

Decision 10-05-018 May 6, 2010

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

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

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

**DECISION STAYING DECISION 10-03-021  
AND IMPLEMENTING TEMPORARY MORATORIUM  
ON COMMISSION APPROVAL OF CERTAIN CONTRACTS**

**Summary**

This decision stays Decision (D.) 10-03-021, which authorizes the use of tradable renewable energy credits (TREC) for compliance with the renewables portfolio standard (RPS) program, defines TREC transactions for RPS purposes, and sets out market and compliance rules for the use of TREC. D.10-03-021 will be stayed pending resolution of the Joint Petition of Southern California Edison Company, Pacific Gas and Electric Company, and San Diego Gas & Electric Company for Modification of Decision 10-03-021 (filed April 12, 2010) and the Petition of the Independent Energy Producers Association for Modification of Decision 10-03-021 Authorizing Use of Renewable Energy Credits for RPS Compliance (filed April 15, 2010) (together Petitions for Modification). The stay is instituted on the Commission's own motion and goes into effect on the effective date of this decision. Additionally, pending resolution of the Petitions for Modification, this decision places a temporary moratorium on approval of any RPS contracts signed after the date of this decision that would be defined under D.10-03-021 as REC-only transactions.

## **Procedural Background**

The Commission issued Decision (D.)10-03-021 on March 11, 2010. On April 12, 2010, Southern California Edison Company (SCE), Pacific Gas and Electric Company (PG&E), and San Diego Gas & Electric Company (SDG&E) filed the Joint Petition of Southern California Edison Company, Pacific Gas and Electric Company, and San Diego Gas & Electric Company for Modification of Decision 10-03-021 (utility petition). Filed with the utility petition were the Joint Motion of Southern California Edison Company, Pacific Gas and Electric Company and San Diego Gas & Electric Company to Shorten Time to Respond to Petition for Modification of Decision 10-03-021 and for an Expedited Decision and the Motion of Southern California Edison Company and San Diego Gas & Electric Company for Stay of Decision 10-03-021 (joint stay motion).

On April 14, 2010, the assigned Commissioner issued the Assigned Commissioner's Ruling Setting Schedule for Consideration of Joint Petition for Modification of Decision 10-03-021 and Joint Motion for Stay of Decision 10-03-021 (ACR). The ACR shortened the time for responses and replies to the joint stay motion and for responses and replies to the utility petition.

On April 15, 2010, the Independent Energy Producers Association (IEP) filed the Petition of the Independent Energy Producers Association for Modification of Decision 10-03-021 Authorizing Use of Renewable Energy Credits for RPS Compliance (IEP petition). IEP also filed the Motion of the Independent Energy Producers Association to Shorten Time with its petition. The Administrative Law Judge's Ruling Granting Motion of the Independent Energy Producers Association to Shorten Time (April 16, 2010) aligned the timing of consideration of the IEP petition with that of the utility petition: responses to the utility petition and the IEP petition (together Petitions for

Modification) are due May 4, 2010; any replies to the responses are due May 10, 2010.

Responses to the joint stay motion were filed and served April 21, 2010.<sup>1</sup> SCE filed and served a reply to the responses to the joint stay motion on April 23, 2010.

As authorized by Rule 14.6(c)(1) of the Commission's Rules of Practice and Procedure,<sup>2</sup> the public comment period on the proposed decision is waived because temporary injunctive relief is under consideration.

### **Discussion**

The parties' arguments on the joint stay motion have been informative and useful in our consideration of a stay of D.10-03-021. This stay, however, is on our own motion and for our own reasons, as explained more fully below.

