with respect to such a contract previously approved by the Commission:~~

- a. The expiration date of the contract is extended beyond the expiration date existing in the approved contract on March 11, 2010; or
- b. The deliveries allowed under the contract are increased beyond the maximum deliveries identified in the contract as the approved contract read on March 11, 2010.

~~In either event, all deliveries after the effective date of the contract amendment that are incremental to the deliveries set forth in the approved contract should be treated according to the then-applicable classification of renewable energy credits-only and bundled transaction and associated rules, including any limitations on their use for renewable portfolio standard compliance.~~

Alternatively, if these changes are not made, CEERT then urges the Commission to modify those orders in D.10-03-021, as modified by D.11-01-025, addressing the Energy Division's expected report on the TREC's market and add a more immediate call for a transparent confirmation, by Energy Division, of the impact on the RPS Program targets resulting from the treatment of previously approved contracts by these decisions. That report should also provide a list of all transaction types that the Commission intends to define as "REC-only." Again, defining "REC only" transactions in terms of a list of two types of "bundled" transactions" is not sufficient clarity to avoid arbitrary implementation of the Commission's orders.

To that end, CEERT recommends that the following Conclusions of Law and Ordering Paragraphs be added to D.11-01-025, with the only language difference being the use of the word "should" for the Conclusion of Law and "shall" for the Ordering Paragraph:

Conclusion of Law ___ / Ordering Paragraph ___: Within 60 days of the effective date of this Order, the Director of the Energy Division should [shall] publish a detailed listing

of all previously approved contracts that are now considered REC-only, the MWhr deliveries from these contracts that will now be considered REC-only, and the impact of those MWhr deliveries on each affected IOUs' APT, overall 20% RPS target, and annual TRECs usage limit. This information should [shall] be served on all parties to this rulemaking (R.06-02-012) and R.08-08-009 (RPS).

Conclusion of Law ___ / Ordering Paragraph ___: Within 60 days of the effective date of this Order, the Director of the Energy Division should [shall] publish a detailed listing of all transaction types that are to be considered "REC only" transactions effective March 2010. The assigned Administrative Law Judge should [shall] issue a ruling, appending and seeking comments on the list, served on all parties in R.06-02-012 and R.08-08-009. The Commission should [shall] issue a further order based on this record.

Finally, regardless of other actions taken by the Commission in response to this Petition, the Commission should at least act to resolve the vagueness as to when the Energy Division will "complete the work" needed "to determine how to characterize RPS-eligible transactions that use firm transmission arrangements, as authorized by OP 26 of D.10-03-021."¹¹ D.11-01-025 only "urge[s]" Energy Division "to complete this task as soon as practicable."¹² However, as stated throughout this Petition, clarity about the "classifications" that will apply to RPS transactions is a priority. For this reason, CEERT recommends that, to remove this uncertainty, the Commission modify D.11-01-025 to add the following Conclusion of Law/Ordering Paragraph:

Conclusion of Law ___/Ordering Paragraph ___: Within 30 days of the effective date of this Order, the assigned Administrative Law Judge shall issue a ruling establishing a schedule by which the Energy Division shall complete the work it began in April 2010 to determine how to characterize RPS-eligible transactions that use firm transmission arrangements, as authorized by OP 26 of D.10-03-021, with a final Energy Division report issued for comment no later than June 2011.

¹¹ D.11-01-025, at p. 32.

¹² Id.

**III.
CONCLUSION**

The RPS Program remains a cornerstone of this State's green energy policies. Ensuring clarity in the rules that apply to transactions needed for RSP-obligated LSEs to meet their 20% RPS goals is a priority. CEERT, therefore, urges the Commission to make the modifications to D.11-01-025 recommended herein to assure that the Commission's rules governing TREC transactions result in certainty, not confusion, as to their direction and application.

Respectfully submitted,

February 14, 2011

/s/ SARA STECK MYERS

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CERTIFICATE OF SERVICE

I, Sara Steck Myers, am over the age of 18 years and employed in the City and County of San Francisco. My business address is 122 - 28th Avenue, San Francisco, California 94121.

On February 14, 2011, I served the within document **PETITION OF THE CENTER FOR ENERGY EFFICIENCY AND RENEWABLE TECHNOLOGIES FOR MODIFICATION OF DECISION 11-01-025**, in R.06-02-012, with prescribed electronic service on the service list in R.06-02-012, with additional delivery by U.S. Mail of hard copies to Assigned Commissioner Peevey and Assigned ALJs Simon and Mattson, at San Francisco, California.

Executed on February 14, 2011, at San Francisco, California.

/s/ SARA STECK MYERS

Sara Steck Myers

**Electronic and U.S. Mail Service Lists
R.06-02-012 (RPS)
February 14, 2011**

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