



**BEFORE THE CALIFORNIA PUBLIC UTILITIES COMMISSION**  
**OF THE STATE OF CALIFORNIA**

**FILED**  
04-08-11  
04:59 PM

In the Matter of the Application of Golden State Water Company on Behalf of its Bear Valley Electric Service Division (U 913 E), for Approval of RPS Contract with BioEnergy Solutions, LLC, and for Authority to Recover the Costs of the Contract in Rates

Application No. 10-07-012

**RESPONSE TO INQUIRIES OF ASSIGNED ALJ**

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April 8, 2011

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In the Matter of the Application of Golden State Water Company on Behalf of its Bear Valley Electric Service Division (U 913 E), for Approval of RPS Contract with BioEnergy Solutions, LLC, and for Authority to Recover the Costs of the Contract in Rates

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**I. INTRODUCTION**

Pursuant to Assigned Administrative Law Judge Seaneen M. Wilson’s Ruling Requiring Golden State Water Company and the Division of Ratepayer Advocates to File a Joint Response to Information Request Within 10 Days (“Ruling”), dated March 28, 2011, the Division of Ratepayer Advocates (“DRA”), and Golden State Water Company (“GSWC”) on behalf of its Bear Valley Electric Service Division (“BVES”)<sup>1</sup> (together, the “Parties”) submit this Response to Inquiries of Assigned ALJ (“Response”). In the Ruling, ALJ Wilson states: “I find that more information is needed in order to process this Joint Motion.”<sup>2</sup> ALJ Wilson requested that the Parties jointly respond to the following questions:

1. State whether there is or is not a cost to GSWC in entering into the Option.
  - a. If there is a cost, provide annual amount GSWC is required to pay BioEnergy to maintain the Option and reference to this requirement in the Option.
2. Since any future contract for Biogas would require Commission approval, and if there is no cost to GSWC to maintain the Option with BioEnergy, why does GSWC believe Commission approval of the Option is required?<sup>3</sup>

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<sup>1</sup> The use of the terms “GSWC” or “BVES” in this Response are intended to be interchangeable unless indicated otherwise.

<sup>2</sup> Ruling at 1.

<sup>3</sup> Id. at 2.

On April 7, 2011, the Parties requested, and ALJ Wilson granted, a one-day extension for the Parties to file their Response.

## II. RESPONSE TO INQUIRES

### A. GSWC Will Incur Some Future Administrative Costs As a Result of Entering Into the Biogas Option Agreement

Question 1 asks if there “is or is not a cost to GSWC in entering into the Option.” Question 1a is more narrowly focused, in that it asks for the “annual amount GSWC is required to pay BioEnergy to maintain the Option” and requests a reference in the Biogas Option Agreement to make such annual payments.<sup>4</sup> In response to Question 1a, there are no out-of-pocket payments from GSWC to BioEnergy to maintain the Biogas Option Agreement.

However, out-of-pocket payments are not the sole costs that may be incurred by BVES in the future for which BVES may seek recovery. There may be future costs incurred by BVES in administering the Biogas Option Agreement. For example, Section V of the Biogas Option Agreement requires BioEnergy Solutions to provide written notice to BVES within 60 days of resumption of Biogas production. BVES intends to periodically determine, independently, whether BioEnergy Solutions has resumed Biogas production. When Biogas production is resumed, BioEnergy Solutions is required to provide actual and projected Biogas production information upon request of BVES.<sup>5</sup> By BVES monitoring future production of Biogas, it will enable BVES to determine whether, and to what extent, it wishes to exercise its option under the Biogas Option Agreement. Additional costs may occur in the event outside legal counsel is consulted regarding BVES’ legal rights under the Biogas Option Agreement. If the Biogas Option Agreement is not approved by the Commission, future costs incurred with respect to administering the Biogas Option Agreement or exercising BVES’ rights thereunder could be rejected as imprudent.

For these and other reasons, the Parties believe it is appropriate and necessary for the Commission to approve the Biogas Option Agreement.

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<sup>4</sup> Ruling at 2.

<sup>5</sup> Section V, Biogas Option Agreement at 2.

**B. GSWC Has Incurred Substantial Costs In Entering Into Biogas Option Agreement**

Approval or rejection of the Biogas Option Agreement does not relate solely to recovery of *future* costs. It also relates to recovery of costs *previously incurred* by BVES, including the drafting and negotiation of the Biogas Option Agreement.