The Petitions for Modification raise significant questions about D.10-03-021 and seek wide-ranging changes to that decision. The utility petition seeks to:

- revise the criteria for determining what transactions are bundled transactions and what transactions are for renewable energy credits (RECs) only;
- apply the criteria only to contracts that are submitted for Commission approval after the effective date of the decision;

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<sup>1</sup> Responses were filed by the Alliance for Retail Energy Markets; Center for Energy Efficiency and Renewable Technologies; City and County of San Francisco; PG&E; Shell Energy North America; Sierra Pacific Industries; The Utility Reform Network; Union of Concerned Scientists; Western Power Trading Forum; and Sempra Generation.

<sup>2</sup> Unless otherwise indicated, all subsequent citations to rules refer to the Rules of Practice and Procedure, which are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations. References to sections are to the Public Utilities Code.

- eliminate the temporary limit on use of tradable renewable energy credits (TRECs) for compliance with the renewables portfolio standard (RPS) by the large utilities (or, at the least, apply it to all RPS-obligated load-serving entities and ensure that it sunsets at the end of 2011);
- expand the rules for “earmarking”<sup>3</sup> TREC contracts; and
- remove the requirement that the new standard terms and conditions set out in D.10-03-021 be added to RPS procurement contracts that have been submitted for Commission approval.

The IEP petition seeks to:

- revise the criteria for determining what transactions are bundled transactions and what transactions are REC-only transactions, proposing revisions different from those suggested in the utility petition; and
- expand the review of the least-cost best-fit methodology for RPS bid evaluation and set a time for its completion.

The Petitions for Modification call for extensive changes to a long and detailed decision. D.10-03-021 includes a number of rules, requirements, and processes for the use of TRECs for RPS compliance. Many sections of D.10-03-021 are connected to other sections, or to other Commission decisions, or to rules of other organizations, such as the California Energy Commission and the Western Renewable Energy Generation Information System. Any modifications to the decision will therefore need to be consistent with a range of requirements, both of this Commission and other agencies.

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<sup>3</sup> Earmarking is a flexible compliance mechanism by which deliveries from a future RPS procurement contract may be designated to make up, within three years, shortfalls in RPS procurement in the same year in which the earmarked contract was signed.

Commission consideration of the Petitions for Modification will thus be complex. The implications of any action the Commission takes on the petitions, whether making essentially all the requested changes, or no changes, or some changes but not others, will also be complex, and not easily predictable.

The Commission seeks an effective way to reduce the complexity and effort involved in both the consideration of the Petitions for Modification and the implementation of whatever decision the Commission ultimately makes on them. Reducing the number of transactions and regulatory actions that must be taken into consideration – and possibly reviewed or revised--based on the outcome of the Commission's review of D.10-03-021 is likely to aid in minimizing complexity and uncertainty during the pendency of the Petitions for Modification.

We therefore determine that, pending resolution of the Petitions for Modification, the public interest would be served by staying D.10-03-021. The stay of this decision would, among other things, temporarily suspend the initial steps to use TRECs for RPS compliance. Additionally, because of the ambiguity and regulatory uncertainty created by the pending Petitions for Modification, we place a temporary moratorium on Commission approval of any RPS contracts signed after the date of this decision that would be defined under D.10-03-021 as REC only transactions. We do not believe it would be prudent to allow new contracts to be signed and approved by the Commission until a greater level of certainty has been achieved regarding the rules that will apply to these transactions. The moratorium will remain in effect until the Petitions for Modification have been addressed. Consequently, exercising our authority under Pub. Util. Code § 701, we stay D.10-03-021 and initiate a temporary moratorium as described above.

### **Scope of Stay**

This stay has its primary effect on the authorization of the use of TRECs for RPS compliance made by D.10-03-021. By staying that decision, the Commission stays the authorization, as well as the rules, requirements, procedures, and reporting that follow on the authorization of the use of TRECs.

