

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

Order Instituting Rulemaking to Continue
Implementation and Administration of California
Renewables Portfolio Standard Program.

Rulemaking 11-05-005

(filed May 5, 2011)

**OPENING COMMENTS FILED BY THE CENTER FOR RESOURCE
SOLUTIONS
ON DECISION IMPLEMENTING PORTFOLIO CONTENT CATEGORIES FOR
THE RENEWABLES PORTFOLIO STANDARD PROGRAM**

Robin Quarrier
Counsel
Center for Resource Solutions
1012 Torney Ave., 2nd Floor
San Francisco, CA 94129
Tel: (415) 568-4285
Fax: (415) 561-2105
Email: robin@resource-solutions.org

Attorney for CENTER FOR RESOURCE SOLUTIONS

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I. Introduction

The Center Resource Solutions (“CRS”) respectfully offers these comments on the Administrative Law Judge’s Proposed Decision Implementing Portfolio Content Categories (“Proposed Decision”) for the Renewables Portfolio Standard Program (“RPS”) pursuant to Pub. Util. Code §399.16 (2011). In these comments, CRS recommends removal or clarification of the tenets proposed on page 14, “What you buy is what you have.” and “What you have is what you retire for RPS compliance,” for the process of determining compliance with the portfolio content categories. To refer to these simplified rules of thumb as “tenets” may cause confusion in the event that the proposed tenets conflict with California Energy Commission (“CEC”) findings during RPS compliance verification. CRS requests that the California Public Utilities Commission (the “Commission”) either remove the tenets completely, or at a minimum, rename

the tenets “rough guidelines,” “considerations” or “rules of thumb” to clarify that the CEC verification and Commission compliance determination supersede the tenets, and that the tenets create no guarantee of RPS eligibility.

The tenets are not necessary to ensure that RPS procurement transactions are accessible to all participants in a transparent and intelligible form. To the contrary, the tenets create confusion about the status of Renewable Energy Credits (“RECs”) that may be legitimately used or owned by other market participants, including in the voluntary market, by providing a basis for retail providers who fail RPS verification to argue that because they procured the RECs, the RECs they “have” should be eligible¹. The success of such an argument would result in RECs being counted more than once for compliance and retail purposes (“double counting”), which is expressly prohibited under Pub. Util. Code §399.21(a)(2)².

II. The proposed tenets should be removed or clarified because they may be improperly relied upon by retail providers who fail to meet RPS obligations as an argument that such entities do meet or have met RPS obligations.

CRS supports the Commission’s policy of requiring an upfront showing by retail providers to demonstrate how a particular procurement would comply with an RPS category³. However, we believe that the proposed tenets could be relied upon to override the Commission’s verification determination, effectively using the procurement approval as a guarantee of compliance. While such an outcome is not the intent of the Commission, the inclusion of the oversimplified tenets, and reference to them as “tenets,” as opposed to “general guidelines” or

¹ Pub. Util. Code §399.12(f)(1), (2) renumbered as Pub. Util. Code §§399.12(h)(1), (2)

² Pub. Util. Code §399.16(a)(2) amended and renumbered as Pub. Util. Code §399.21(a)(2): “A renewable energy credit shall be counted only once for compliance with the renewables portfolio standard of this state or any other state, or for verifying retail product claims in this state or any other state.”

³ California Public Utilities Commission, Proposed Decision of ALJ Simon, *Decision Implementing Portfolio Content Categories for the Renewables Portfolio Standard Program*, Rulemaking11-05-005 Section 3.4.2.1, at 12,29 (2011).

“considerations” for example, could enable retail providers to argue that the approval of the procurement contract and subsequent purchase of WREGIS certificates are by definition sufficient for RPS compliance. This scenario is outlined below:

Scenario 1

Double selling-RECs not validly transferred: Suppose a renewable energy generator sells RECs in a forward contract in the voluntary market, or any market that relies in part on contract path auditing rather than exclusively on WREGIS. Suppose the generator then wrongly reports that the RECs have not been sold, registers their generator in WREGIS, and does not transfer the resulting RECs to the original purchaser. Later, a retail provider seeks to use those same RECs for RPS compliance. The retail provider makes an upfront showing to the Commission. The procurement is accepted and the retail provider purchases the RECs in WREGIS. The retail provider later submits data to the CEC for verification of RPS compliance.

Double selling caught by CEC: Upon verification review, the CEC finds that the RECs were sold into the voluntary market before they were sold to the retail provider; hence, valid title was never transferred to the retail provider. Rather, valid title to the RECs belongs with a voluntary purchaser who can trace the chain of custody of the RECs to the first sale of the specific MWh. That purchaser is using the RECs to make advertizing claims that its products are made with renewable energy and its customers are relying on those claims.

RPS noncompliance found as a result of hollow WREGIS certificates: The CEC recommends to the Commission that the RECs should not be accepted for RPS compliance, as to do otherwise would invalidate the purchaser’s claims as the RECs would be double counted, having severe impacts not only on the purchaser, who is now liable to the FTC for false advertizing, but also for contract certainty. The Commission issues an order refusing the RECs for RPS compliance.

