From: Karen Mitchell [mailto:kam@eslawfirm.com] **On Behalf Of** Jeffery Harris
Sent: Friday, February 07, 2014 1:59 PM
To: Oglesby, Rob@Energy
Cc: Hochschild, David@Energy; Taylor, Gabriel@Energy; Korosec, Suzanne@Energy; Herrera, Gabe@Energy; Kootstra, Mark@Energy; Jed Gibson; Zocchetti, Kate@Energy; Kourtney.Vacarro@energy.ca.gov
Subject: NID Petition for Reconsideration of CEC Denial of July 1, 2013 Eligibility Date

Executive Director Oglesby,

In accordance with the California Energy Commission's ("Commission") RPS Eligibility Guidebook, earlier today Nevada Irrigation District ("NID") hand delivered its petition for reconsideration of the Commission's denial of the July 1, 2013 eligibility date for the Dutch Flat #2 Powerhouse and the Rollins Powerhouse. Attached, please find an electronic copy of the petition for your convenience. If you have any questions or concerns, please let me know.

Thank you.

Jeffery D. Harris

Jeffery D. Harris, Attorney
Ellison, Schneider & Harris L.L.P.
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816
(916) 447-2166
mailto:jdh@eslawfirm.com
www.eslawfirm.com

MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP
ATTORNEYS AT LAW
A Partnership Including Professional Corporations

1681 BIRD STREET
P.O. BOX 1679
OROVILLE, CALIFORNIA 95965-1679

Writer's email: pharman@minasianlaw.com

PAUL R. MINASIAN, INC.
JEFFREY A. MEITH
M. ANTHONY SOARES
DUSTIN C. COOPER
EMILY E. LaMOE
PETER C. HARMAN

WILLIAM H. SPRUANCE,
Retired

MICHAEL V. SEXTON,
Retired

TELEPHONE:
(530) 533-2885

FACSIMILE:
(530) 533-0197

Re: Petition for Reconsideration of the CEC's January 10, 2014 Decision Letter

Nevada Irrigation District (NID) hereby respectfully requests that the Executive Director of the California Energy Commission (Executive Director, CEC) reconsider the analysis and decision in the January 10, 2014, letter (Revocation Letter) issued by the CEC's Deputy Director, Renewable Energy Division. The Revocation Letter revoked the Renewable Portfolio Standard (RPS) certifications for two of NID's small hydroelectric facilities, Dutch Flat #2 Powerhouse and Rollins Powerhouse (collectively, Facilities), for the period of July 1, 2013 through September 30, 2013 (Revocation Period). NID does not dispute that it submitted the recertification applications more than 90 days after the original power purchase agreement (PPA) between NID and Pacific Gas & Electric Company (PG&E) was renegotiated. NID does, however, vigorously contest the determination contained in the letter that the CEC was required to revoke the certifications for the 91-day Revocation Period and that CEC staff lacked discretionary authority to waive the RPS Guidebook's filing deadline or assign retroactive certification for the Facilities.

The Facilities have been producing clean, renewable energy since long before the RPS program was created and they are incapable of producing non-renewable energy. Their operations and management have continued without material change since the Facilities began operations in 1965 and 1980, respectively. The Facilities have always met the statutory criteria to qualify for the RPS program. They were RPS-eligible and -certified from the beginning of the RPS program until July 1, 2013, and from October 1, 2013 through the present. The only change that triggered the Revocation Period was that NID renewed its contract with its retail seller,

PG&E. Although the renewal did not alter the Facilities' operations, according to the RPS Guidebook it triggered the 90-day recertification deadline. When NID missed that deadline, the CEC, believing it lacked discretion to do otherwise, temporarily revoked the Facilities' certifications. This revocation, caused by an innocent failure to meet the asserted deadline, placed NID at risk for the potential that PG&E may pursue a $671,517 contractual penalty against NID under the terms of the new PPA, which would not provide any benefit to the CEC, the state, or the public. But for the administrative technicality, the Facilities would have remained RPS-certified throughout the Revocation Period. Because the revocations were based on an erroneous interpretation of the limits of the CEC's discretionary authority, NID asks the Executive Director to exercise his inherent discretionary authority to rescind the Revocation Letter and reinstate the Facilities' RPS certification for the entire Revocation Period.

Background

NID is an irrigation district formed pursuant to the California Irrigation District Law, Water Code §§ 20500-26677. NID has served agricultural, domestic, municipal, and industrial water to its customers in Nevada, Placer, and Yuba Counties since 1921. NID owns an extensive system of water conveyance and storage facilities that it uses to serve its customers. Beginning in the 1960s, NID began adding small-scale hydroelectric generation facilities to its water system, creating the Yuba-Bear Hydroelectric Project (Yuba-Bear Project), which includes the Dutch Flat #2 and Rollins Powerhouses, among others. Since the completion of the Yuba-Bear Project, NID has always sold, and continues to sell, all of the power generated in the Yuba-Bear Project, both renewable and not,[1] to PG&E. (Sommers Decl. at ¶ 6 (Administrative Record (AR) Tab 5).) NID and PG&E executed the original PPA for the Yuba-Bear Project in 1963. (Sommers Decl. at ¶ 6.) Generation from Dutch Flat #2 (24.57 MW) was included in the PPA when it came online in 1965, and Rollins (12.15 MW) was included when it came online in 1980. (Sommers Decl. at

[1] The Yuba-Bear Project also includes one powerhouse, Chicago Park, that exceeds the megawatt limitation for "small hydroelectric," and is therefore excluded from the RPS program.

¶¶ 3, 6.)

Operations at the Facilities have not materially changed from before they became RPS-certified through the present. (Sommers Decl. at ¶ 7.) Although NID was and is the owner of the Facilities, PG&E issues the operational orders for all renewable and non-renewable Yuba-Bear hydroelectric facilities and it purchases all generation, both renewable and non-renewable, from the entire Yuba-Bear Project for a fixed annual amount, regardless of actual output. (Sommers Decl. at ¶¶ 6, 7.) "[A]ssuming average hydrological conditions . . . , the cost on a dollar per megawatt hour (MWh) basis would equate to a price below the . . . 2011 Market Price Referent (MPR)." (Public Utilities Commission (PUC) Decision No. 13-03-030, Mar. 21, 2013, at p. 6 (AR Tab 6).) The Yuba-Bear Project thus generates affordable, renewable energy for the people of California.

PG&E obtained the original RPS certifications for the Facilities using the now-discontinued CEC-RPS-2 "Utility Certification" form, which permitted retail sellers like PG&E to obtain RPS certifications on behalf of facility owners, and without need for the facility owners' input. Under the original RPS Guidebook, the Facilities' original RPS certifications apparently would

> become[] void in the event that the facility's contract with [PG&E] expires, or is voluntarily extended or is otherwise re-negotiated by [PG&E] and the facility operator. Once the contract expires or is voluntarily renegotiated, the facility operator must apply for certification from the Energy Commission on its own behalf, and [PG&E] may not re-certify the facility on the operator's behalf.

(RPS Eligibility Guidebook, (no edition number), May 2004, at p. 20.)

The original PPA between NID and PG&E for the Yuba-Bear Project was set to expire by its own terms in July 2013. (PUC Decision No. 13-03-030 at pp. 2-3.) The parties negotiated a new 20-year PPA for the Yuba-Bear Project, to go into effect on July 1, 2013. (*Id.* at 4,5; Sommers Decl. at ¶ 6.) There was no material change in the operations, capacity, or eligibility of

the Facilities before or after the effective date of the current PPA.

NID's longtime Hydroelectric Manager, William Morrow, retired on July 1, 2013. (Sommers Decl. at ¶ 2.) The Hydroelectric Manager is the person responsible for compliance activities related to NID's hydroelectric facilities. (*Id.*) Mr. Morrow was succeeded on July 1, 2013 by Keane Sommers, P.E. (*Id.*) In the time leading up to Mr. Sommers's appointment as Hydroelectric Manager, he was totally consumed with overseeing emergency repairs on one of NID's dams, which were needed not only to regain NID's ability to draft that water supply, but also to ensure the safety of the dam itself. (*Id.* at ¶ 5.)

Under the terms of the RPS Guidebook in effect at the time the original PPA expired,[2] the RPS certifications that PG&E had secured for the Facilities were deemed "void" on July 1, 2013. (*See* RPS Guidebook, 7th ed., at p. 71.). The voiding of the original RPS certifications triggered a 90-day period for NID to apply for the same certifications on its own behalf. (*Id.*)[3] The 90-day period therefore began to run on July 1, 2013, and it expired on September 29, 2013.[4] Due to the recent turnover of NID staff responsible for compliance in hydropower matters and a diversion of those staff members to oversee to emergency dam repairs, combined with NID's total lack of previous dealings or experience with the CEC or the RPS program and its guidelines, NID was unaware of the impending deadline and did not submit the recertification applications within 90 days of the expiration of the original PPA. (Sommers Decl. at ¶¶ 2, 5, 10.)

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[2] This and all subsequent references to the RPS Guidebook are to the 7th edition, issued April 2013, unless otherwise noted.

[3] While the RPS Guidebook, 7th ed., at p. 71, would have authorized PG&E to obtain the recertification on NID's behalf as its "agent," the new PPA placed the burden of maintaining RPS Certification on NID. (Sommers Decl. at ¶ 8.)

[4] September 29, 2013, was a Sunday, but the RPS Guidebook does not contain any provision that would extend the deadline to the next business day, which would have been Monday, September 30th. A CEC regulation extends certain due dates, but that regulation does not clearly apply to CEC-issued "guidelines" or "guidebooks." (*See* 20 C.C.R. § 1.15.)

On October 1, 2013, 92 days after the original PPA's termination date, PG&E notified NID that it was required to "self-certify" the Facilities, and it provided NID with application forms. (Sommers Decl. at ¶ 9.) Prior to that date, neither the CEC, nor PG&E, nor any other party, informed NID of the recertification deadline, and NID did not have actual notice of the RPS Guidebook's provisions. (Sommers Decl. at ¶ 10.) NID staff completed the PG&E-provided application forms and submitted them to the CEC by hardcopy and by email on October 7, which the CEC apparently received on October 8. (Sommers Decl. at ¶¶ 11-12; Emails from NID to CEC, Oct. 7, 2013 (AR Tabs 3 & 4); Emails from CEC to NID, Oct. 24, 2013 (AR Tabs 3 & 4).)

