BEFORE THE ENERGY COMMISSION OF THE STATE OF CALIFORNIA

In the matter of: Developing Regulations and Guidelines for the 33 Percent Renewables Portfolio Standard and Implementation of Renewables Investment Plan Legislation	Docket No. 11-RPS-01 Docket No. 02-REN-1038 NOTICE Re GUIDELINE REVISIONS FOR RPS IMPLEMENTATION

COMMENTS OF

BIOFUELS PT. LOMA, LLC

On the Commission's Draft Guidebook for
Renewables Portfolio Standard Eligibility, Seventh Edition

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For BioFuels Pt. Loma, LLC
Date: March 25, 2013

I. INTRODUCTION

BioFuels Pt. Loma, LLC, ("BPL") appreciates this opportunity to submit comments in response to the California Energy Commission's *Draft Guidebook for Renewables Portfolio Standard Eligibility, Seventh Edition* (the "Guidebook"), issued March 11, 2013. As the Commission knows from our comments on its Concept Paper, we are proud to be a California-based company and the developers and owners of the first in-state biomethane plant to inject into a common carrier pipeline. BPL could not have financed or constructed this project without the promise of producing biomethane that was eligible under California's renewables portfolio standard ("RPS"). We believe that it is the intention of both the Legislature and the CEC to use A.B. 2196 and the Guidebook as tools to encourage the further development of indigenous biomethane sources. BPL applauds that effort, but we are deeply troubled that the Guidebook as currently drafted inadvertently bars us from ever qualifying under the RPS.

At a cost of $12 million, BPL built, owns and operates a 950 mmbtu/day biomethane production plant located at the City of San Diego's Point Loma wastewater treatment works ("Point Loma"). The majority of Point Loma's biomethane production is injected into the SDG&E common carrier pipeline and dedicated for use by two off-site fuel cells, which sell their power to the City of San Diego and the University of California, San Diego. The remainder is used by an on-site fuel cell. As a result of this project, digester gas that was previously burned in an open flare is now used to generate emission-free electricity for public customers. Simply put, Point Loma is an example of the kind of projects that the Legislature wants to protect and promote through A.B. 2196.

There are two facts about Point Loma's operations that are critical for purposes of these comments. First, the off-site fuel cells buying Point Loma's biomethane are "distributed

generation" facilities ("DG Facilities") under California's RPS and are not a "retail seller" or a local publicly owned electric utility ("POU").[1] Second, BPL executed its biomethane contracts and began commercial injections into the SDG&E common carrier pipeline between December 2011 and January 2012, only a few short months before the March 29, 2012 moratorium took effect. We believe this makes us the newest biomethane project in California.

The unambiguous intent of A.B. 2196 is to promote projects like Point Loma, but the Guidebook as currently drafted would prevent our biomethane from ever constituting an RPS-eligible fuel. This contradicts the language of the statute and, we believe, CEC's goals for implementing it. The solution is simple: *A.B. 2196 only prohibits existing biomethane sources injecting into a common carrier pipeline from entering into new contracts if those prior injections were made pursuant to a grandfathered contract with a retail seller or POU.* This interpretation not only fully achieves the legislature's goals, it is required by fundamental principles of statutory construction. A.B. 2196 only grandfathers existing biomethane contracts that use common carrier pipelines, and only if those contracts are with a retail seller or POU. This grandfathering is necessary because those sources are prevented from ever entering into new contracts for their existing output. By contrast, the Legislature did not need to grandfather any other biomethane contracts because every other source is allowed to enter into new contracts. This includes biomethane used on-site, transported through a dedicated pipeline, or injected into a common carrier pipeline and directed for a DG Facility. The important point is that the Legislature only intended to phase out a subset of existing biomethane sources, and that subset does not – and should not – include facilities like Point Loma.

[1] Section 399.12(j) defines a retail seller as an "electric corporation," an "electric service provider" or a "community choice aggregator." DG Facilities do not fall into any of these definitions. Nor is a DG Facility a POU, as defined in Section 224.3.

We provide detailed comments below. Any undefined capitalized terms have the meaning given to them in the Guidebook or the Public Utilities Code. All Section references are to the Public Utilities Code, and all Guidebook references are to sections of that document.

II. COMMENTS ON THE GUIDEBOOK

The Guidebook overlooks the Legislature's unambiguous distinction between two types of directed biomethane sources injecting into common carrier pipelines ("Directed Biomethane"): (i) those that serve a retail seller or POU ("Utility Directed Biomethane"), and (ii) those serving DG Facilities ("DG Directed Biomethane"). Treating these different sources as though they are the same contradicts the plain language of A.B. 2196, unfairly penalizes Point Loma and similar projects the Legislature wanted to incentivize, and gains nothing in exchange.