Retail provider relies on tenets to argue for compliance: The retail provider argues that the tenets create a guarantee that RECs purchased through approved procurement are eligible to retire for RPS compliance, regardless of title or lack thereof. If this argument is found successful, the CEC and the Commission verification and enforcement authority would be limited by these tenets.

Based on this scenario, and the potential consequences discussed in these comments, CRS recommends removal of the proposed tenets on page 14 of Proposed Decision, or at a minimum, clarification that the tenets cannot be used to subvert, modify, or override the CEC verification and the Commission’s ability to make determinations for RPS compliance.

III. The proposed tenets should be removed or clarified because they could be used to override the CEC’s verification process and the Commission’s verification determination.

The proposed tenets, "What you buy is what you have" and "What you have is what you retire for RPS compliance"⁴, can be interpreted as a binding limitation on the CEC and the Commission. The tenets suggest that so long as RECs are approved for procurement (which requires the transaction be registered in WREGIS⁵), the RECs are valid for RPS compliance.

CRS supports the use of WREGIS in aiding with RPS verification; however, the combination of the procurement approval process and the use of WREGIS are not designed to guarantee the validity of RECs or to verify that RECs meet requirements for particular portfolio content categories⁶. The assumption of validity created by the proposed tenets (i.e. that RECs approved for purchase will not necessarily be accepted for RPS compliance) would undermine the CEC’s ability to properly verify RECs. The CEC would stand in conflict to the proposed tenets if, based on verification related findings, the CEC recommended that purchased RECs are not accepted for RPS compliance. Likewise, the Commission would stand in conflict with the proposed tenets during any finding that purchased renewables will not be accepted for the RPS. This would cause confusion as to proper REC verification for the RPS and thus undermine the CEC’s and the Commission’s verification authority.

IV. The proposed tenets should be removed or clarified because they may be interpreted in a manner that allows for double counting or double claiming.

CRS also wishes to comment on the proposed tenets’ relationship to double claiming. If a retail provider, failing to meet its RPS obligations is able to successfully argue that the

⁴ California Public Utilities Commission, Proposed Decision of ALJ Simon, *Decision Implementing Portfolio Content Categories for the Renewables Portfolio Standard Program*, Rulemaking11-05-005 Section 3.4., at 14 (2011).

⁵ Id. at 14-15.

⁶ Id. at 25.

proposed tenets create a guarantee of RPS acceptance for RECs purchased, then double claiming of RECs will occur. This, in turn, will have an adverse impact on voluntary and compliance REC markets⁷. We suspect the Commission did not anticipate this implication when proposing these tenets, and we believe the Commission may wish to consider revising the Proposed Decision to remove or clarify the tenets so as to prevent regulatory confusion or double counting.

a. The proposed tenets would allow for double counting between the CA RPS and compliance markets that do not require tracking through WREGIS.

The use of WREGIS may assuage worries that RECs might be used multiple times for the California RPS. However, the possibility of double counting still exists between California and any state not requiring the use of WREGIS for RPS verification. While the WREGIS Terms of Use require that all attributes of the uploaded generation be aggregated and intact, WREGIS does not pre-screen all RECs for prior sale or validity⁸. Rather, WREGIS relies on attestation by the REC owner⁹. The purpose of the CEC's check on compliance with all RPS requirements is to ensure that renewable energy is actually and accurately purchased and allocated, not merely that utilities have been charged for the renewable energy¹⁰.

The Proposed Decision states that unbundled RECs will not be eligible for RPS compliance under 399.16(b)(1) and cites CRS for the proposition that a REC's value lies in its renewable attributes, and once a REC is stripped from the underlying energy with which it was originally associated, the underlying energy loses its renewable attributes. CRS would like to

⁷ For further discussion regarding the impact of double counting on the voluntary REC market, see *CRS Comments to California Energy Commission (CEC) Regarding RPS Procurement. Docket 02-REN-1038 and 03-RPS-1078* at 7-9 (2009), available at: http://resource-solutions.org/pubs_archive.php?year=All&type=All&page=5

⁸ WREGIS, *WREGIS Operating Rules December 2010* at 9 (2010), available at: <http://www.wregis.org/Documents.php>

⁹ Id.

¹⁰ Committee Draft, *Renewables Portfolio Standard Eligibility Guidebook*, Fourth Edition. California Energy Commission, Efficiency and Renewable Energy Division. Publication Number: CEC-300-2010-007-CMF, available at: <http://www.energy.ca.gov/2010publications>

take this opportunity to clearly state that it is has not taken a position as to whether unbundled RECs should satisfy 399.16(b)(1) for RPS compliance. While we may disagree with the application of this proposition, we stand by the proposition itself and feel that it further supports the need to prevent against double counting.

