

**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)

**INDIVIDUAL REPLY POST-WORKSHOP COMMENTS OF THE
CALIFORNIA WIND ENERGY ASSOCIATION AND THE
LARGE-SCALE SOLAR ASSOCIATION REGARDING
IMPLEMENTATION OF SB 1036**

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July 14, 2008

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I. INTRODUCTION

Pursuant to Administrative Law Judge (“ALJ”) Simon’s ruling on June 20, 2008, the California Wind Energy Association (“CalWEA”) and the Large-scale Solar Association (“LSA”) hereby submit their Individual Reply Post-Workshop Comments (“Reply Comments”) on the unresolved issues regarding the implementation of Senate Bill 1036 (“SB 1036”) (“Individual Comments”). On June 27, 2008 counsel for CalWEA/LSA sought and obtained a ruling by ALJ Simon that extended the time for filing opening comments to July 8 and reply comments to July 14.

Despite the consensus on a majority of issues, CalWEA and LSA differ from the investor-owned utilities (“IOUs”) and the Division of Ratepayer Advocates (“DRA”) and The Utility Reform Network (“TURN”) in several areas. To begin, the AMF balance must be made publicly available to provide interested parties information about the critical status of the RPS program as to prevent AMF information from becoming an unfair and improper negotiating advantage. Moreover, additional viability criteria or other enhanced review for evaluating power purchase agreements (“PPAs”) that seek AMFs, whether or not in the context of contract

amendments for price increases, are counter to SB 1036's intent, which is to streamline, not complicate, the renewable PPA process—and will do far more harm than good. Further, SB 1036 does not restrict AMFs to in-state projects, and they should be available to out-of-state projects. As well, TURN's notions that bilateral contracts should be subject to a wholly new cost cap, and evaluated more stringently than solicitation contracts are without any statutory basis, conflict with Commission precedent and are well beyond the scope of the Commission's inquiry here. Additionally, TURN's recommendation that the Commission should automatically reject PPAs at any set level above the market price referent ("MPR") once AMFs are exhausted is directly contradicted by SB1036, which explicitly requires the Commission to consider the merits of proposed contracts above the MPR regardless of the availability of AMFs. Finally, SDG&E's and TURN's proposal that price re-openers should be subject to additional justification review, including review of developers' present cash-flow and financial models, is inconsistent with SB 1036, which states that RPS procurement is subject to comparison against the market price of long-term power contracts.

II. RESPONSE

A. SB 1036 Guiding Principles

3. Should all contracts that are eligible for AMFs and approved by the Commission be required to be applied toward the AMFs cost limitation? Please include a legal argument based on Pub. Util. Code § 399.15(d) and/or other relevant sources.

Each of the IOUs self-servedly argues that all AMF-eligible contracts approved by the Commission must be counted against AMFs in order to wrest themselves from RPS requirements at the earliest possible date. It appears that their concern is that the Commission will, on its own initiative, approve an AMF eligible contract for which the IOUs sought AMF allocation, but not allocate AMFs to that contract. Indeed, TURN and DRA suggest that the language of Public

Utilities Code § 399.15 provides the Commission with discretion to decide whether to count contracts that are eligible for AMFs toward the cost cap, regardless of what the IOUs have decided (although TURN also says that the Legislature intends that the Commission not have discretion).¹ CalWEA and LSA do not take a position on this issue.

What is clear, however, as discussed in CalWEA's and LSA's Opening Comments, is that the IOUs have the discretion to determine whether to seek to apply AMFs to an above-MPR contract. The Commission should keep these two issues separate; by the express terms of SB 1036, the Commission may not divorce the IOUs from this discretion.

Administration of AMFs

B. Administration of AMFs

"4. RPS Procurement after AMFs are exhausted."

- Propose a methodology for notifying an IOU and other parties when AMFs are exhausted.

CalWEA and LSA do not take a position on how often the AMFs should be updated; however, CalWEA and LSA do not agree with the IOUs' position that the true-up should be maintained as confidential information, regardless of when such true-up occurs.² CalWEA and LSA recognize that confidential price information must be protected, but believe that aggregation and provision of updates at reasonable intervals would provide reasonably balanced protection of all of the interests concerned.