A. The Guidebook Contradicts The Plain Language of A.B. 2196.

The Guidebook's interpretation of A.B. 2196 contradicts the statute's plain language and long-recognized principles of statutory construction. The CEC interprets Section 399.12.6(b)(3)(B) to preclude all existing Directed Biomethane sources from entering into new contracts for existing biomethane quantities,[2] but that is not what the statute says:

> The source of biomethane did not inject biomethane into a common carrier pipeline prior to March 29, 2012, or the source commenced injection of sufficient incremental quantities of biomethane after March 29, 2012, **to satisfy the contract requirements**.[3]

[2] Although incremental biomethane production is allowed, prohibiting existing quantities from qualifying effectively shuts out the entire facility.

[3] Section 399.12.6(b)(3)(B) (emphasis supplied).

The last phrase (bolded) qualifies the rest of the sentence, narrowing its applicability to a subset of Directed Biomethane sources. CEC must give effect to that language.

One of the "most fundamental rules of statutory construction" – recognized by the California Supreme Court – is the "last antecedent rule", which states that "a qualifying phrase [separated by a comma] is supposed to apply to all antecedents instead of only the immediately preceding one…."[4] Applied here, CEC must read the statute to say:

> The source of biomethane did not inject biomethane into a common carrier pipeline prior to March 29, 2012 [**to satisfy the contract requirements**], or the source commenced injection of sufficient incremental quantities of biomethane after March 29, 2012, to satisfy the contract requirements.[5]

Using the qualifier here signals the Legislature's intent to preclude some – but not all – existing Directed Biomethane sources from selling existing quantities of biomethane under new contracts. Knowing which sources are precluded is easy, because there is only <u>one</u> other reference in A.B. 2196 to biomethane procurement contracts executed prior to March 29, 2012 and using common carrier pipelines. That reference is in the statute's grandfathering rule, which applies to existing Directed Biomethane contracts *with a retail seller or POU*.[6] The only cogent way to read Section 399.12.6(b)(3)(B) is in parallel with this grandfathering rule – existing Directed Biomethane sources are ineligible if they previously injected biomethane to satisfy "contract requirements [with a retail seller or POU]".

[4] *White v. County of Sacramento*, 31 Cal.3d 676 (1982).

[5] Section 399.12.6(b)(3)(B) (emphasis supplied).

[6] Section 399.12.6(a)(1).

Consistent with this strict reading of A.B. 2196, BPL proposes the following amendment to Section II.C.2.b of the Guidebook (new text underlined and bolded):

> Biomethane sources associated with new biomethane procurement contracts must not have injected biomethane into a common carrier pipeline before March 29, 2012 **pursuant to contracts that were executed with a retail seller or POU**, unless the source commenced injection of sufficient incremental quantities of biomethane after March 29, 2012, to satisfy the contract requirements. Biomethane from a biomethane source that is or was part of an existing biomethane procurement contract **with a retail seller or POU and** originally executed and reported to the Energy Commission before March 29, 2012, may be used for RPS purposes only if the biomethane source produces sufficient incremental quantities of biomethane on or after March 29, 2012, to satisfy the new biomethane procurement contract requirements and the biomethane source otherwise satisfies the requirements of this Section 2: New Biomethane Procurement Contracts.

B. The Guidebook Undermines the Legislature's Intent.

If CEC does not adopt the proposed change and properly distinguish between Utility and DG sources of Directed Biomethane, it will flip on its head the twofold purpose of A.B. 2196:

(1) Ensure that biomethane used to meet California's RPS requirements delivers real environmental benefits to the state, and