As discussed above, a principal purpose of this stay is to protect the public interest by minimizing the number and scope of actions with respect to the RPS program that may be subject to review, reconsideration, and/or revision once the Commission acts on the Petitions for Modification. One area of the RPS program on which the stay will have a readily foreseeable impact is the consideration of the 2010 RPS procurement plans of the three large utilities.<sup>4</sup> Pursuant to ordering paragraph 33 of D.10-03-021, the three large utilities are required to amend their 2010 RPS procurement plans to address each utility's anticipated plans for the use of TRECs to meet their RPS procurement obligations. In accordance with the Administrative Law Judge's Ruling of March 19, 2010, the large utilities provided those amendments on April 9, 2010. If the Commission conditionally approves the 2010 RPS procurement plan of any utility during the pendency of the stay set out in this decision, such approval would not constitute authorization to use TRECs for RPS compliance. Rather, it would express the Commission's conditional approval of the utility's plan for the use of TRECs, once the use of TRECs is again authorized. Alternatively, the Commission could decide not to conditionally approve utility plans for the use of TRECs until after the use of TRECs is again authorized.

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<sup>4</sup> These are PG&E, SCE, and SDG&E.

This stay and temporary moratorium does not invalidate any actions taken on the basis of D.10-03-021 prior to the effective date of this decision.

Because this stay and moratorium will be in place pending resolution of the Petitions for Modification, we need not address the issues raised in the joint stay motion, and thus, the motion is rendered moot.

### **Waiver of Comments on Proposed Decision**

Because temporary injunctive relief is under consideration, the 30-day public review and comment period required by Section 311 of the Public Utilities Code is waived, as authorized by Rule 14.6(c)(1) of the Commission's Rules of Practice and Procedure.

### **Assignment of Proceeding**

Michael R. Peevey is the assigned Commissioner and Anne E. Simon is the assigned Administrative Law Judge in this proceeding.

### **Findings of Fact**

1. D.10-03-021 affects many aspects of the RPS program and the renewable energy market.
2. The two Petitions for Modification of D.10-03-021 raise significant issues about and seek major changes to that decision.

### **Conclusions of Law**

1. In order to reduce the number and complexity of transactions and regulatory actions that may need to occur at the conclusion of the Commission's consideration of the two Petitions for Modification, a stay of D.10-03-021 should be issued, in addition to a temporary moratorium on Commission approval of any contracts signed after the date of this decision that would be defined under D.10-03-021 as REC-only transactions.

2. The temporary stay and moratorium should remain in effect pending resolution of the two Petitions for Modification.
3. Because a stay has been issued, the joint stay motion should be denied as moot.
4. In order to provide clarity and certainty, this decision should be effective today.

**O R D E R**

**IT IS ORDERED** that:

1. Decision 10-03-021 is stayed, pending resolution of the Joint Petition of Southern California Edison Company, Pacific Gas and Electric Company, and San Diego Gas & Electric Company for Modification of Decision 10-03-021, filed April 12, 2010, and the Petition of the Independent Energy Producers Association for Modification of Decision 10-03-021 Authorizing Use of Renewable Energy Credits for RPS Compliance.
2. A temporary moratorium is placed on Commission approval of any contracts signed after the issuance of this decision that would be defined under D.10-03-021 as REC-only transactions pending resolution of the Joint Petition of Southern California Edison Company, Pacific Gas and Electric Company, and San Diego Gas & Electric Company for Modification of Decision 10-03-021, filed April 12, 2010, and the Petition of the Independent Energy Producers Association for Modification of Decision 10-03-021 Authorizing Use of Renewable Energy Credits for RPS Compliance.
3. The temporary stay and moratorium imposed by this order do not invalidate any actions taken on the basis of Decision 10-03-021 prior to the effective date of this decision.



4. The Motion of Southern California Edison Company and San Diego Gas & Electric Company for Stay of Decision 10-03-021 is denied as moot.

This order is effective today.

Dated May 6, 2010, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
JOHN A. BOHN  
TIMOTHY ALAN SIMON  
NANCY E. RYAN  
Commissioners

I will file a concurrence.