CEC staff informed NID by emails on October 24, 2013 that its applications had been rejected because they were submitted on the incorrect forms, and that NID needed to submit new applications on updated forms. (AR Tabs 3 & 4.) NID resubmitted its applications on the proper forms by mail and email the following day. (Emails from NID to CEC, Oct. 25, 2013 (AR Tabs 3 & 4).) After the CEC notified NID of an error in the second submission, on October 29, NID submitted corrected applications on the proper forms by email and hardcopy on October 30, 2013. (Emails from NID to CEC, Oct. 30, 2013 & Emails from CEC to NID, Oct. 30, 2013 (AR Tabs 3 & 4).)

In a letter dated November 1, 2013, Remleh Scherzinger, NID's General Manager, expressed concern that NID's the applications' filing dates could potentially result in a temporary revocation of the Facilities' RPS certifications. (Letter from NID to CEC, Nov. 1, 2013, at p. 1 (AR Tab 2).) The letter noted that, once aware of the timeline, NID had worked diligently with CEC staff to complete the applications and that the Facilities had been generating unquestionably renewable energy since 1965 and 1980, respectively. (*Id.*) Because "the eligibility of these facilities for inclusion in the [RPS] program is not in question," the letter requested the CEC to apply retroactive certification to prevent any lapse in the Facilities' RPS certifications. (*Id.*)

The CEC responded with three separate letters, each dated January 10, 2014. Two of the

letters notified NID that the applications had been approved, and transmitted the new certification documents. (Letters from Certification Lead, CEC, to NID, Jan.10, 2014 (AR Tab 1).) The transmittal letters indicated that the certifications were effective October 30, 2013—the date the CEC received the final, corrected applications, rather than the date it received NID's initial, good-faith submission, October 8th. (*Id.* at 1.) The letters also stated that all generation from the Facilities occurring from October 1, 2013 onward (the first day of the calendar month containing the certification date) would be RPS-eligible. (*Id.*) The transmittal letters acknowledged that each "facility is using Small Hydroelectric as the only energy resource used to generate electricity, and [each] facility, as described, *is incapable of using any other energy resource to generate electricity*." (*Id.* Emphasis added.)

The third letter, the Revocation Letter, denied NID's request for retroactive certification. (AR Tab 1.) It stated that, "based on the [RPS Guidebook], staff does not have the discretion to grant retroactive certification and therefore the electrical generation from the facilities from July 1, 2013, through September 30, 2013, cannot be used by any California retail seller for California RPS compliance." (*Id.* at 1.) The letter explained that the Facilities had been certified under the PG&E-submitted applications until those certifications were deemed void on July 1, 2013, and that NID had 90 days from the original PPA's expiration date to submit new applications. (*Id.*) The letter concluded that if such an "application is *not* received within 90 days, the facility loses its original RPS eligibility date, meaning that any generation between the contract expiration date and the date the facility is recertified cannot be used by any California retail seller for RPS compliance purposes." (*Id.* at 1-2. Emphasis in original.) The letter reiterated that "there are no provisions in the [RPS Guidebook] that would allow retroactive certification" in this case. (*Id.* at 2.) It further held that this matter "do[es] not satisfy the appeal process criteria" for administrative appeals within the CEC, and it invited NID to provide input on potential revisions to the next edition of the RPS Guidebook, which might address NID's problem. (*Id.*)

Under the CEC's interpretation of the RPS Guidebook, had NID's applications been submitted on or before September 29, 2013, the Facilities' certifications would have automatically

been granted eligibility retroactively, up to 90 days, moving the effective application dates back to before the new PPA became effective, thereby eliminating the period when the Facilities' RPS certifications were deemed "void." This act of retroactivity automatically allows facilities that submit recertification applications within 90 days of the expiration of the original PPA to retain their original RPS eligibility dates (e.g., for the Facilities, the date PG&E obtained the original certifications). Under the CEC's interpretation, beginning on the 91st day after the original PPA expires, the CEC is barred from granting any retroactive eligibility. Under that interpretation, the void period becomes irrevocable, and any energy generated by these otherwise eligible Facilities during the void period is permanently ineligible for the RPS. This conclusion would be applied regardless of whether the generation would otherwise qualify for the RPS program under the RPS Guidebook and the controlling statutes.

As described above, the PPA for the Yuba-Bear Project, which includes the Facilities, pays NID a fixed annual amount for all generation that occurs within the Project, regardless of actual output. (Sommers Decl. at ¶ 6.) As such, the PPA does not contain differential pricing provisions for generation that is and is not eligible for the RPS program. Instead, the currently effective PPA contains a clause under which PG&E may pursue a fixed monetary penalty against NID for each kilowatt-hour of generation from the Facilities that could have been, but was not, RPS-eligible. (*Id.* at ¶ 8.) According to PG&E's calculations, the resulting contractual penalty could amount to $671,517. (*Id.* at ¶ 17.) The only conduct for which NID is culpable, which could result in this disproportionate penalty, was that NID was one week late in submitting its recertification application, and the initial submission was on the wrong form. There is no question that the Facilities' generation was otherwise qualified for the RPS program before, during, and after the Revocation Period.

NID now seeks reconsideration of the Revocation Letter's holding that CEC staff lacks discretion to waive the RPS Guidebook's 90-day deadline or to retroactively certify the Facilities, and that it was required to revise the Facilities' eligibility dates to deny RPS eligibility for all generation from the Facilities during the Revocation Period.

RPS Guidebook

The 7th edition of the RPS Guidebook requires facilities that had been certified by retail sellers to apply for recertification upon expiration or renegotiation of the original PPA:

> [R]etail seller certification on the operator's behalf using the CEC-RPS-2 form becomes void in the event the facility's contract with the retail seller expires, is voluntarily extended, or is otherwise renegotiated[71] by the retail seller and the facility operator. Once the contract expires or is voluntarily renegotiated, the facility operator, or agent thereof, must apply for certification from the Energy Commission using a CEC-RPS-1 form within 90 days of the contract termination date. Facilities that have applied using a CEC-RPS-1 form as of the adoption date of this *Seventh Edition* of the *RPS Guidebook* are not subject to this requirement, if the application is approved. The retail seller may not recertify the facility on the operator's behalf using a CEC-RPS-2 form.
>
> [71] Historically, only revisions to contracts affecting the amount of electricity procured by the retail seller, such as contract term or quantities, or the resource used to generate that electricity constituted a renegotiation and required a new application. As of the adoption date of this seventh edition of the *RPS Guidebook,* any revision to a contract will be considered a renegotiation, will void the previously awarded utility certification and require the submission of an amended certification application form.

(RPS Guidebook at p. 71. Italics in original.) The recertification guidelines included an application deadline, apparently in order to assure that the CEC had current information on hand when reviewing certification applications and to ensure timely completion of the verification process. (RPS Guidebook Scoping Workshop, January 28, 2014, PowerPoint Presentation at Slide 21.)

The RPS Guidebook mentions in scattered sections the CEC's discretionary authority to revise facilities' RPS eligibility dates in certain situations, including the situation in which NID finds itself now—when a facility that was utility-certified files its recertification application more than 90 days after renegotiating its PPA. However, nothing in the RPS Guidebook indicates that such a revision is mandatory. (*See* RPS Guidebook at pp. 76-77 ("The eligibility date for a facility

may be revised for several reasons," including failure to meet a deadline. Emphasis added.). *See also id.* at 82 (A facility that fails to notify the CEC of changes in previously submitted application information "within 90 days of the change *risks* losing its certification status."[5] Emphasis added.); *id.* at Appendix B-3 ("Facilities that do not notify the Energy Commission in a timely manner of material changes *face* revocation of the original certification."[6] Emphasis added.).)

Jurisdictional Statement

The Executive Director's jurisdiction to hear petitions for reconsideration is explained in pages 113-114 of the RPS Guidebook, 7th ed., which is in turn based on PRC § 25747(c). Under the terms of the Guidebook, PRC § 25747(a), and the January 10, 2014 Revocation Letter, an applicant may petition the Executive Director for reconsideration if (1) the applicant's RPS certification was revoked and (2) the revocation was based on factors other than those described in the RPS Guidebook.

The jurisdictional criteria are fulfilled here because (1) the Facilities' RPS certifications were temporarily revoked for the period spanning July 1, 2013 through September 30, 2013, and (2) the revocation was based on erroneously interpreting the RPS Guidebook as including a mandate and two prohibitions that do not exist: Nothing in the RPS Guidebook mandated that the CEC had to revise the Facilities' eligibility dates and nothing in the Guidebook prohibited the CEC from exercising its inherent discretionary authority to waive strict application of the 90-day deadline or to apply retroactive certification.

Relief Requested

[5] It is not clear whether NID's submission of a new application on a different form would constitute a change in application information.

[6] It is not clear whether renewing an existing PPA between the same owner and the same retail seller would qualify as a "material change" when the only relevant changes are the end date of the PPA and the identity of the applicant (the owner, as opposed to the retail seller).

NID requests that the Executive Director rescind the January 10, 2014 Revocation Letter and exercise his discretion to either (1) exercise discretion to not revise the Facilities' original eligibility dates because, under the terms of the RPS Guidebook, such revision is not mandatory; or (2) grant RPS certification for the Facilities retroactively to July 1, 2013, so that there is no lapse in RPS eligibility or certifications; or (3) waive strict application of the 90-day recertification deadline. To the extent necessary to effectuate the preceding requests, NID also requests that the Executive Director modify the transmittal letters and RPS certification documents that were sent to NID on January 10, 2014 by the RPS Program Certification Lead.

Summary of NID's Position

The January 10, 2014 Revocation Letter contained erroneous legal conclusions that resulted in the unnecessary and inequitable revisions to the Facilities' eligibility dates and related losses of RPS certification during the Revocation Period. The Revocation Letter erroneously stated that, because NID's recertification applications were "not received within 90 days, [each facility] loses its original RPS eligibility date, meaning that any generation between the contract expiration date and the date the facility [was] recertified cannot be used" for RPS compliance purposes. (Revocation Letter at 1-2. Emphasis removed.) The letter also erroneously held that "[CEC] staff does not have the discretion to grant retroactive certification" based on the limited view that "there are no provisions in the [RPS Guidebook] that would allow retroactive certification based on such an error." (*Id.* at 1, 2.) Finally, the letter summarily and incorrectly concluded, without explanation, that "[t]he facts presented here do not satisfy the appeal process criteria." (*Id.* at 2.)

CEC staff does have the discretionary authority to take the action requested here and in NID's November 1, 2013 letter to CEC. Were the CEC to exercise its discretion in the manner requested here, such action would not violate the goals and justification behind the recertification deadline requirement. Indeed, such action would further the RPS program's statutory policy

goals. Further, the revocation of the Facilities' RPS certifications for the July 1 to September 30 period violated a clear statutory mandate to certify facilities that meet the statutory criteria. The January 10, 2014 Revocation Letter must be rescinded and the Facilities' RPS eligibility for July1 through September 30, 2014 must be reinstated.