Access to such RPS information is in the public interest, and Commission policy favors greater access to information, not less. Indeed, the Commission's general policy is that records be available for public inspection.³ Additionally, the Commission established in Decision

¹ TURN Comments, p. 3; DRA Comments, p. 4.

² SDG&E Comments, p. 14; PG&E Comments, p. 6 ; SCE Comments, p.

³ Decision 91-12-047.

06-06-066, *Interim Opinion Implementing Senate Bill No. 1488, Relating to Confidentiality of Electric Procurement Data Submitted to the Commission*, that there should be greater access to RPS information “due to the strong public interest in the RPS program.”⁴ Indeed, the Commission has held that “RPS information should be public,” and the Commission authorized only narrowly-tailored confidentiality. Thus, in keeping with the Commission’s policy regarding openness and the RPS program, the IOUs should make the AMF balance information available to the public.

Further, SDG&E’s argument that such public disclosure will improperly influence bidding behavior does not provide adequate justification for nondisclosure.⁵ Bidding behavior is complicated; idiosyncratic to each particular bidder and completely outside of the Commission’s control. A myriad of factors influence how a developer sets its bid price, and knowing the status of the AMFs will not necessarily sway the pendulum in one direction or the other. The Commission should not attempt to keep important information concerning the status of the RPS program confidential based upon claims that knowledge of such information will influence bids. Rather, IOUs should conduct their own due diligence regarding the viability of bids and the reasonableness of the offered contract price and enter into contracts only at a reasonable price for the product being offered. Such due diligence will make greater strides at “normalizing” bid prices than IOU attempts to keep the account balance of AMFs to themselves. Indeed, greater transparency and more information in the public domain will lead to better informed bidders, and avoid the potential that, in the absence of AMF information kept only in IOU hands, developers might be driven to underestimate costs due to fear that IOUs, having already exhausted the AMFs, will be empowered to walk away from higher bids.

⁴ Decision 06-06-066 at 59.

⁵ PG&E Comments, p. 8; SCE Comments, p. 7.

Finally, public dissemination of AMF status will allow all parties involved, including the Commission, IOUs, suppliers and ratepayers to anticipate the exhaustion of AMF funds in time for rational public debate rather than in response to urgent crisis. This is extremely important information pertaining to the status and success of the RPS program. Indeed, CalWEA and LSA have difficulty contemplating how presumably the Commission would give the reason upon its occurrence would be in the public interest for the public to find out that the AMFs are exhausted only upon its occurrence.

C. Revoking AMFs

- Identify situations when AMFs should be revoked.
- Propose a methodology for revoking AMFs.

Both PG&E and SCE argue that AMFs should only be revoked if a contract is terminated.⁶ If this rule were adopted, the Commission would have to hold the IOUs accountable to act responsibly in ensuring that non-viable contracts that will never come to fruition do not linger, tying up limited AMFs—a very difficult task, as the reemergence of AMFs would re-invoke the IOUs’ above-MPR contracting requirement, creating a perverse incentive for IOUs to keep non-viable contracts in suspended animation. The Commission should require the IOUs to propose reasonable time limits to achieve milestones for contracts awarded AMFs

D. In-state versus out-of-state

- Please discuss whether the Commission should implement additional AMFs eligibility criteria (e.g., AMFs should be awarded only to in-state renewable generation facilities as defined in Pub. Res. Code § 25471). Please provide any necessary legal and policy justifications for your suggestion, including for a suggestion that no additional criteria are needed.

⁶ PG&E Comments, p. 8; SCE Comments, p. 7.

