

procurement targets of RPS-obligated sellers.¹ This change could dramatically undermine the development of new renewable resources expected by the legislature and all stakeholders.

Public Utilities Code §399.12(a)(3) precludes RPS eligibility for any existing small hydroelectric facility unless it was owned or procured by a California electric utility on January 1, 2003. Output from existing facilities “procured or owned” by a utility as of that date is eligible “only for purposes of establishing the baseline. . .” This section of the statute should be understood to limit the eligibility of existing, in-state hydro to facilities that were contained in utility resource portfolios as of the date of enactment, and further limiting the eligibility of that hydro by counting it only towards the baseline. Thus, the Commission’s initial interpretation (as contained in the adopted Guidebooks) is the correct one. The interpretation underlying the proposed revisions to the “small hydroelectric” subsection (beginning on page 11) is unreasonable because it would provide unrestricted eligibility to existing hydro outside the utility portfolio while restricting the eligibility of hydro resources in a utility portfolio at the time SB 1078 was enacted.

This proposed revision to the small hydro subsection is greatly compounded by the Guidebook’s erroneous interpretation of the requirements for out-of-state generators, which fails to require that out-of-state generators be newly developed as required in P.U. Code §399.16(b). That code section prohibits any out-of-state renewable generator from being eligible for the RPS unless “it is developed with guaranteed contracts to sell its generation, and demonstrates delivery of energy, to a retail seller or the Independent System Operator.” We discuss this issue at greater length in the next section.

The Commission’s failure to establish Guidelines consistent with this “newly developed” requirement, combined with the proposed revision to small hydro eligibility, would make eligible for the RPS more than 1,900 MW of existing, out-of-state small hydroelectric facilities. If this generation is eligible to satisfy the California RPS, the effect on new non-hydro renewable resource development could be profound. And, because the resale of this generation into California is likely to be replaced with new gas and coal-fired generation throughout the WECC, the purchase of such resources by California retail sellers could actually produce detrimental environmental and consumer impacts. Pollution from coal-

¹ According to the CEC’s Renewable Resources Development Report, issued November 2003 (p. 34), “there are close to 1,900 MW of existing small hydroelectric facilities in the WECC states outside of California. Using a capacity factor of 35 percent, average energy production from these facilities is estimated to be almost 5,800 GWh/year.” In-state existing small hydroelectric facilities outside of utility portfolios (e.g., in a municipal utility portfolio) as of 2003 would be in addition.

fired facilities may increase, reliance on fossil fuels would not decline, and market price volatility would not be dampened.

The primary objectives of the RPS will be undermined if the Commission does not reject the proposed revisions to small hydro eligibility and correct the Guidebook's requirements for out-of-state facilities, as discussed next. Both changes are essential to meet the intent of the RPS eligibility requirements in SB 1078.

B. THE GUIDEBOOK MUST BE REVISED TO REQUIRE OUT-OF-STATE FACILITIES TO BE DEVELOPED WITH GUARANTEED CONTRACTS TO SELL POWER TO CUSTOMERS OF CALIFORNIA'S INVESTOR OWNED UTILITIES

In comments submitted on April 14, TURN/CalWEA explained that the draft guidebooks failed to include the RPS eligibility requirement that out-of-state renewable facilities be "developed with guaranteed contracts" to sell power to end-users subject to the funding requirements of §381 of the Public Utilities Code.² The final guidebooks, and the pending set of proposed revisions, fail again to address this concern.

The proposed revisions modify the eligibility criteria for out-of-state facilities but fail to correctly implement the relevant section of the Public Utilities Code. Instead, the revisions propose that any out-of-state facility would be eligible if it "has a guaranteed contract to sell its generation to an IOU or the California Independent System Operator (CA ISO)."³ Since the guidebook omits the requirement that the facility be "developed" with a guaranteed contract with an RPS-obligated entity, all existing renewable resources throughout the WECC would be eligible under the California RPS. This outcome is contrary to the plain language of §399.16 and must be modified to conform to the clear intent of the legislature.

Apart from the need to adhere to statutory language, the Commission must take into account the practical implications of this change. Failure to implement and enforce this provision would allow existing out-of-state renewables capacity previously developed to supply other buyers in the WECC to redirect historical levels of output to serve California retail sellers. This practice could result in no net increase in the total amount of renewable energy produced throughout the

² SB 1078, P.U. Code section 399.12 (a)(1) defines an eligible renewable resource as a facility that meets the definition in section 383.5. Section 383.5 (d)(2)(B)(ii) requires out-of-state facilities to be "developed with guaranteed contracts to sell. . ." SB 67, section 399.16, reiterates this requirement.

³ RPS Eligibility Guidebook with proposed revisions, page 19.

region since the bulk of WECC states have not adopted RPS policies that would require in-state retailers to maintain their existing levels of renewable energy.