Basis for Appeal

I. The CEC Erroneously Concluded that it Lacked Discretion in Revising the Facilities' Original Eligibility Dates

The Revocation Letter erroneously concluded that the CEC was required to revise the Facilities' eligibility dates and that it lacked discretion to do otherwise. (*See* Revocation Letter at 1-2.) A review of the governing statutes and the RPS Guidebook shows that (1) nothing in the statutes or Guidebook mandates that a facility that had been certified by the retail seller must lose its original eligibility date if its recertification application is not submitted with 90 days of renegotiating its PPA; and (2) CEC staff has discretion to waive strict application of the RPS Guidebook's procedural requirements or to grant retroactive RPS certification or eligibility. Moreover, the absence of a specific grant of discretionary authority in the RPS Guidebook does not mandate a conclusion that CEC staff lacks such authority.

A. The RPS Guidebook Indicates that the CEC had the Requisite Discretion

Nothing in the RPS Guidebook mandated that the CEC revise the Facilities' eligibility dates. The RPS Guidebook states only that RPS certifications that were obtained on a facility's behalf by a utility "become[] void in the event the facility's contract with the retail seller expires, is voluntarily extended, or is otherwise renegotiated[] by the retail seller and the facility operator." (RPS Guidebook at p. 71.) It further states that "the facility operator, or agent thereof, must apply for certification from the [CEC] using a CEC-RPS-1 form within 90 days of the contract termination date." (*Id.*) But nothing in the RPS Guidebook requires the CEC to revise facilities'

eligibility dates if the recertification applications are submitted more than 90 days after the original PPA's expiration date.

The Facilities' original eligibility dates—the dates when PG&E initially secured RPS certification—"*may be* revised" under certain circumstances. (RPS Guidebook at 76. Emphasis added.) Under the Guidebook, the CEC "may" revise the Facilities' original eligibility dates for failure to meet a deadline. (*Id.* at 76-77.) It is notable that the permissive "may" is used, as opposed to the mandatory "shall." The word "shall" is used 70 times in the 7th edition of the RPS Guidebook, but is never used in relation to eligibility date revisions. (*E.g.*, RPS Guidebook, 7th ed., at 49 ("The information *shall* be submitted to the Energy Commission by March 31 for the prior calendar year and *shall* include all relevant information for the prior calendar year, listed by month." Emphasis added.).)

The non-mandatory nature of eligibility date revisions is also evident in other parts of the RPS Guidebook that may or may not apply here.[7] "Representatives of certified or precertified facilities must notify the [CEC] promptly of any changes in information previously submitted in an application for certification or precertification. A facility failing to do so *risks* losing its certification status." (RPS Guidebook at 82. Emphasis added.) To put a facility at "risk" of losing its eligibility date is far from *mandating* that the date be revised.

Also, the instructions for the CEC-RPS-1 application form similarly state:

> Amendment to a Certification – applies to facilities already certified as eligible for the RPS that have undergone material changes since being certified (for example, change of ownership, size of facility, etc.). Facilities that do not notify the [CEC] in a timely manner of material changes *face revocation* of the original certification.

(RPS Guidebook at Appendix B-3. Emphasis added.) Again, to "face revocation" does not have

[7] *See* notes 4 and 5, *supra*.

the same meaning as, e.g., "the certifications *shall be* revoked."

Nothing in the RPS Guidebook mandates that the CEC revise facilities' eligibility dates or revoke their certifications if a facility submits a recertification application more than 90 days after it renews its PPA. Each authorization is a grant of *discretionary* authority and is permissive, not mandatory. Nothing in the RPS Guidebook—let alone the governing statutes, which do not mention or authorize deadlines at all—precludes the CEC from exercising its discretion to decide whether or not circumstances warrant revising a facility's eligibility date. The Revocation Letter must therefore be rescinded so that CEC staff may exercise its discretion in deciding whether or not to revise the Facilities' eligibility dates.

B. The CEC had Inherent Discretion to Waive Application of its Guidelines

Even if the RPS Guidebook did mandate revision of the Facilities' original eligibility dates—which it clearly did not—the CEC would still be vested with discretion to waive application of the quasi-legislative guidelines in the RPS Guidebook. It is clear that the governing statutes themselves do not mandate revisions to facilities' eligibility dates in this situation, nor do they impose any certification deadlines at all.

Given the CEC's professed authority and discretion to impose guidelines on the RPS facility certification program, and its reliance on an alleged exemption from the California Administrative Procedures Act (APA) (*see* PUC § 25747(a)), it should be clear that the CEC has the requisite authority and discretion to waive strict application of the same guidelines. This is particularly true when, as here, the circumstances would support such an exercise of the CEC's discretion. The CEC, as it should be, is vested with the discretionary authority to waive application of a provision of the RPS Guidebook in order to encourage the acquisition of generation from RPS-eligible units, and to prevent a disproportionately harsh penalty from accruing against otherwise eligible facilities, in accordance with *Global Discoveries, Ltd, v.*

Barnett.[8]

1. *Global Discoveries, Ltd. v. Barnett*

Global Discoveries, Ltd. v. Barnett considered quasi-legislative rules promulgated by a county board of supervisors to implement Revenue and Taxation Code §§ 4674 & 4675, which allow interested parties to claim excess proceeds derived from a tax sale. (*Global Discoveries, Ltd v. Barnett* (2008) Cal.App.Unpub. LEXIS 10073, at pp. 5-6.) The statutes permit interested parties to file such claims within 1 year of the tax sale. (*Id.* at 5 (quoting Rev. & Tax. Code § 4674(a)).) The statutes also authorize county boards of supervisors to determine what information and proof will be required to maintain such a claim. (*Id.* at 5-6 (quoting Rev. & Tax. Code § 4674(d)).) The Kern County Board of Supervisors passed a resolution that established rules and procedures for the claims process, and it delegated the authority to process claims to the county auditor. (*Id.* at 6-8.) One of the Board's rules required that, if the auditor requested additional information from a claimant, the claimant must furnish the information within 30 days or "have his or her claim rejected." (*Id.* at 7.) After a request from the auditor, the plaintiff (Global Discoveries) failed to timely remit the requested documents.

The plaintiff argued to the court that the Board of Supervisors abused its discretion by imposing the 30-day deadline for additional information and that the auditor abused her discretion by strictly implementing the deadline. (*Id.* at 9-10.) The court did not reach the issue of the propriety of imposing the 30-day deadline, but instead focused on the auditor's strict application of the deadline. "The auditor, believing she had no discretion to extend the 30-day period, did not consider Global's request for relief from the failure to meet the deadline, but denied the claim because" Global did not submit the documents within the deadline. (*Id.* at 12.) The court stated:

[8] Although *Global Discoveries* is an unpublished opinion and therefore does not carry precedential weight in a civil proceeding, its analysis and the cases cited therein are offered to illustrate the genesis of the CEC's inherent discretionary authority.

> When "a public official's authority to act in a particular area derives wholly from statute, the scope of that authority is measured by the terms of the governing statute." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1086.) However, "[i]t is well settled in this state that governmental officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as may fairly be implied from the statute granting the powers." (*Dickey v. Raisin Proration Zone* (1944) 24 Cal.2d 796, 810, italics omitted.) To determine whether the auditor had discretion to grant relief, we consider the purpose and provisions of section 4675 and the board's resolution.

(*Global Discoveries, Ltd.* at 12-13.)

The court noted both the lack of mandatory "shall" language in the Board's resolution and the fact that the deadline did not serve any statutory goals. (*Id.* at 17-19.) The court thus concluded that an authority to extend the deadline was one of the "additional powers . . . necessary for the due and efficient administration of [the] powers expressly granted by [the] statute." (*Id.* at 18-19 (quoting *Dickey*, 24 Cal.2d at 810).) The court held that the auditor had the inherent authority to extend the deadline. (*Id.* at 19 (citing *Kupka v. Board of Administration* (1981) 122 Cal.App.3d 791, 795).) The Court therefore determined that the auditor had erroneously "failed to exercise her discretion . . . because of her belief that the 30-day period was absolute and she had no discretion to deviate from it." (*Id.* at 19.) The matter was remanded to the auditor with instructions "to exercise her discretion to grant or deny Global's request for relief." (*Id.* at 20.)

Applying the holding in *Global Discoveries* to the present situation, CEC staff already has the requisite discretionary authority to waive non-statutory, non-regulatory procedural guidelines. Moreover, the statutory policy emphasizes the need to encourage development of RPS-eligible generation (PUC § 399.20(a)), and staff discretion encouraging that goal, rather than frustrating it, is to be favored. The Revocation Letter must therefore be rescinded so that CEC staff may exercise its inherent discretion to decide whether to waive the recertification deadline, whether to

retroactively certify the facilities, or whether to simply choose not to revise the Facilities' eligibility dates.

C. Discretionary Authority Exists Even in the Absence of a Clear Grant in the RPS Guidebook

A government agency's authority is derived entirely from its governing statutes and not from rules or guidelines that it may issue from time to time. (*Lockyer*, 33 Cal.4th at p. 1086.) A "guideline" is simply "a rule or instruction that shows or tells how something should be done." (Merriam-Webster's Online Dictionary, accessed Feb. 4, 2014.) The CEC has readily suggested that it could amend the RPS Guidebook to "grant" authority to the Executive Director or his staff to permit the waiver of Guidebook provisions for good cause. (*E.g.*, RPS Guidebook Scoping Workshop, January 28, 2014, PowerPoint Presentation at Slide 22.) But if the CEC has the authority to amend its guidelines to "grant" itself such authority, then it is necessarily already vested with that authority. The RPS Guidebook simply explains the authority that the CEC already has, which is derived entirely from its governing statutes. The CEC need not revise the RPS Guidebook in order to exercise its inherent discretionary authority to waive application of its non-statutory guidelines, especially here, where NID is guilty of nothing worse than being uninformed of procedural requirements of a program with which it had no prior experience.

II. Granting the Relief Requested Furthers the RPS Program's Statutory Goals Without Undermining the Underlying Justification for the Recertification Deadline

Were the CEC to grant NID the relief it requests, the underlying justifications for the deadline would still be served, as would the overarching goals of the RPS program. In fact, affirming the revocation and revision of the Facilities' original eligibility dates would work directly against the RPS program's statutory and policy goals.