Both TURN and DRA argue that AMFs should be awarded to in-state projects only and argue that out-of-state projects do not confer the benefits of renewable power on the citizens of California.⁷ Such a position is contrary to the explicit language of the statute and is not logical in light of current law and Commission policy. For instance, Public Resources Code § 25741(b)(2) defines “in-state renewable electricity generation facilities” as including out-of-state facilities that meet certain criteria delineated in the statute and deliver renewable power in-state to California customers. Energy delivered to California from renewables, consistent with the intent of California’s RPS statutes, provides economic values of reducing California’s reliance on fossil fuels, increasing overall reliability by providing diversification of energy sources, reducing in-state pollution and associated health impacts, and reducing the greenhouse gas impacts of California’s energy consumption. CalWEA and LSA are further concerned that requiring recipients to be located in California may be inconsistent with federal law.

E. Reasonableness Review

In its comments, SDG&E recommends that when seeking price re-openers, developers should be required to justify the new price through a thorough review of all project costs.⁸ TURN recommends that when addressing price re-openers, the Commission should either require developers to provide documentation concerning project costs, including the financial models, as SDG&E suggests, or, alternatively, re-evaluate the contract price against the bid supply curves in the most recent solicitation.⁹

CalWEA and LSA disagree with any proposal that requires developers to provide such cash-flow models or documentation, as stated in CalWEA’s and LSA’s Individual Opening

⁷ TURN Comments, p. 2-3.

⁸ SDG&E Comments, p. 10.

⁹ TURN Comments, p. 8.

Comments at p. 5-6. Rather, as TURN suggests in part, any price re-opener should be compared against the market price for long-term power contracts. Indeed, in re-evaluating the appropriate price for a contract, the best indicator of price is current market values. An examination of a developer's cash-flow model is overly intrusive, and there exists no statutory or other basis for such intrusive examination of third-party developer's profit margin.

Additionally, TURN suggests in its comments that heightened evaluation criteria should be applied to above-MPR projects that require more than \$50 million in AMF funding in order to "minimize drop-outs from the queue."¹⁰ CalWEA and LSA disagree. Although CalWEA and LSA recognize that no interests are served if a non-viable project ties up AMFs, the Commission is best suited to address this potential problem during the normal contract review and approval process. As with every contract, the Commission reviews the rationality of the price of the contract in relation to the product being purchased (including the amount of energy that results) and makes a determination as to whether the contract is reasonable. Given that the IOUs may be able to obtain relief for their RPS procurement target, for "developer non-performance," the Commission should not approve any non-viable contracts, whether or not AMFs apply.

F. Exhaustion of AMFs

TURN argues that once the AMFs are exhausted, the Commission should automatically reject contracts that are above the MPR or, confusingly, to evaluate them on a "stand-alone basis" similar to bilateral contracts.¹¹ To the extent that TURN is arguing for automatic rejection of any kind, this position contradicts the discretion granted to IOUs to enter into RPS contracts, subject to Commission approval pursuant to

¹⁰ TURN Comments, p. 6-7.

¹¹ TURN Comments, p. 7.

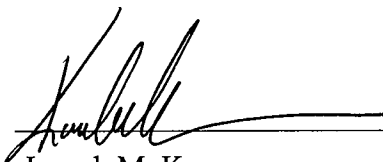
Public Utilities Code § 399.15(d)(2)(E)(4), which explicitly states:

Nothing in this section prevents an electrical corporation from voluntarily proposing to procure eligible renewable energy resources at above-market prices that are not counted toward the cost limitation. Any voluntary procurement involving above-market costs shall be subject to commission approval prior to the expense being recovered in rates.

As stated in CalWEA's and LSA's Individual Opening Comments at p. 3-4, the above statute is dispositive of the issue. To the extent that TURN is simply stating that above-MPR contracts are subject to Commission review for reasonableness after AMF exhaustion, CalWEA and LSA certainly agree.

III. CONCLUSION

In sum, CalWEA and LSA respectfully submit these Individual Reply Comments in addition to the Joint Parties' Joint Comments on the AMF issues identified by the Commission at the AMF Workshops.



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July 14, 2008

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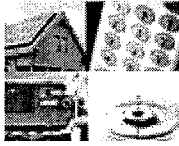
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Executed on July 14, 2008 at San Francisco, California.


Peggy Jane Basa



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