/s/ TIMOTHY ALAN SIMON  
Commissioner

I reserve the right to file a dissent.

/s/ DIAN M. GRUENEICH  
Commissioner

I will file a concurrence.

/s/ JOHN A. BOHN  
Commissioner

I reserve the right to file a concurrence.

/s/ NANCY E. RYAN  
Commissioner

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**Concurrence of Commissioner Timothy Alan Simon**  
**Decision Staying Decision D.10-03-021**  
**A.06-02-012/D.10-05-018**

I support this Decision Staying D.10-03-021, as it affords us an opportunity to revisit the challenging issues associated with designing a balanced Tradable Renewable Energy Credits (TREC) regime. As voiced in the Petitions for Modification of D.10-03-021, there are numerous competing interests in this proceeding that clearly have not been fully vetted to the satisfaction of a consensus of parties to this proceeding. While some may view the action of staying D.10-03-021 as extreme or unnecessary, the success of our policymaking process hinges in part on the level of “buy-in” of the market participants that we regulate. Furthermore, this Decision will facilitate a review of the potentially irreparable harm that could be done to our western regional renewable energy marketplace if our TREC program is overly shackled by unnecessary regulatory protections.

With this Decision, we will have an opportunity to review many of the complex issues raised by Petitioners regarding the TREC program design options and their implications for the marketplace. In addition, in issuing a temporary moratorium on any Renewable Portfolio Standard (RPS) contracts that would be characterized as “REC-only” in D.10-03-021, this Decision prudently protects the public interest by minimizing the scope of transactions that may need to be reviewed and reconsidered once the Commission acts on the Petitions for Modifications.<sup>1</sup> This also means that any approval of the use of TREC in utility RPS procurement plans during the pendency of the stay of D.10-03-021 will be considered conditional until we again authorize the use of TREC.<sup>2</sup>

As I noted in my Concurrence to D.10-03-021, while I voted in favor of that Decision in order to establish a consensus opinion, I have concerns with the 25 percent cap on REC-only transactions, and would support

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<sup>1</sup> See Decision Staying D.10-03-021 and Implementing Temporary Moratorium on Commission Approval of Certain Contracts (D.10-05-018), May 6, 2010, at 6.

<sup>2</sup> *Id.*

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lifting this cap entirely.<sup>3</sup> Without specifically addressing the validity of the arguments levied by parties in their Petitions for Modifications at this time, I want to reiterate my support for an unmitigated western regional RECs market. It is my belief that constraining the TRECs market with an unnecessary cap could have the unintended consequence of increasing prices for renewables in the long run. Moreover, while I agree that we should carefully monitor the final version of the TRECs market that we authorize after reviewing the Petitions for Modification, it is essential that we establish a regime that facilitates efficiency and compliance with our 20 percent RPS target.

Our critically important TRECs program will ultimately benefit from increased cooperation between the CPUC and the California Energy Commission (CEC), particularly with regard to the functionality of the deliverability definition. In addition, some concerns have been expressed that an uncapped TRECs regime could delay California's achievement of its greenhouse gas (GHG) emissions reduction goals. I have always asserted that the regional and global nature of the climate change challenges that we face necessitate a regional approach to procurement planning that refrains from undue protectionism.

I look forward to reviewing the Petitions for Modification and remain optimistic that a balanced approach, an attempt to dispel certain myths about a western TRECs market, and the establishment of greater buy-in by parties will result in a more effective program in the long run.

Dated May 11, 2010, at San Francisco, California.

/s/ TIMOTHY ALAN SIMON

TIMOTHY ALAN SIMON

Commissioner

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<sup>3</sup> See Concurrence of Commissioner Timothy Alan Simon to D.10-03-021, March 17, 2010.