A. Justifications for the Deadline Not Served by Revising Eligibility Dates

The CEC's justification for imposing the recertification deadline is "to ensure quality of data and timely completion of the verification process." (RPS Guidebook Scoping Workshop, January 28, 2014, PowerPoint Presentation at Slide 21.) There is no question that the Facilities at issue here have always been qualified for the RPS program, under both the statutory criteria and the RPS Guidebook's criteria, aside from the deadline requirement. Both of the Facilities were RPS-eligible and certified prior to the Revocation Period. The Facilities' operations, capacity, and characteristics have remained unchanged since the Facilities were constructed, long before the RPS program's inception. Further, the Facilities are currently RPS-eligible and certified under all statutory and Guidebook criteria. Nothing about the Facilities changed before, during, or after the Revocation Period, aside from the term of NID's contract with PG&E. There is no possibility that the CEC could have had inferior data when reviewing the applications because, as was plainly stated by the CEC when it approved the recertification applications, the Facilities are "*incapable* of using any other energy resource to generate electricity." (Transmittal Letters, January 10, 2014, at 1. Emphasis added.) Unlike, for instance, "multifuel" facilities (*see* RPS Guidebook at pp. 42-51), these Facilities' operational characteristics are static and they are incapable of generating non-renewable energy. Because the Facilities always have, and always will, produce energy that qualifies for inclusion in the RPS program, and they are incapable of generating electricity in any other way, the goal of ensuring high-quality application data is not served by excessively rigid imposition of the deadline.

Further, the delays caused by NID's untimely submission did not materially affect the "timely completion of the verification process." First, the delay between the deadline date and NID's first submission attempt—9 days (8 days if 2 C.C.R. § 1.15 applies)—is only half the time that it took the CEC to respond and inform NID that the October 8 submission used the wrong forms. And after NID submitted corrected applications on the proper forms on October 30, the CEC did not approve the applications until 22 days later, and did not notify NID that the applications were approved until January 10—72 days after NID's final submission. In all, NID's submissions were between 8 and 31 days late, while the CEC took 16 days to notify NID that it

used the wrong forms and another 72 days to inform NID that the applications were approved. NID's late applications did not materially affect the timely completion of the verification process, so there is no benefit to enforcing the RPS Guidebook's deadline against NID here. Because the deadline's justifications are irrelevant here, they need not be strictly enforced.

B. Statutory and Policy Goals are Not Served by Revising Eligibility Dates

Preventing a 91-day lapse in the Facilities' certifications, and thereby eliminating the risk of a $671,517 contractual damages claim against NID, serves the RPS program's statutory policy goals, and to do otherwise would work against those goals. The program's goals include: Encouraging electrical generation from eligible renewable energy resources (PUC § 399.20(a)); achieving 20% renewable generation for retail customers by December 31, 2013, and 33% by December 31, 2020 (PUC § 399.11(a); PRC § 25740); ensuring electricity rates are just and reasonable, and are not significantly affected by the procurement requirements of the RPS program (PUC § 399.11(e)(1)); and benefitting the State of California by, *inter alia*, promoting stable retail rates for electric service and achieving a diversified and balanced renewable generation portfolio (PUC § 399.11(b)(5)&(6)).

These goals are not served by the decision to deem the Facilities' July 1 through September 30 generation ineligible for the RPS and to allow the potential for the unnecessary contractual penalty to stand—in fact, the Revocation Letter works against those very goals. As the Public Utilities Commission stated in its decision approving the current PPA, the Facilities' renewable generation is "particularly valuable" because it is intended to "fall[] into the RPS portfolio content category for which the target is the highest." (PUC Decision 13-03-030 at p. 2.) The statutory policy goals would be best served by rescinding the January 10, 2014 Revocation Letter and granting NID the relief it requests.

III. The CEC's Action Does Not Comport with an Unambiguous Statutory Mandate

The CEC's decision to revise the Facilities' RPS eligibility dates and to temporarily revoke their certifications due to a missed procedural deadline violates the clear mandate to the CEC in Public Utilities Code § 399.25. The Facilities' original RPS eligibility dates must be reinstated in order to adhere to the statutory mandate.

A. The Statutory Mandate to Certify Qualified Facilities is Clear

The CEC's decision to revoke the Facilities' RPS certifications, based only on NID's untimely applications, violates the CEC's clear statutory mandate to certify renewable facilities that meet the statutory criteria. Public Utilities Code § 399.25 states, "The [CEC] *shall do* all of the following: (a) Certify eligible renewable energy resources that it determines meet the criteria described in subdivision (e) of Section 399.12." (PUC § 399.25(a). Emphasis added.) The statute does not grant the CEC any discretion to choose not to certify a facility for any reason other than a failure to meet the criteria described in section 399.12(e).

In the relevant part, § 399.12(e) says:

> (e) "Eligible renewable energy resource" means an electrical generating facility that meets the definition of a "renewable electrical generation facility" in Section 25741 of the Public Resources Code, subject to the following:
>
> (1) (A) An existing small hydroelectric generation facility of 30 megawatts or less shall be eligible only if a retail seller or local publicly owned electric utility procured the electricity from the facility as of December 31, 2005. . . . .

The relevant provisions of Public Resources Code § 25741 define a "renewable electrical generation facility" as follows:

> (a) "Renewable electrical generation facility" means a facility that meets all of the following criteria:
>
> (1) The facility uses . . . small hydroelectric generation of 30 megawatts or less . . . .
>
> (2) The facility satisfies one of the following requirements:
>
> (A) The facility is located in the state . . . .

The PUC § 399.12(e) criteria, and the PRC § 25741 criteria incorporated therein, do not include adherence to timelines imposed by the CEC or to guidelines that the CEC may issue and revise from time to time. The certification requirements found in the RPS Guidebook cannot negate the clear statutory mandate. For the CEC to deny, revoke, or void a certification based on anything other than the statutory criteria is an abuse of discretion. For that reason, the Revocation Letter must be rescinded and the original eligibility dates reinstated.

B. The CEC Lacked Authority to Depart from the Statutory Criteria

The legislation that created the RPS program authorized the CEC to promulgate guidelines governing two specific facets of the RPS program. The CEC was explicitly authorized and directed to promulgate "guidelines governing the *funding programs* authorized under" Chapter 8.6 of Division 15 of the Public Resources Code. (PRC § 25747(a). Emphasis added.) The CEC was also impliedly authorized to promulgate guidelines to govern an accounting system, which PUC § 399.25(b) directed the CEC to design and implement. Separate and apart from the directive to design and implement an accounting system, and completely unrelated to the funding programs, the CEC was also ordered to certify all eligible renewable energy resources that meet the statutory criteria. (PUC § 399.25(a).) That mandate did not include an authorization to promulgate guidelines. (*See id.*) Where the legislature "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that" the legislature acted intentionally. (*E.g., Garfield Medical Ctr. v. Belshe* (1998) 68 Cal.App.4th 798, 807.) The intentional exclusion of authority to promulgate guidelines governing facility certification cannot be overcome by *Dickey*'s recognition of "necessary additional powers." (*See* Section I.B.1, *supra*.)

The RPS Guidebook's guidelines related to the recertification requirement are vague and ambiguous and should therefore not be strictly enforced. As quasi-legislative "guidelines" that were neither authorized by the statute, nor promulgated in accordance with APA, the RPS

Guidebook provisions applicable to the facility certification process cannot be given the same force and effect of duly promulgated, APA-compliant "regulations," and therefore the guidelines should not be strictly enforced. This is particularly true here, where the CEC is adjudicating the individual rights of NID. It is essential that the Commission exercise its discretion rather than bind itself to the RPS Guidebook's guidelines. Given the lack of statutory authority to the contrary, the CEC should exercise its discretion to determine that the eligibility date for the Facilities is July 1, 2013. To assert a lack of authority to hear and consider the facts and circumstances of this case and a duty to blindly follow what is labeled a "guideline" without reference to those facts and circumstances is tantamount to a taking of property without due process of law.

The CEC was not authorized to promulgate guidelines that augment the statutory RPS certification criteria, so any such guidelines are not enforceable. Because the Facilities have met the statutory criteria continuously since their original eligibility dates, those dates must be reinstated.

Conclusion

The strict imposition of the procedural deadline in the Revocation Letter has only two results: disqualifying otherwise qualified generation from being included within the retail seller's portfolio for 91 days, and exposing NID to the potential for a severe financial penalty by virtue the provision in the PPA. Strict imposition of the deadline will serve no substantive purpose, nor will it further the public policy favoring acquisition of renewable energy. The public interest is not advanced by the imposition of such a penalty, whatsoever.

Given the foregoing, it is reasonable for CEC Staff to exercise, in the public interest, the discretion which it inherently has to rectify what would otherwise be an unduly harsh result. The invitation to work toward rectifying the problem through a revision to the RPS Guidebook, while welcome (as it would spare others from similarly harsh penalties), cannot be relied upon to

solve this problem because the outcome of the revision process is not certain, the timing is unknown, and the risk of penalty on NID remains.

NID does not deny that it submitted the recertification applications more than 90 days after the original PPA expired. But that omission, in this case, is understandable. NID was facing a rollover of a PPA that had been in place for 50 years. All operation, and all regulatory administration, had been handled by the retail seller for 50 years. NID had new management in place that was unfamiliar with the CEC's requirements, and that one person was confronted with the need for an emergency repair to the outlet works of one of NID's major water storage reservoirs, a situation made even more critical by the dry conditions prevailing in 2013. Moreover, it was clear to anyone familiar with the Facilities that they were qualified for the RPS program, they had already been RPS-certified by PG&E, and their operation, and indeed the utility's operation of those units, remained unchanged as the new PPA began. If ever a situation called for exercise of reasoned discretion to confirm the continuing RPS-eligibility of the Facilities—to relieve NID of the risk of a claim for a harsh penalty and to allow the energy generated to continue to be included in the Renewable Portfolio of the retail seller, as it had right up until midnight on June 30, 2014—this is that situation.

MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP
Counsel for Nevada Irrigation District

Dated February 7, 2014

By: _____
M. ANTHONY SOARES

_____
PETER C. HARMAN

Administrative Record

Re: Nevada Irrigation District's Petition for Reconsideration of Decision Letter Dated January 10, 2014, Issued by Deputy Director Suzanne Korosec, California Energy Commission

Table of Contents

TAB 1

CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET
SACRAMENTO, CA 95814-5512
www.energy.ca.gov

January 10, 2014

Mr. Remleh Scherzinger, P.E.
General Manager, Nevada Irrigation District
1036 W. Main Street
Grass Valley, CA 95945

RE: Renewables Portfolio Standard (RPS) Certification for Dutch Flat #2 (60264A) Powerhouse and Rollins Powerhouse (60265A)

Dear Mr. Scherzinger:

Robert Oglesby, Executive Director of the California Energy Commission, asked me to respond to your letter dated November 1, 2013. This letter was received by the Energy Commission on November 13, 2013, and requests retroactive RPS certification for the facilities referenced above. Energy Commission staff have determined that, based on the *Renewables Portfolio Standard Eligibility Guidebook (RPS Guidebook) Seventh Edition,* staff does not have the discretion to grant retroactive certification and therefore the electrical generation from these facilities from July 1, 2013, through September 30, 2013, cannot be used by any California retail seller for California RPS compliance.