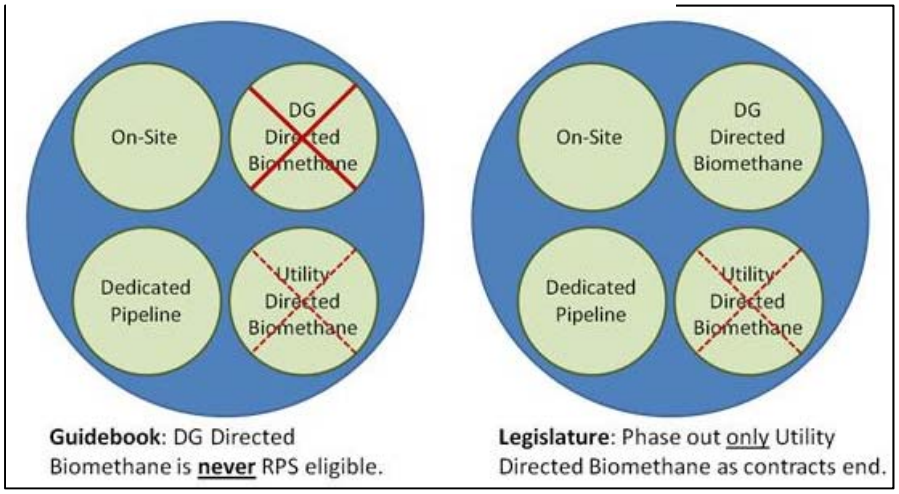
(2) Promote the development of indigenous biomethane sources.

The Legislature knew that drawing distinctions based on location is unconstitutional, so instead they crafted a multi-layer system to weed out disfavored sources over time. Existing

contracts for Utility Directed Biomethane are grandfathered for the life of those contracts, but when they end only incremental production is RPS eligible. All other biomethane sources – including *existing* DG Directed Biomethane sources like Point Loma – must qualify under the new standards. The critical point is this: *grandfathering is only available to existing Utility Directed Biomethane because only those sources are ineligible under the new standards*.

By overlooking this distinction, the Draft Guidebook twists the Legislature's neatly tailored exclusion into a blunt-edged ban that penalizes DG Directed Biomethane in unintended

Figure 1: Conflicting Treatment of Existing Biomethane Sources



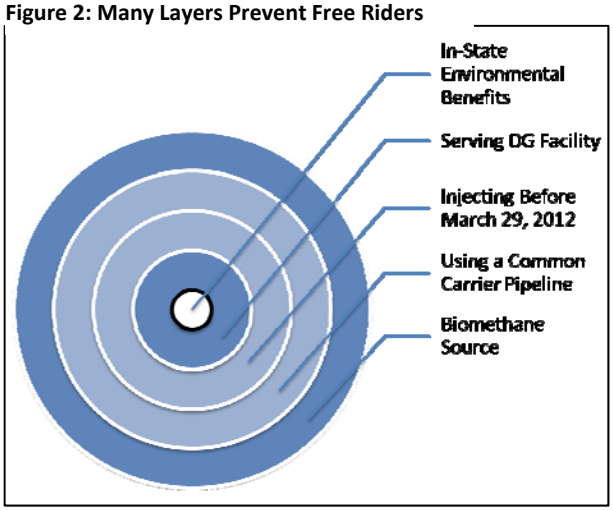
ways (see Figure 1). Following the CEC's proposal, biomethane produced in-state and sold to a DG facility before March 29, 2012 is (i) ineligible for grandfathering and (ii) prohibited from ever participating in the RPS under the new standards. Meanwhile, out-of-state sources that produce no environmental benefits for California continue to be RPS-eligible until their existing contracts expire years from now. This is precisely opposite what the Legislature intended.

C. CEC's Interpretation Produces No Benefits for California.

For all it does to inadvertently penalize DG Directed Biomethane generally, and Point Loma in particular, the Guidebook's misinterpretation of A.B. 2196 buys California nothing toward its biomethane and RPS goals. One might worry that the strict reading of A.B. 2196 that

BPL proposes would create "free riders" – out-of-state biomethane producers currently serving DG Facilities that would utilize the same eligibility language as BPL. Thankfully, the Legislature closed that opportunity by establishing multiple standards that Directed Biomethane sources must meet in order to qualify for the RPS (see Figure 2). We are aware of no out-of-state biomethane project that injected into a common carrier pipeline before March 29, 2012, serving a DG Facility that can demonstrate in-state environmental benefits as required by statute. Moreover, in light of the rigorous environmental requirements for new Directed Biomethane contracts, which will make it nearly impossible for out-of-state sources to qualify – we do not believe such a facility *could* exist. As a result, BPL is confident that our proposed change aligns the Guidebook with the Legislature's goals, ensures that California's maiden project is not inadvertently penalized for being an in-state market leader, and carries only trivial risk that a disfavored project could utilize the same language to qualify for the RPS.

Figure 2: Many Layers Prevent Free Riders



III. CONCLUSION

BPL supports CEC's and the Legislature's efforts to develop RPS rules that encourage the development of indigenous biomethane sources. We believe that by adopting the narrow amendment proposed above CEC can avoid penalizing pioneering in-state facilities such as Point Loma, and we look forward to working with CEC staff as they finalize the Guidebook.