All of BVES' outside legal and consulting costs relating to the preparation of the Biogas Option Agreement have been tracked in BVES' Renewable Portfolio Standard Memorandum Account ("RPS Memorandum Account").<sup>6</sup> BVES intends to file an application in May to recover costs booked in the RPS Memorandum Account, including costs related to the Biogas Option Agreement. A failure to approve, or an outright rejection of, the Biogas Option Agreement by the Commission could undermine and adversely affect BVES' ability to recover costs in the RPS Memorandum Account related to the Biogas Option Agreement.

**C. Commission Approval of the Biogas Option Agreement Is Essential for Additional Reasons**

Without Commission approval of the Biogas Option Agreement, the settlement of this matter will likely fall apart. Approval of the Biogas Option Agreement is the lynchpin of the settlement.

The Parties stated in the Settlement Agreement that the Biogas Option Agreement is the "centerpiece" of the Settlement Agreement.<sup>7</sup> The Parties agreed that the Settlement Agreement shall not become effective and shall be given no force or effect until the issuance of a final decision that accepts and approves both the Biogas Option Agreement and the Settlement Agreement.<sup>8</sup> It further provides that in the event the Commission rejects or materially alters the Settlement Agreement or the Biogas Option Agreement, the Parties are no longer bound by the terms of the Settlement Agreement.<sup>9</sup>

If the Biogas Option Agreement is not approved by the Commission, BVES will lose the very favorable pricing provisions (*i.e.*, a price equal to the lowest price of Biogas previously

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<sup>6</sup> The RPS Memorandum Account was established pursuant to Advice Letter 218-E, which was filed on July 31, 2007, and approved by Sean H. Gallagher, Director of Energy Division, by letter dated September 20, 2007.

<sup>7</sup> Settlement Agreement at 6.

<sup>8</sup> *Id.*

<sup>9</sup> Settlement at 2.

offered to another purchaser for a similar term and volumes of Biogas). This “most-favored-nation” pricing provision was extracted in the context of potential litigation against BioEnergy Solutions. Such a circumstance is not likely to be replicated in the future.

As noted in the Application, the price of the Biogas under the GPA was less than any viable bid solicitation BVES had received over a substantial time period.<sup>10</sup> The Biogas Option Agreement most-favored-nation pricing provision should result in prices even lower than the price of Biogas under the original GPA. Approval of the Biogas Option Agreement will preserve this extremely favorable pricing provision for BVES and its customers. Failure to approve the Biogas Option Agreement exposes BVES and its customers to the substantial risk that the price of Biogas may rise in the future.

Furthermore, if BVES does exercise its option under the Biogas Option Agreement, the Parties believe the submission for approval of the resulting biogas purchase agreement would be limited in scope and issues, resulting in an expedited process because all of the other key issues would have already been resolved in this proceeding (*i.e.*, reasonableness, justification, purpose, need, eligibility to RPS requirements, *etc.*). The subsequent consideration and approval by the Commission of the resulting biogas purchase agreement essentially would be to ensure that the Biogas Option Agreement had been properly exercised and assuage DRA’s concern that the favorable pricing provisions in the Biogas Option Agreement were reflected in the resulting biogas purchase agreement. Indeed, this expedited and narrowly focused review and approval process satisfies the needs and desires of both Parties.

Approval of the Biogas Option Agreement will also avoid any risk that use of biogas to fuel a peaking power plant will, at some point in the future, no longer be eligible to satisfy RPS requirements. In addition, BVES expects to soon face stiffer competition for RPS resources in light of the anticipated increase of RPS requirements from 20% to 33%. Given the considerable challenges BVES has faced and continues to face in meeting its RPS requirements, this additional risk should be avoided.

Moreover, the terms of the Biogas Option Agreement provide that the Agreement is subject to Commission approval. If the Commission fails to approve the Biogas Option Agreement, it is of no force or effect.<sup>11</sup> The Biogas Purchase Agreement (the original purchase agreement between BioEnergy Solutions and BVES, and referred to as the “GPA” in the

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<sup>10</sup> Application at 18.

<sup>11</sup> Section VII, Biogas Option Agreement at 3.

Application) only becomes null and void and is replaced by the Biogas Option Agreement if the Biogas Option Agreement is approved by the Commission.<sup>12</sup>

Without Commission approval of the Biogas Option Agreement, neither the Settlement Agreement nor the Biogas Option Agreement will become effective. The deal unravels and all parties – BVES, DRA and BioEnergy Solutions – are back to square one.