Until July 1, 2013, the Dutch Flat #2 and Rollins Powerhouses were certified as RPS-eligible based on applications submitted by Pacific Gas and Electric Company (PG&E) on the facilities' behalf. Early in the RPS program, an investor-owned utility (IOU) such as PG&E was allowed to apply for RPS certification for facilities whose electrical generation was sold to that IOU under a contract executed before April 21, 2004. However, once that contract expires, is voluntarily extended, or is otherwise renegotiated, these certifications become void and the facility operator must apply for RPS certification on its own behalf.

To help facility operators make the transition from utility certification to self certification, the *RPS Guidebook, Sixth Edition* (August 2012) gave owners or agents of utility-certified facilities 90 days after the contract termination or renegotiation date to submit a self-certification application. If the application is <u>not</u> received within 90 days, the facility loses its original RPS eligibility date, meaning that any generation between the contract expiration date and the date the facility is recertified cannot be used by any California

retail seller for RPS compliance purposes. The generation could, however, be claimed by a local publicly owned electric utility for RPS compliance under certain circumstances.[1]

Nevada Irrigation District's contracts with PG&E for the Dutch Flat #2 and Rollins Powerhouses expired July 1, 2013. The Energy Commission received the certification applications for the Dutch Flat #2 Powerhouse and the Rollins Powerhouse on October 30, 2013, 121 days after the contract expiration. Energy Commission staff approved the facilities for RPS certification on November 21, 2013, and the facilities' generation from October 1, 2013 forward can be used by California retail sellers for RPS compliance.

Your letter stated that a clerical error resulted in a delayed submittal of your application for certification. Unfortunately, there are no provisions in the *RPS Guidebook, Seventh Edition* that would allow retroactive certification based on such an error. Further, although the *RPS Guidebook*, *Seventh Edition,* establishes an appeal process that allows applicants to seek reconsideration of certification decisions, the appeal process is narrowly limited to circumstances where the applicant can show that the Energy Commission denied or revoked RPS certification by applying factors other than those set forth in the *RPS Guidebook*.[2] The facts presented do not satisfy the appeal process criteria.

The Energy Commission periodically revises the *RPS Guidebook* to reflect changes in California law, developments in the renewable energy markets and related programs, and lessons learned in implementing the program. As part of a future guidebook revision process, staff plans to hold a scoping workshop on January 28, 2014 to solicit input from stakeholders on a number of outstanding issues identified in the *RPS Guidebook, Seventh Edition,* and to provide stakeholders the opportunity to bring additional issues of importance to them for consideration. The workshop notice is available online at [www.energy.ca.gov/portfolio/documents/index.html#01282014]. I encourage you to participate in this workshop to discuss the issue of retroactive RPS certification and seek changes to the guidebook to allow retroactive certification in cases such as your own.

---

1 The *RPS Guidebook Seventh Edition* (April 2013) provides a grace period for facilities serving local publicly owned electric utilities that allows a local publicly owned electric utility to count generation from facilities that were "not certified by the Energy Commission as RPS eligible at the time of generation, [if] the Energy Commission receive[d] an application for RPS certification by December 31, 2013, and subsequently [certified] the facility as RPS-eligible" (page 78).

2 The "Reconsideration of Certification" process is described on pages 113-115 of the *RPS Guidebook, Seventh Edition* (April 2013), [http://www.energy.ca.gov/2013publications/CEC-300-2013-005/CEC-300-2013-005-ED7-CMF-REV.pdf].

I have enclosed approval letters and certificates of eligibility for the Dutch Flat #2 Powerhouse and Rollins Powerhouse with the effective eligibility date of October 30, 2013.

If you have any questions about this letter or the January 28, 2014 scoping workshop, please contact Mark Kootstra at [mark.kootstra@energy.ca.gov] or 916-653-4487.

Sincerely,

Suzanne Krosa

SUZANNE KOROSEC
Deputy Director
Renewable Energy Division

Enclosures

cc: Robert Oglesby, Executive Director

CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET
SACRAMENTO, CA 95814-5512
www.energy.ca.gov

January 10, 2014

Remleh Scherzinger
Nevada Irrigation District
1036 W Main St
Grass Valley, CA 95945

RE: Approval of Application for RPS Certification, **Dutch Flat #2 Powerhouse** Facility, RPS ID **60264A**.

Dear **Remleh Scherzinger**:

The California Energy Commission has evaluated the application you submitted on behalf of **Nevada Irrigation District** for the **Dutch Flat #2 Powerhouse** facility for certification and determined that the facility is eligible for California's Renewables Portfolio Standard (RPS) under the criteria specified in the *Renewables Portfolio Standard Eligibility Guidebook, Seventh Edition*, publication number CEC-300-2013-005-ED7-CMF, April 2013. The facility is assigned CEC-RPS-ID number **60264A**. Please use this number in all future correspondence with the Energy Commission regarding this facility's RPS certification status. A certificate confirming the RPS certification of the facility is enclosed.

This certification is effective on **October 30, 2013**, and will remain in effect unless certification is voluntarily withdrawn by an authorized representative of the facility, the facility is permanently shut down or decommissioned, or the certification is revoked by the Energy Commission because of noncompliance with the applicable RPS requirements. Beginning with the month containing **October 30, 2013**, all generation from **Dutch Flat #2 Powerhouse** may be used for RPS compliance purposes if all of the requirements specified in the *RPS Eligibility Guidebook, Seventh Edition*, continue to be met.

This certification is based on an evaluation of the RPS-eligibility of the facility, as described in the application and supporting documentation you submitted to the Energy Commission in **October, 2013**, the accuracy of which was attested to by **Remleh Scherzinger**, the **General Manager** of **Nevada Irrigation District**.

As described in the submitted application, the facility is using **Small Hydroelectric** as the only energy resource used to generate electricity, and the facility, as described, is incapable of using any other energy resource to generate electricity.

To maintain the certification of this facility, you must comply with all applicable requirements for certified facilities set forth in the *RPS Eligibility Guidebook, Seventh Edition.* The Energy Commission must be notified promptly of any changes to the information included in the application for RPS certification of the facility. Failure to do so within 90 days of the change in the information may result in the suspension of the facility's RPS certification. Any changes in the information submitted in the application for RPS certification must be reported to the Energy Commission in an amended certification application (CEC-RPS-1), and the amended application will supersede the original application. If any supporting documentation is necessary for the certification of the facility, it must be submitted with the amended application. The applicant may submit a letter confirming the applicant's desire to use the previously submitted supporting documentation and confirming that the documentation previously submitted is the most accurate

and current information available for the facility in lieu of resubmitting the supporting documentation.

The Energy Commission may request additional information to monitor compliance with RPS requirements, and may conduct periodic or random reviews to verify records submitted for certification. The Energy Commission may also conduct on-site audits and facility inspections to verify compliance with the certification requirements specified in the *RPS Eligibility Guidebook, Seventh Edition*. If you do not respond to the Energy Commission's request for an information update in a timely manner, the facility's RPS certification status may be suspended.

The Energy Commission will list facilities that are participating in the RPS or have applied for participation in the RPS on its website. Any changes in a facility's certification or precertification status will also be posted on the Energy Commission's website.

If you have any questions about your certification, please do not hesitate to contact Christina Crume by phone at (916) 654-4674 or by e-mail at christina.crume@energy.ca.gov.

Sincerely,

Mark Kootstra
Certification Lead, Renewables Portfolio Standard Program
Renewable Energy Office

Enclosure

Certified Eligible for California's Renewables Portfolio Standard

This is to officially state that beginning on ***October 30, 2013****, the facility:*

Dutch Flat #2 Powerhouse

Owned by Nevada Irrigation District,
Located in Nevada City, CA,
And having Commenced Commercial Operations on:
November 21, 1965

Is certified by the California Energy Commission as eligible for California's Renewables Portfolio Standard (RPS) under the criteria specified in the ***Renewables Portfolio Standard Eligibility Guidebook, Seventh Edition,*** *publication number CEC-300-2013-005-ED7-CMF, April 2013, and assigned CEC-RPS-ID number:*

60264A

The application for RPS certification of this renewable electrical generation facility was submitted by **Remleh Scherzinger**, of **Nevada Irrigation District**, on behalf of the facility owner **Nevada Irrigation District**. The accuracy of the information in the submitted application for RPS certification was attested to by **Remleh Scherzinger**, the **General Manager** of **Nevada Irrigation District**.

The facility has a total nameplate capacity, measured in alternating current, of

24.57 MW

Using the following renewable energy resource(s):

Small Hydroelectric

And using the following nonrenewable energy resource(s):

None

The contribution of each energy resource to the electrical generation is based on the Dutch Flat #2 Powerhouse measurement methodology, as identified in the submitted application for RPS certification. California RPS-eligible Renewable Energy Credits will not be created for any electricity resulting from the use of nonrenewable energy resources, except in cases where the use of nonrenewable energy resources does not exceed a de minimis quantity or other allowance as specified in the Renewables Portfolio Standard Eligibility Guidebook, Seventh Edition, and sufficient evidence has been submitted in support of compliance with those requirements.

The RPS certification of the Dutch Flat #2 Powerhouse facility may be revoked if any of the information presented in the application for RPS certification, or supporting documentation, submitted to the California Energy Commission is determined to be false or inaccurate.

The California Energy Commission must be promptly notified of any changes to the information included in the application for RPS certification of the facility, including changes in the facility's operations, ownership, or representation, as specified in the Renewables Portfolio Standard Eligibility Guidebook, Seventh Edition. Failure to do so within 90 days of the change in the information may result in the revocation of the facility's RPS certification.

CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET
SACRAMENTO, CA 95814-5512
www.energy.ca.gov

January 10, 2014

Remleh Scherzinger
Nevada Irrigation District
1036 W Main St
Grass Valley, CA 95945

RE: Approval of Application for RPS Certification, **Rollins Powerhouse** Facility, RPS ID **60265A**.