The Commission has identified approximately 14,400 Gwh/year of production from existing out-of-state renewable generation that would become RPS-eligible under the criteria contained in the Guidebook. This total includes 8,600 GWh/year of biomass, geothermal, and wind, along with 5,800 Gwh/year of small hydro.⁴ The total amount of generation (14,400 Gwh/year) equals 9.2% of bundled retail sales by California's investor-owned utilities. Since preliminary determinations of current utility procurement show that 13.6% of bundled sales are supplied by in-state renewable resources, the Commission must recognize that out-of-state resources could satisfy the bulk of retail sellers' RPS procurement needs and thereby displace most, if not all, near-term renewable resource development.⁵

Having been closely involved in the development of the statutory language, TURN and CalWEA can attest to the fact that the intent of sections permitting out-of-state resources to qualify was to prevent such an outcome. The legislature did not intend for the RPS to encourage or allow a rearrangement of deliveries from existing renewable resources throughout the WECC. The objective of the RPS program is to protect California's existing base of renewable resources and promote the development of new renewable generation within or outside of the state in order to promote environmental objectives, lessen the use of fossil fuels, and reduce energy price volatility. The CEC must therefore include the "developed with guaranteed contracts to sell" requirement contained in §399.16 in the RPS eligibility criteria. Under this language, any newly-developed renewable generation in the WECC would be eligible to satisfy California RPS requirements subject to the other limitations identified in the guidebooks.

Failure to address this issue will only create uncertainty and invite future legal challenges to the eligibility of out-of-state resources that do not satisfy the statutory criteria. As indicated in previous comments, TURN plans to raise such legal challenges in the event that any California retail seller proposes to use a non-conforming out-of-state resource for compliance purposes. The Commission should eliminate this litigation risk by incorporating the statutory requirements in these guidebooks.

C. THE GUIDEBOOK SHOULD SPECIFY THE MEANING OF
"DEVELOPED WITH GUARANTEED CONTRACTS TO SELL . . ."

⁴ CEC Renewable Resources Development Report, issued November 2003, p.33-34.

⁵ This figure is derived from the CPUC's Order Instituting Rulemaking 04-04-026, page 4.

Although the RPS Eligibility Guidebook does not include the “developed with contracts” criteria in the RPS eligibility requirements for out-of-state facilities, it does apply that criteria to any generator seeking an award of Supplemental Energy Payments (SEPs).⁶ However, there is no interpretation of the phrase or explanation as to how sellers will certify compliance with this requirement. The requirement must be applied to both RPS eligibility and SEP awards. The Commission should clarify that an out-of-state facility must have been initially constructed as a direct result of a new contract to sell output to end-use customers of a California IOU, a California Electric Service Provider (ESP) or a California Community Aggregator.

TURN/CalWEA strongly encourage the Commission to provide greater clarity on this criterion in order to avoid after-the-fact disputes over eligibility. RPS-obligated retail sellers need assurances that products selected through competitive solicitations will be deemed eligible for satisfying compliance obligations. Failure to elaborate on the exact application of this standard could lead to conflicting opinions on eligibility for specific projects and thereby create disputes over the very first round of RPS solicitations scheduled for the summer of 2004.

D. HYBRID SYSTEMS USING FOSSIL FUELS SHOULD NOT RECEIVE FULL RPS CREDIT FOR EACH KILOWATT-HOUR OF OUTPUT

The proposed revisions to the eligibility criteria applicable to hybrid systems that partially rely on fossil fuels to generate electrical output would allow any new Qualifying Facility (QF) to use up to 25% natural gas while counting 100% of its output towards RPS annual procurement targets. TURN/CalWEA oppose this change and fail to understand why the Commission believes that allowing electricity produced by natural gas should count towards the RPS targets.

The proposed revisions also create an arbitrary distinction between generation units that receives QF certification and those that do not. QFs would be permitted to count 100% of output as renewable so long as fossil fuel use stays at or below the 25% threshold established by the Federal Energy Regulatory Commission. Non-QFs would only be allowed to count the “renewable portion of the electricity production” for RPS purposes.⁷

CalWEA believes that existing QFs that rely primarily on renewable energy should get full renewables credit for all output, but that the output of all new facilities should be pro-rated according to renewable and non-renewable inputs.

⁶ RPS Eligibility Guidebook, page 19.

⁷ RPS Eligibility Guidebook with proposed revisions, page 17.

TURN urges the Commission not to make the proposed change that would allow 25% of “renewable” output from all renewable QFs (new or existing) to be generated through the combustion of fossil fuels. The RPS program was not established to encourage additional gas-fired generation, nor did the legislature intend to allow gas-fired production to either count towards RPS targets or be eligible for SEPs. While it is appropriate for existing hybrid renewable QFs to continue to use fossil fuel, as necessary, to generate some portion of electrical output, there is no reason to count this output towards the annual procurement targets of an RPS-obligated retail seller.

Respectfully submitted,

Matthew Freedman
Staff Attorney
The Utility Reform Network
711 Van Ness Avenue #350
San Francisco, CA 94102
(415) 929-8876
freedman@turn.org

Nancy Rader
Executive Director
California Wind Energy Association
1198 Keith Avenue
Berkeley, CA 94708
(510) 845-5077
nrader@calwea.org

May 17, 2004