If the Settlement Agreement fails due to Commission rejection or failure to approve the Biogas Option Agreement, BVES would need to reevaluate its situation and determine its next course of action. If BVES were to decide it is prudent to pursue litigation against BioEnergy Solutions for breach of the original GPA for Biogas, this course of action would *only* be possible if the Commission approves the GPA (as originally proposed under the Application). Without Commission approval, the GPA will not be effective and BioEnergy Solutions cannot be held liable or be obligated to BVES for breaching the GPA.<sup>13</sup> In short, BVES believes it must first obtain Commission approval of the GPA before it can pursue litigation against BioEnergy Solutions for breach of the GPA. This scenario appears both costly and risky to BVES, BVES' customers, DRA and BioEnergy Solutions. There may be no winners under this scenario except, perhaps, BioEnergy Solutions. Approval of the Biogas Option Agreement avoids this costly and unnecessary risk to all parties. Approval also would be in accordance with the express desires of all interested parties to this proceeding.

### **III. INCURRENCE OF COSTS IS NOT A PREREQUISITE FOR COMMISSION APPROVAL.**

Approval by the Commission of the Biogas Option Agreement is the centerpiece of the settlement. Without it, the Parties believe the deal they struck will likely unravel. It should be noted that the request for withdrawal of BVES' Application for approval of the GPA is *contingent* upon Commission approval of the Biogas Option Agreement.<sup>14</sup>

As stated in the Joint Motion: “The Parties believe that the Settlement Agreement, which is dependent upon the approval of the Biogas Option Agreement, fulfills the criteria that the Commission requires for approval of such settlements in that it is reasonable in light of the whole

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<sup>12</sup> Section VIII, Biogas Option Agreement at 3.

<sup>13</sup> Section IH of the GPA provides that if CPUC approval is not obtained, the GPA shall not take effect, and neither party shall be liable or obligated to the other under the GPA or any related transaction confirmation. GPA at 4.

<sup>14</sup> Joint Motion at 5.

record, consistent with the law, and in the public interest . . .” The Parties furthered stated in their Joint Motion:

The key provisions of the Settlement Agreement are that the Parties agree that the execution of the Biogas Option Agreement preserves for BVES and its customers the core value of the GPA. Specifically, the Biogas Option Agreement provides an option for BVES to purchase renewable energy for BVES’ customers for ten years into the future, with an anticipated reduction in the price of Biogas as compared to the GPA. In addition, the Parties agree that the execution of the Biogas Option Agreement avoids potentially costly and time-consuming litigation between BVES and BioEnergy.

The Parties’ positions set forth above and in greater detail in their Joint Motion regarding the Settlement Agreement and the Biogas Option Agreement are unaltered. The Parties continue to support the package deal set forth in the Settlement Agreement, including the approval of the Biogas Option Agreement.

In addition, the Parties are unaware of any requirement that a request for Commission approval of an agreement must be predicated upon or demonstrate the incurrence of future, out-of-pocket costs. The Parties believe that the demonstration of benefits to BVES and its customers of the Biogas Option Agreement (*i.e.*, the option to purchase Biogas at potentially attractive prices and the avoidance of costly litigation between BVES and BioEnergy Solutions), coupled with the Commission’s strong public policy favoring settlement of disputes if they are fair and reasonable, clearly warrant Commission approval of the Biogas Option Agreement, along with the Settlement Agreement.<sup>15</sup>

#### **IV. CONCLUSION**

For the reasons stated above, the Parties urge the Commission to approve the Settlement Agreement and the Biogas Option Agreement without modification. Without approval of the Biogas Option Agreement, the Parties believe it likely, if not almost certain, that the settlement among BVES, DRA and BioEnergy Solutions will unravel. The Parties see no benefit to BVES, its customers, DRA or BioEnergy Solutions to have this settlement scuttled because BVES is not required to pay an annual fee to BioEnergy Solutions to maintain the Biogas Option Agreement.

Dated at San Dimas, California: April 8, 2011.

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<sup>15</sup> The Parties set forth, in some detail, their reasoning and support for approval of the Settlement Agreement and the Biogas Option Agreement. The Parties will not burden the record by restating their position in the Joint Motion.

Respectfully submitted,

By: /s/ Noel Obiora

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Respectfully submitted,

By /s/ Keith Switzer

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**CERTIFICATE OF SERVICE**

I certify that I have by electronic mail this day served a true copy of the attached RESPONSE TO INQUIRIES OF ASSIGNED ALJ on all parties listed on the attached Service List.

Dated: April 8, 2011, at Los Angeles, California.

/s/ Diana L. Cardenas

Diana L. Cardenas

**SERVICE LIST**

**Electronic service list for A.10-07-012**

**Updated: March 28, 2011**

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