Dear **Remleh Scherzinger**:

The California Energy Commission has evaluated the application you submitted on behalf of **Nevada Irrigation District** for the **Rollins Powerhouse** facility for certification and determined that the facility is eligible for California's Renewables Portfolio Standard (RPS) under the criteria specified in the *Renewables Portfolio Standard Eligibility Guidebook, Seventh Edition*, publication number CEC-300-2013-005-ED7-CMF, April 2013. The facility is assigned CEC-RPS-ID number **60265A**. Please use this number in all future correspondence with the Energy Commission regarding this facility's RPS certification status. A certificate confirming the RPS certification of the facility is enclosed.

This certification is effective on **October 30, 2013**, and will remain in effect unless certification is voluntarily withdrawn by an authorized representative of the facility, the facility is permanently shut down or decommissioned, or the certification is revoked by the Energy Commission because of noncompliance with the applicable RPS requirements. Beginning with the month containing **October 30, 2013**, all generation from **Rollins Powerhouse** may be used for RPS compliance purposes if all of the requirements specified in the *RPS Eligibility Guidebook, Seventh Edition*, continue to be met.

This certification is based on an evaluation of the RPS-eligibility of the facility, as described in the application and supporting documentation you submitted to the Energy Commission in **October, 2013**, the accuracy of which was attested to by **Remleh Scherzinger**, the **General Manager** of **Nevada Irrigation District**.

As described in the submitted application, the facility is using **Small Hydroelectric** as the only energy resource used to generate electricity, and the facility, as described, is incapable of using any other energy resource to generate electricity.

To maintain the certification of this facility, you must comply with all applicable requirements for certified facilities set forth in the *RPS Eligibility Guidebook, Seventh Edition.* The Energy Commission must be notified promptly of any changes to the information included in the application for RPS certification of the facility. Failure to do so within 90 days of the change in the information may result in the suspension of the facility's RPS certification. Any changes in the information submitted in the application for RPS certification must be reported to the Energy Commission in an amended certification application (CEC-RPS-1), and the amended application will supersede the original application. If any supporting documentation is necessary for the certification of the facility, it must be submitted with the amended application. The applicant may submit a letter confirming the applicant's desire to use the previously submitted supporting documentation and confirming that the documentation previously submitted is the most accurate

and current information available for the facility in lieu of resubmitting the supporting documentation.

The Energy Commission may request additional information to monitor compliance with RPS requirements, and may conduct periodic or random reviews to verify records submitted for certification. The Energy Commission may also conduct on-site audits and facility inspections to verify compliance with the certification requirements specified in the *RPS Eligibility Guidebook, Seventh Edition*. If you do not respond to the Energy Commission's request for an information update in a timely manner, the facility's RPS certification status may be suspended.

The Energy Commission will list facilities that are participating in the RPS or have applied for participation in the RPS on its website. Any changes in a facility's certification or precertification status will also be posted on the Energy Commission's website.

If you have any questions about your certification, please do not hesitate to contact Christina Crume by phone at (916) 654-4674 or by e-mail at christina.crume@energy.ca.gov.

Sincerely,

Mark Kootstra
Certification Lead, Renewables Portfolio Standard Program
Renewable Energy Office

Enclosure

Certified Eligible for California's Renewables Portfolio Standard

This is to officially state that beginning on ***October 30, 2013****, the facility:*

Rollins Powerhouse

Owned by Nevada Irrigation District,
Located in Grass Valley, CA,
And having Commenced Commercial Operations on:
August 20, 1980

Is certified by the California Energy Commission as eligible for California's Renewables Portfolio Standard (RPS) under the criteria specified in the ***Renewables Portfolio Standard Eligibility Guidebook, Seventh Edition,*** *publication number CEC-300-2013-005-ED7-CMF, April 2013, and assigned CEC-RPS-ID number:*

60265A

The application for RPS certification of this renewable electrical generation facility was submitted by **Remleh Scherzinger**, of **Nevada Irrigation District**, on behalf of the facility owner **Nevada Irrigation District**. The accuracy of the information in the submitted application for RPS certification was attested to by **Remleh Scherzinger**, the **General Manager** of **Nevada Irrigation District**.

The facility has a total nameplate capacity, measured in alternating current, of

12.15 MW

Using the following renewable energy resource(s):

Small Hydroelectric

And using the following nonrenewable energy resource(s):

None

The contribution of each energy resource to the electrical generation is based on the Rollins Powerhouse measurement methodology, as identified in the submitted application for RPS certification. California RPS-eligible Renewable Energy Credits will not be created for any electricity resulting from the use of nonrenewable energy resources, except in cases where the use of nonrenewable energy resources does not exceed a de minimis quantity or other allowance as specified in the Renewables Portfolio Standard Eligibility Guidebook, Seventh Edition, and sufficient evidence has been submitted in support of compliance with those requirements.

The RPS certification of the Rollins Powerhouse facility may be revoked if any of the information presented in the application for RPS certification, or supporting documentation, submitted to the California Energy Commission is determined to be false or inaccurate.

The California Energy Commission must be promptly notified of any changes to the information included in the application for RPS certification of the facility, including changes in the facility's operations, ownership, or representation, as specified in the Renewables Portfolio Standard Eligibility Guidebook, Seventh Edition. Failure to do so within 90 days of the change in the information may result in the revocation of the facility's RPS certification.

TAB 2

NEVADA IRRIGATION DISTRICT

1036 W. Main Street, Grass Valley, CA 95945-5424 ~ www.nidwater.com
(530) 273-6185 ~ Fax: (530) 477-2646 ~ Toll Free: (800) 222-4102

November 1, 2013

California Energy Commission
Office of the Executive Director
1516 9th Street, MS-39
Sacramento, CA 95814-5512

Re: Potential Revocation of RPS Certification for Dutch Flat #2 and Rollins Powerhouses

Dear Sir/Madam:

The Nevada Irrigation District recently submitted the paperwork to recertify its Renewable Portfolio Standard (RPS) eligibility for the Dutch Flat #2 (RPS ID 60264E) and Rollins (RPS ID 60265E) Powerhouses. The District understands that, due to the delay in submitting the Certification, it is possible that the RPS Certification for the above plants may be suspended during the period from July 1, 2013 through September 30, 2013. Upon learning of the requirement, the District made multiple efforts to submit the Certifications as quickly as possible including working directly with staff at the California Energy Commission and hand delivering the necessary documents.

The District is requesting that the California Energy Commission consider making the certification retroactive so no gap exists.

The Dutch Flat #2 and Rollins Powerhouses have been providing renewable electricity for California since 1965 and 1980 respectively. With a combined capacity of over 36 Megawatts these two powerhouses are an important component used to meet the requirement for retail sellers of electricity and local publicly owned electric utilities to increase the amount of renewable energy they procure until 33 percent of their retails sales are served with renewable energy by December 31, 2020.

Since the eligibility of these facilities for inclusion in the program is not in question, the District hopes that a clerical error on our part will not be allowed to stand in the way of meeting such an important requirement.

We appreciate your consideration of our request. If you need additional information please contact Remleh Scherzinger, P.E., General Manger at 530.273.6185 or by email at Scherzinger@nidwater.com or Keane Sommers, P.E., Hydroelectric Manager at 530.273.8571 or by email at sommers@nidwater.com.

Sincerely,

Remleh Scherzinger, P.E.
General Manager

c: Keane Sommers, Hydroelectric Manager, NID
Central Files, NID

TAB 3

Peter Harman

From: Energy - RPSTrack [RPSTrack@energy.ca.gov]
Sent: Wednesday, October 30, 2013 2:36 PM
To: Keane S. Sommers
Cc: Karen Blair
Subject: RE: Certification of the Rollins Powerhouse

Dear Applicant:

The Energy Commission has received both the hard copy and electronic copy submissions of RPS certification application for the **Rollins Powerhouse, 60265A**. The application has a received on date of **October 30, 2013**. Please retain this email as proof that your submission was received by the Energy Commission.

This notice of receipt does not signify approval of the facility for RPS certification or completeness of the information contained within the submission, only that the review process may begin.

The Energy Commission will make every effort to notify applicants if their facility is eligible for the RPS as soon as possible. For applications not needing additional reviews or requiring correspondence with the applicant the Energy Commission expects to review applications for certification or precertification within 30 business days of receiving a complete application subject to change depending on the complexity of the application and the activity in the application queue. For additional information please see the RPS Eligibility Guidebook, Seventh Edition, page 79.

If questions arise, the applicant will be contacted and may be asked to submit additional information. Applicants will have 60 days to respond to any request for clarification or additional information before the application will be returned without approval. For additional information please see the RPS Eligibility Guidebook, Seventh Edition, page 80.

The Renewables Portfolio Standard Eligibility Guidebook, Seventh Edition, can be found online at:
http://www.energy.ca.gov/renewables/documents/index.html#rps

If you have any questions or concerns after reviewing the RPS Guidebook please feel free to contact me.

Sincerely,

Christina Crume
Renewables Portfolio Standard
California Energy Commission
1516 9th Street MS-45
Sacramento, CA 95814
(916)-654-4674
christina.crume@energy.ca.gov

From: Keane S. Sommers [mailto:sommers@nidwater.com]
Sent: Wednesday, October 30, 2013 12:57 PM
To: Energy - RPSTrack
Cc: Karen Blair
Subject: Certification of the Rollins Powerhouse

Attached please find Nevada Irrigation District's corrected Certification for the Rollins Powerhouse on the current forms. A signed hard copy was hand delivered to the CEC office this morning.

Thank you,

Keane Sommers, P.E.
Nevada Irrigation District | Hydroelectric Manager
28311 Secret Town Road | Colfax, California 95713
Office: (530) 273-8571 x101 | Cell: (530) 263-9723
sommers@nidwater.com

From: Keane S. Sommers
Sent: Friday, October 25, 2013 12:32 PM
To: RPSTrack@energy.ca.gov
Cc: Karen Blair
Subject: FW: Certification of the Rollins Powerhouse

Attached please find Nevada Irrigation District's Certification for the Rollins Powerhouse. A signed hard copy will follow in the mail.
Thank you,

Keane Sommers, P.E.
Nevada Irrigation District | Hydroelectric Manager
28311 Secret Town Road | Colfax, California 95713
Office: (530) 273-8571 x101 | Cell: (530) 263-9723
sommers@nidwater.com

From: Energy - RPSTrack [mailto:RPSTrack@energy.ca.gov]
Sent: Thursday, October 24, 2013 12:12 PM
To: Keane S. Sommers
Subject: RE: Certification of the Rollins Powerhouse

Hi Keane,

Thank you for your interest in California's Renewables Portfolio Standard (RPS). The Energy Commission adopted the seventh edition of the Renewables Portfolio Standard Eligibility Guidebook in April 2013, and published the document and forms in May 2013. Unfortunately, you submitted a form electronically on **October 8, 2013** that is associated with an earlier edition of the RPS Eligibility Guidebook. The Energy Commission can no longer accept applications for certification or precertification on forms associated with the earlier editions of the RPS Eligibility Guidebook. Forms associated with the Seventh Edition of the RPS Eligibility Guidebook can be found online at: http://www.energy.ca.gov/renewables/documents/index.html#rps.