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**Dissent of Commissioner Dian M. Grueneich  
May 6, 2010 Business Meeting, Agenda ID# 9397, Item 34**

Less than two months ago, at the March 11, 2010 business meeting this Commission agreed, in a landmark 5-0 vote, to approve ALJ Anne Simon's decision on Tradable Renewable Energy Credits (TRECs). That decision institutes a clear definition of TRECs, states a strong policy preference for TRECs from new renewable generation throughout the Western United States, and places a 25% cap on the use of TRECs for compliance with the 20% Renewable Portfolio Standard.

Let me be very clear on one point - as I just stated the Decision deals solely with the 20% target, not the 33% target currently under consideration by the Legislature.

In the discussion of the March 11 Decision, my colleagues on this dais pointed out that we are currently operating under an unlimited REC market and agreed unanimously that the decision was necessary to place meaningful and prudent limits on the use of TRECs for RPS compliance. We all agreed that the Decision was reasonable, thoughtful and achieved the right balance for fostering a robust TREC market without sacrificing the statutory goals of the RPS law. This position was echoed in recent letters from legislators, the Union of Concerned Scientists, the Sierra Club, the Ella Baker Center for Human Rights, the California League of Conservation Voters, Green for All, and the Planning and Conservation League.

The Decision provides utilities with the flexibility they need to meet near term RPS targets, but prohibits the outsourcing of California's renewable economy. This vote was the culmination of more than 4 years of careful debate

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and deliberation among all parties and it is the right policy decision for consumers, for the environment and for the economy.

Today we are presented with a proposed decision that grants Southern California Edison and San Diego Gas and Electric's Request to Stay the unanimous Commission Decision.

This proposed decision is ill-advised in many respects. First, the draft decision was issued just 7 days ago and a revised version was issued yesterday afternoon. The parties to the proceeding have been denied a fair opportunity to comment or to be heard. This rush to judgment violates our procedural rules and processes and is unprecedented. The lack of process is a serious legal flaw because the question before this Commission on whether to grant a stay is a question of fact, i.e., whether the petitioners would suffer irreparable harm if the stay is not granted.

Second, the details of Edison and San Diego's request and the pending petitions for modification of the March 11 Decision contain no facts or legal arguments which have not already been carefully weighed by our Energy Division staff, Judge Simon, the parties to the proceeding, and each of the Commissioners. In fact, nothing has changed in the intervening weeks except relentless lobbying by the utilities at this Commission and in Sacramento to overturn a decision they dislike.

Third, the stay of the March 11 Decision, is bad policy that runs counter to every action of this Commission on renewable energy and counter to every promise of building a new renewable economy in California. Since the RPS mandate was first signed into law, one message that has been repeated again and again from developers, from investors and from members of this Commission itself, is that market players need certainty and consistency in decision making in

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order to make long term investments in California. This decision will disrupt renewable energy markets, threaten financing for existing and future projects, and compromise the careful work of the Governor's office to ensure that renewable energy projects obtain their CEC permits and break ground expediently.

The March 11 decision is consistent with our efforts and massive investments in building renewable generation in California. Over the past 3 years in California, we have approved construction of 5 major transmission projects to access renewable energy at over 6 billion dollars in ratepayer cost. The analysis of need and basis for approving these lines was based on carrying renewable energy in order to achieve the RPS goals. We have also approved over 3,000 MW of new, bundled renewable energy projects to fill these lines with renewable energy. Opening the door to unlimited outsourcing of renewable energy production threatens to strand the investments ratepayers have already made in this transmission infrastructure.

Fourth, the utilities suffer no irreparable harm from the March 11 Decision. The fact that the Stay imposes a moratorium on Commission approval of new TREC contracts supports the finding of no irreparable harm. California's utilities are fully capable of meeting 100% of their RPS targets with bundled renewable energy projects; the utilities already have enough bundled contracts in the pipeline to achieve this goal. California is poised to exceed its RPS targets with renewable generation that is either currently operating, under contract, or which will result from the Commission's other renewable programs, such as the utilities' solar PV programs. Currently, the missing link in turning that potential into reality is effective and consistent policies that encourage and promote in-state renewable project development. Staying a critical decision that sets an

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important policy framework for bundled renewable projects threatens to undermine all of these efforts.