CRS encourages the Commission to keep the responsibility on the utilities to purchase renewable energy that has not yet been sold into the voluntary market by deleting the tenets or clarifying that they do not override findings by the CEC or the Commission related to REC verification.

b. The proposed tenets would allow for double claiming that would have an adverse impact on voluntary REC markets.

If the proposed tenets were interpreted as to guarantee regulatory acceptance of purchased RECs for RPS compliance, then REC ownership by other legitimate purchasers would be reduced to mere potential ownership. The voluntary market would only exist subject to future claims in the California compliance market. This would be the case in the example in Scenario 1 if the Commission allowed a retail provider to rely on the tenets and use paid for, but not transferred RECs, for RPS compliance. This could have the effect of destroying the value of contracts in the voluntary market, impacting not only contracts with California generators and consumers, but also casting doubt onto the security of all voluntary purchases, with over 1,400,000 customers nationwide¹¹.

¹¹ Lori Bird, and Jenny Sumner, *Green Power Marketing in the United States: A Status Report* (2009 Data) at 8-9, National Renewable Energy Laboratory, (2009), available at: <http://apps3.eere.energy.gov/greenpower/>

Currently, the CEC conducts annual verification of RPS claims made by IOUs¹². Part of this verification process is cross-checking RECs reported for California RPS compliance with voluntary market sales originating from the same facility¹³. If the verification process was constrained by the tenets in such a way as to prevent or override a CEC recommendation, and subsequent Commission determination of noncompliance with the RPS, the value of verification and its assurances against double counting would not be realized. Hence, the established RPS verification process would not, and could not be exclusively performed by WREGIS and the Commission during the upfront showing.

To allow WREGIS certificates, whose environmental attributes legitimately belong to a third party, to count for the RPS would be double counting¹⁴. This would destroy the value of the legitimate owner's RECs as the environmental attributes of the REC (i.e. the REC's value) will have been counted towards California's RPS policy¹⁵. Furthermore, it would create uncertainty as to the value of voluntary REC contracts, significantly undermining the voluntary REC market¹⁶. It is imperative that the Commission not allow already owned RECs to count towards the California RPS.

¹² Committee Draft, *Renewables Portfolio Standard Eligibility Guidebook*, Fourth Edition. California Energy Commission, Efficiency and Renewable Energy Division. Publication Number: CEC-300-2010-007-CMF, available at: <http://www.energy.ca.gov/2010publications>

¹³ Id. at 41.

¹⁴ Pub. Util. Code §399.16(a)(2) amended and renumbered as Pub. Util. Code §399.21(a)(2).

¹⁵ For further discussion regarding the impact of double counting on the voluntary REC market, see *CRS Comments to California Energy Commission (CEC) Regarding RPS Procurement. Docket 02-REN-1038 and 03-RPS-1078* at 7-9 (2009), available at: http://resource-solutions.org/pubs_archive.php?year=All&type=All&page=5

¹⁶ Id.

V. The proposed tenets should be removed or clarified because they cast doubt on the validity of green pricing programs.

The language of the second proposed tenet, "what you have is what you retire for RPS compliance," may be interpreted to mean that an entity must retire all their RECs for RPS compliance. We believe that the Commission did not have this intention, and that the language was likely intended to mean that one has the ability to retire, at most, only what they have for RPS compliance. However, the vagueness of the language could cast doubt on the validity of green pricing programs because if retail providers were required to retire all of their RECs for the RPS, then they could not allocate some RECs for green pricing programs¹⁷.

We put this forward as another example of how the ambiguity of the proposed tenets could lead to adverse consequences. Thus, we recommend removing the tenets from the decision entirely, or at the very least, clarifying their power.

VI. Conclusion

CRS requests that the Commission remove or clarify the tenets from the draft as they cause confusion and may be interpreted as overriding the power of the CEC to verify that what has been purchased will be accepted for RPS compliance. Furthermore, an interpretation of the tenets as guaranteeing acceptance would result in double counting of renewables and severe consequences to the voluntary market.

The proposed tenets can be interpreted to mean that entities purchasing RECs for compliance will always have valid RECs, even if those RECs are invalidated by legitimate claims. Essentially, any minimal amount paid or contracted for RECs would result in the retail providers' ability to claim the RECs for compliance purposes, even if the environmental

¹⁷ Examples and explanations of green pricing programs are available at: http://www.green-e.org/getcert_re_howto.shtml

attributes had been sold off prior to the purchase. The tenets do not achieve their stated purpose of increasing transparency, but rather create a fall-back argument for retail providers who do not meet RPS obligations.

DATED: October 27, 2011

Respectfully submitted,

/s/ Robin Quarrier

Robin Quarrier

CENTER FOR RESOURCE SOLUTIONS

VERIFICATION

I am an officer of the nonprofit organization herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 27, 2011 at San Francisco, California.

/s/ Jennifer Martin

Jennifer Martin

Executive Director

CENTER FOR RESOURCE SOLUTIONS