Before Energy Commission staff can begin reviewing any application for RPS certification or pre-certification, all application forms must be submitted unsigned in Excel® format by email to RPSTrack@energy.ca.gov, and the original signed application forms must be mailed to:

California Energy Commission
Attn: RPS Certification
1516 9th Street, MS-45
Sacramento, CA 95814

Any supplemental information may be submitted electronically or by mail. For facilities with substantial supplemental information electronic copies either a word or searchable PDF format is preferred, where appropriate, but not required, see the RPS Eligibility Guidebook, Seventh Edition, pages 74-76.

If you have any questions or concerns after reviewing the RPS Guidebook please feel free to contact me.

Sincerely,

Christina Crume
Renewables Portfolio Standard
California Energy Commission
1516 9th Street MS-45
Sacramento, CA 95814
(916)-654-4674
christina.crume@energy.ca.gov

From: Keane S. Sommers [mailto:sommers@nidwater.com]
Sent: Monday, October 07, 2013 2:46 PM
To: Energy - RPSTrack
Subject: Certification of the Rollins Powerhouse

Attached please find Nevada Irrigation District's Certification for the Rollins Powerhouse. A signed hard copy will follow in the mail.
Thank you,

Keane Sommers, P.E.
Nevada Irrigation District | Hydroelectric Manager
28311 Secret Town Road | Colfax, California 95713
Office: (530) 273-8571 x101 | Cell: (530) 263-9723
sommers@nidwater.com

TAB 4

Peter Harman

From: Energy - RPSTrack [RPSTrack@energy.ca.gov]
Sent: Wednesday, October 30, 2013 2:36 PM
To: Keane S. Sommers
Cc: Karen Blair
Subject: RE: Certification of the Dutch Flat #2 Powerhouse

Dear Applicant:

The Energy Commission has received both the hard copy and electronic copy submissions of RPS certification application for the **Dutch Flat #2 Powerhouse, 60264A**. The application has a received on date of **October 30, 2013**. Please retain this email as proof that your submission was received by the Energy Commission.

This notice of receipt does not signify approval of the facility for RPS certification or completeness of the information contained within the submission, only that the review process may begin.

The Energy Commission will make every effort to notify applicants if their facility is eligible for the RPS as soon as possible. For applications not needing additional reviews or requiring correspondence with the applicant the Energy Commission expects to review applications for certification or precertification within 30 business days of receiving a complete application subject to change depending on the complexity of the application and the activity in the application queue. For additional information please see the RPS Eligibility Guidebook, Seventh Edition, page 79.

If questions arise, the applicant will be contacted and may be asked to submit additional information. Applicants will have 60 days to respond to any request for clarification or additional information before the application will be returned without approval. For additional information please see the RPS Eligibility Guidebook, Seventh Edition, page 80.

The Renewables Portfolio Standard Eligibility Guidebook, Seventh Edition, can be found online at:
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If you have any questions or concerns after reviewing the RPS Guidebook please feel free to contact me.

Sincerely,

Christina Crume
Renewables Portfolio Standard
California Energy Commission
1516 9th Street MS-45
Sacramento, CA 95814
(916)-654-4674
christina.crume@energy.ca.gov

From: Keane S. Sommers [mailto:sommers@nidwater.com]
Sent: Wednesday, October 30, 2013 12:57 PM
To: Energy - RPSTrack
Cc: Karen Blair
Subject: Certification of the Dutch Flat #2 Powerhouse

Attached please find Nevada Irrigation District's corrected Certification for the Dutch Flat #2 Powerhouse on the current forms. A signed hard copy was hand delivered to the CEC office this morning.

Thank you,

Keane Sommers, P.E.
Nevada Irrigation District | Hydroelectric Manager
28311 Secret Town Road | Colfax, California 95713
Office: (530) 273-8571 x101 | Cell: (530) 263-9723
sommers@nidwater.com

From: Keane S. Sommers
Sent: Friday, October 25, 2013 12:32 PM
To: 'RPSTrack@energy.ca.gov'
Cc: Karen Blair
Subject: Certification of the Dutch Flat #2 Powerhouse

Attached please find Nevada Irrigation District's Certification for the Dutch Flat #2 Powerhouse on the current forms. A signed hard copy will follow in the mail.
Thank you,

Keane Sommers, P.E.
Nevada Irrigation District | Hydroelectric Manager
28311 Secret Town Road | Colfax, California 95713
Office: (530) 273-8571 x101 | Cell: (530) 263-9723
sommers@nidwater.com

From: Energy - RPSTrack [mailto:RPSTrack@energy.ca.gov]
Sent: Thursday, October 24, 2013 12:12 PM
To: Keane S. Sommers
Subject: RE: Certification of the Dutch Flat #2 Powerhouse

Hi Keane,

Thank you for your interest in California's Renewables Portfolio Standard (RPS). The Energy Commission adopted the seventh edition of the Renewables Portfolio Standard Eligibility Guidebook in April 2013, and published the document and forms in May 2013. Unfortunately, you submitted a form electronically on **October 8, 2013** that is associated with an earlier edition of the RPS Eligibility Guidebook. The Energy Commission can no longer accept applications for certification or precertification on forms associated with the earlier editions of the RPS Eligibility Guidebook. Forms associated with the Seventh Edition of the RPS Eligibility Guidebook can be found online at: http://www.energy.ca.gov/renewables/documents/index.html#rps.

Before Energy Commission staff can begin reviewing any application for RPS certification or pre-certification, all application forms must be submitted unsigned in Excel® format by email to, and the original signed application forms must be mailed to:

California Energy Commission
Attn: RPS Certification
1516 9th Street, MS-45
Sacramento, CA 95814

Any supplemental information may be submitted electronically or by mail. For facilities with substantial supplemental information electronic copies either a word or searchable PDF format is preferred, where appropriate, but not required, see the RPS Eligibility Guidebook, Seventh Edition, pages 74-76.

If you have any questions or concerns after reviewing the RPS Guidebook please feel free to contact me.

Sincerely,

Christina Crume
Renewables Portfolio Standard
California Energy Commission
1516 9th Street MS-45
Sacramento, CA 95814
(916)-654-4674
christina.crume@energy.ca.gov

From: Keane S. Sommers [mailto:sommers@nidwater.com]
Sent: Monday, October 07, 2013 2:46 PM
To: Energy - RPSTrack
Subject: Certification of the Dutch Flat #2 Powerhouse

Attached please find Nevada Irrigation District's Certification for the Dutch Flat #2 Powerhouse. A signed hard copy will follow in the mail.
Thank you,

Keane Sommers, P.E.
Nevada Irrigation District | Hydroelectric Manager
28311 Secret Town Road | Colfax, California 95713
Office: (530) 273-8571 x101 | Cell: (530) 263-9723
sommers@nidwater.com

TAB 5

Declaration of Keane Sommers in Support of
Nevada Irrigation District's Petition for Reconsideration by the
Executive Director of the California Energy Commission

I, KEANE SOMMERS, declare as follows:

1. I make this declaration based on my personal knowledge, except for matters set forth herein on information and belief, and as to those matters, I believe them to be true.

2. I am employed as Hydroelectric Manager for Nevada Irrigation District (NID). I have held this position since July 1, 2013, and have worked for NID since 2007. William D. Morrow served as NID's Hydroelectric Manager prior to my succession to that position. As NID's Hydroelectric Manager, I oversee 22 budgeted positions and administer operations at NID's 7 hydroelectric power plants, reservoirs, and related facilities. My duties include, among other things, overseeing compliance activities related to these facilities.

3. NID owns a water conveyance and hydroelectric generation system located in Nevada, Sierra, and Placer Counties, California, known as the "Yuba-Bear Hydroelectric Project." The Yuba-Bear Project includes the Dutch Flat #2 and Rollins Powerhouses (collectively, the Facilities). Dutch Flat # 2 has a total nameplate capacity of 24.57 MW and commenced commercial operations in 1965. Rollins has a total nameplate capacity of 12.15 MW and commenced commercial operations in 1980.

4. Prior to serving as Hydroelectric Manager, I was employed as an Engineer in NID's Engineering Department. In that position, I did not routinely work within the Hydroelectric Department until September 2012, as most engineering support was provided either by Pacific Gas & Electric Company (PG&E) or outside consultants. Most of my direct work within the Hydroelectric Department was involved with the relicensing of the Yuba-Bear Hydroelectric

Project by the Federal Energy Regulatory Commission. In September 2012, I was appointed NID's Dam Safety Engineer and worked within the Hydroelectric Department.

5. In January 2013, a failure of the outlet works at NID's Bowman Reservoir resulted in the loss of NID's ability to draft that reservoir for its water system requirements and threatened the dam's safety. NID undertook emergency repairs, and virtually all of my time was devoted to retaining contractors, permitting, supervising, and inspecting the repairs.

6. PG&E purchases all of the power generated in the Yuba-Bear Project, including renewable and non-renewable energy, under the terms of a power purchase agreement (PPA) between NID and PG&E. NID and PG&E executed the initial PPA in 1963, which expired when the current PPA came into effect on July 1, 2013. Under the terms of the current PPA, PG&E purchases all electrical generation from the Yuba-Bear Project, including both renewable and non-renewable energy, for a fixed annual amount.

7. Operations at the Facilities have remained materially unchanged since they were constructed. NID receives operational orders from PG&E and executes those orders in accordance with the PPA.

8. The current PPA assigns to NID the responsibility for obtaining and maintaining California Energy Commission (CEC) certifications and verifications. The PPA also imposes liquidated damages against NID for any monthly "deficit" in renewable energy credits (RECs). A deficit exists when the amount of RECs, measured in megawatt-hours, delivered to PG&E for any given month is less than the number of megawatt-hours generated by the eligible renewable energy resources subject to the PPA (i.e., the Facilities) during that month. If the deficit is not remedied within 120 days of the end of the calendar year in which the deficit accrued, PG&E may pursue a damage claim against NID based on fixed penalty per megawatt-hour of deficit.

9. On October 1, 2013, I was notified by PG&E that NID needed to "self-certify" the Facilities as RPS-eligible with the CEC. To assist with NID's self-certification, PG&E also supplied application forms.