Fifth, as I stated in my concurrence to the March 11 Decision, unlimited use of TRECs threatens the state's ability to meet the AB 32 emissions reductions goals. TRECs do not offset any existing fossil fuel generation and result in no net reductions in GHG emissions in California.

Sixth, by granting this stay, this Commission undermines its own decision-making and integrity as an institution. How can any consumer, business, investor or lawmaker take us at our word when we adopt a unanimous decision that was four years in the making and in less than 60 days flip-flop with no apparent rhyme or reason.

Finally as I noted above, the revised Stay issued yesterday afternoon places a moratorium on the PUC's approval of new TRECs contracts. However, the Stay does not place a moratorium on the approval of TRECs contracts representing 5,000 gigawatt hours per year that the IOUs have already filed with the Commission. The Stay does not prohibit the utilities from continuing to execute TRECs contracts and thus provides little or no assurance that the flow of short term deals with existing facilities will stop. It also diverts attention from the real issue at hand - that this Commission has no basis in law or policy to stay or reverse the March 11 Decision. At heart, the Stay is a signal that this Commission has prejudged the applications for rehearing.

The statements by my colleagues and myself on March 11 still hold true today. The March 11 decision strikes the right balance between promoting new generation and encouraging near-term RPS compliance through TRECs. There have been no changes in facts, laws or policies since March 11 that support a relook at our decision, whether in the form of a stay or a petition for

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modification. The fact remains that there is no need for unlimited TRECs to achieve the 20 percent, or indeed, the 33 percent RPS goal, and much potential for harm to ratepayers from our failure to stick with our prudent and reasonable framework for TRECs.

For these reasons I reaffirm my support of ALJ Simon's March 11 decision and vote no on Item 34.

Dated, May 6, 2010, at San Francisco, California.

/s/ DIAN M. GRUENEICH  
Commissioner



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### **CONCURRENCE OF COMMISSIONER BOHN**

It is with a profound sense of frustration that I concur with this decision. Our original decision, which we now stay, provided a reasonable balance between the very real need to encourage development of renewable resources in California and the equally real need to provide flexibility in reaching our greenhouse gas goals. It was crafted to recognize the areas of conflict between these goals and the reality that any long-term progress toward greenhouse gas reduction requires at the least a regional solution and collaboration among the western states. If we fail to recognize that fact, we will impose upon our citizens and ratepayers, as well as those of other states, large, unnecessary costs, duplication of effort and inefficient results.

Yet again California has proven its skeptics correct. This Commission had issued a decision providing a workable means to move forward, with guidance to those we ask to help us meet our goals and encouraging investment. We now change that decision, thereby adding more uncertainty to any investment decision, whether it be capital to our utilities, what's left of California's large business community or of the engine of our economy, the small business sector. At a time when we are putting increasing burdens on our ratepayers, when the economy is still troubled and capital is in short supply, we are saying to those who provide the needed investment to achieve our goals "Wait! We didn't really mean what we said just a few weeks ago. Whatever you do is riskier and you better rethink investing in California or ask for a higher premium."

While I am deeply troubled by this decision, I do support it. The Commission cannot provide reasonable guidance without the support of our state government at the policy level. To leave our prior decision in place, while the Legislature and Governor continue to disagree over these issues, would provide an even worse result, the appearance of certainty where there is none. Reluctantly, I concur with this decision with the hope that the leadership of this state will in fact lead and move expeditiously and meaningfully forward with some resolution of this matter, recognizing that every to and fro rocks not the cradle, but the image of our state, makes capital more expensive and harder to come by, and thereby increases the costs and burdens on California's ratepayers.

Dated May 6, 2010, San Francisco, California.

/s/ JOHN A. BOHN  
Commissioner