10. Prior to PG&E's October 1, 2013 notice, neither I nor, to my knowledge, anyone else employed by NID, had been informed about or was aware of a requirement that NID apply to recertify the Facilities with the CEC within 90 days of the expiration of the original PPA, or that the Facilities' original RPS certificates could be deemed "void."

11. On October 7, 2013, I submitted completed RPS certification applications for the Facilities to the CEC by email and mail.

12. On October 24, 2013, I received an email from the CEC, which stated that the applications that had been submitted electronically were received on October 8, 2013, but they had been rejected because they were submitted on outdated forms.

13. On October 25, 2013, I submitted new RPS certification applications for the Facilities on the proper forms by email and mail.

14. On or about October 29, 2013, I was informed via telephone conversation with Christina Crume, of the CEC, that the October 25 submissions contained errors that needed to be corrected, and the applications needed to be resubmitted.

15. On October 30, 2013, I submitted corrected RPS certification applications for the Facilities on the proper forms via email and hand delivery to the CEC's office. I received a confirmation email several hours later, indicating that the CEC had received the electronic and hardcopies of the applications.

16. The CEC finally notified NID that the CEC had approved the Facilities' RPS recertification applications by letters dated January 10, 2014. The notifications indicated that the Facilities had been deemed ineligible for the RPS program for the period from July 1, 2013 through September 30, 2013.

17. Although PG&E has not yet presented a formal claim for damages, one is anticipated, and I have been informed by PG&E that damages under the PPA due to the lapse in certifications could total $671,517, calculated as follows:

Invoice Month	*Deficient MWh*	*Damages Due*
July 2013	8373.14	$251,194
August 2013	10,383.16	$311,495
September 2013	3627.60	$108,828
Total	**22,384.90**	**$671,517**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on the 6th day of February, 2014 at Grass Valley, California.

Keane Sommers, P.E.
NID Hydroelectric Manager

TAB 6

Decision 13-03-030 March 21, 2013

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U39E) for Expedited Approval of the Power Purchase Agreement with Nevada Irrigation District and for Authority to Recover the Costs of the Agreement In Rates.	Application 12-06-014 (Filed June 20, 2012)

DECISION APPROVING APPLICATION OF PACIFIC GAS AND ELECTRIC COMPANY FOR APPROVAL OF ITS POWER PURCHASE AGREEMENT WITH NEVADA IRRIGATION DISTRICT AND FOR AUTHORITY TO RECOVER THE COSTS OF THE AGREEMENT IN RATES

1. Summary

Today's decision approves a Power Purchase Agreement between Pacific Gas and Electric Company (PG&E) and Nevada Irrigation District, grants PG&E authority to recover the costs of the agreement in rates, and provides for confidential treatment of certain documents that support the application.

2. Background

On June 20, 2012, Pacific Gas and Electric Company (PG&E) filed an Application for approval of the Power Purchase Agreement (PPA) it entered into with Nevada Irrigation District (NID) and for authority to recover the costs of the agreement in rates (Application). No protests were filed and the application is unopposed.

The PPA provides for PG&E's purchase of generation and capacity from four hydroelectric powerhouses for a 20-year term. Specifically, the PPA procures energy, capacity, capacity attributes, ancillary services (from Chicago

Park and Dutch Flat Powerhouse No. 2), and green attributes (from Bowman, Rollins and Dutch Flat Powerhouse No.2) in the California Independent System Operator (CAISO) defined capacity-deficient South of Palermo sub-area within the Sierra Local area. The renewable generation procured from the Renewables Portfolio Standard (RPS) eligible facilities under the 20-year contract would be particularly valuable if, as intended, it falls into the RPS portfolio content category for which the target is the highest.[1] PG&E requests approval of the PPA by application, rather than the advice letter process provided for RPS PPAs, because approximately half of the resource is RPS-eligible[2] and the other half is large hydro, and because two RPS non-modifiable terms have been modified.

The four powerhouses above are part of NID's Yuba-Bear Hydroelectric Project (YB Project). The YB Project is hydrologically linked to PG&E's 190 Megawatt (MW) Drum-Spaulding (DS) Project, which is comprised, in part, of 12 powerhouses located both upstream and downstream of the NID powerhouses. PG&E asserts that it and NID's personnel have established working relationships and a mutual understanding of both of their respective systems and their integration. PG&E currently receives power from the YB Project under two long-term agreements with NID. The first agreement is the Yuba-Bear Consolidated Contract between PG&E and NID which governs procurement from the Chicago Park, Dutch Flat No. 2 and Rollins Powerhouses

[1] *See* Pub. Util. Code § 399.16(b),(c). All statutory citations are to the California Public Utilities Code unless otherwise stated.

[2] The California Energy Commission determines the RPS eligibility of generation facilities.

and expires in July 2013.[3] The second is a 30-year Qualifying Facility Standard Offer 4 (SO 4) contract for the Bowman Powerhouse that expires in December 2016. The output of all four powerhouses within the YB Project will be covered by the new PPA. PG&E anticipates that the current Yuba-Bear Water Operations Contract, which coordinates the operations of and water conveyance through the YB Project and the DS Project will be replaced upon its expiration by a Coordinated Operations and Water Conveyance Agreement. PG&E further states that it and NID are currently negotiating the terms and conditions of such an agreement with the goal of coordinating the planning and operation of the two projects as needed, to manage the supply of water for generation by the two hydroelectric systems and to meet NID's consumptive demands.

3. Discussion

3.1. Project Description

As noted above, there are four powerhouses within the YB Project owned and operated by NID. NID is licensed by the Federal Energy Regulatory Commission (FERC) to operate each powerhouse under the terms of a 50-year agreement. The current agreement is scheduled to expire on April 30, 2013.[4] The output of all four powerhouses within the YB Project will be covered by the new PPA.

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[3] The Yuba-Bear Consolidate Contract is a two-part contract consisting of the Yuba-Bear Project Power Purchase Contract, which is Part I, and the Yuba-Bear Water Operation Contract, which is Part II. The Water Operation Contract governs the coordinated operations of and water conveyance between the YB Project and PG&E's Drum-Spaulding Project.

[4] NID is currently in the process of obtaining a successor license from FERC which is expected to have a term of at least 30 years. NID's obtaining a successor license is a condition precedent to the Agreement.

3.2. PPA Terms

PG&E currently procures the output from the YB Project under the YB Project Power Purchase Contract and the Bowman Powerhouse SO 4 contract.[5] The PPA consolidates the purchase of power under these two contracts into a single new agreement between PG&E and NID.

As part of its application, PG&E provides a description of the major terms of the PPA.[6] In addition to force majeure, termination, and default provisions the PPA provides the following terms:

- The PPA is a "hybrid" contract for dispatch rights and output from the capacity from three RPS-eligible resources and one non-RPS eligible hydro resource.
- PG&E will purchase all Products from the YB Project. Product includes all of the following and similar attributes – energy, capacity, capacity attributes, ancillary services from Chicago Park and Dutch Flat Powerhouse No. 2, and green attributes from Bowman, Rollins and Dutch Flat Powerhouse No.2.
- The PPA will become effective after California Public Utilities Commission (Commission) approval and the Initial Energy Delivery Date is July 1, 2013, subject to the satisfaction of all Conditions Precedent.
- Initial Energy Delivery Data for Chicago Park, Dutch Flat No. 2 and Rollins Powerhouse is July 1, 2013.[7] The Conversion Date,

[5] These two power purchase agreements will expire in 2012 and 2016 respectively.

[6] The terms that PG&E claims are market-sensitive and/or proprietary are described in Confidential Appendix A of the Application.

[7] Deliveries from the Chicago Park, Dutch Flat, and Rollins Powerhouses under the PPA will begin in 2013 upon the expiration of the YB Project Power Purchase Contract, subject to the satisfaction of all the conditions precedent as required in the PPA.

i.e. the "Start of Delivery Term for Bowman Powerhouse" is January 1, 2017.[8]

- NID will pay for interconnection, obtain and comply with the requirements of the CAISO Large Generator Interconnection Plan or other such agreement with the Participating Transmission Operator, execute a CAISO Participating Generator Agreement, and cause interconnection and metering facilities to be maintained throughout the Delivery Term.
- PG&E is the Scheduling Coordinator (SC) for the YB Project; PG&E also has the option to designate a third-party SC, but must give prior notice to NID of such designation.
- The delivery term is 20 Contract Years from the Initial Energy Delivery Date.
- NID must perform an Initial Capacity Test and an Initial Efficiency Test prior to the Initial energy Delivery Date. PG&E has the option to require NID to perform Capacity and Efficiency Testing during the Delivery Term. Adjustments to payments and contract capacity can result depending on the results of these tests.
- Losses due to congestion from the delivery point to load center are born by PG&E. If NID is exempted from or receives any refunds, credits or benefits from CAISO for congestion charges or Congestion Revenue Rights, NID must pass on those reductions to PG&E.
- As SC, PG&E is responsible for securing CAISO approval of outages for NID. Seller is required to provide PG&E with notification sufficiently in advance to comply with CAISO requirements for forced and planned outages. Non-compliance may result in adjustments to payment and contract capacity.
- NID must reduce powerhouse output during any system emergency Curtailment Period per CAISO or participating Transmission Owner instructions.

[8] Deliveries from the Bowman Powerhouse under the PPA are expected to begin in 2016 upon the expiration of the SO 4 contract.

- NID will ensure that all Western Renewable Energy Generation Information System Certificates associated with Delivered Energy from the aforementioned powerhouse resources are transferred to PG&E to satisfy RPS requirements.
- If at any time after the execution date the conditions of NID's new long-term FERC license decrease the YB Project's expected generation by more than a pre-established threshold, then PG&E can calculate an appropriate reduction in payment.
- If a new powerhouse is completed during the delivery term, NID must convey to PG&E NID's first offer to sell all Products from the new powerhouse under the same terms and conditions as the PPA, except for contract price, which must be quoted by Seller in the first offer. The parties then have ninety days to enter into a PPA or amend the existing PPA to include the new powerhouse, subject to Commission approval. If PG&E refuses Seller's first offer, NID may offer the output of the new powerhouse to a third party, provided that the material terms and conditions of any agreement with a third party are no more favorable to NID compared to its first offer to PG&E.
- The delivery term may be extended for another ten years at the parties option provided that NID has requested the extension at least two years before the end of the contract terms, parties agree to the subsequent price and delivery term within six months of the request, and the amended PPA is approved by the Commission.

3.3. Ratepayer Benefits

According to PG&E, assuming average hydrological conditions over the term of the agreement, the cost on a dollar per megawatt hour (MWh) basis would equate to a price below the current 2011 Market Price Referent (MPR).[9] PG&E goes on to assert that approval of the contract will produce additional

non-monetary benefits as well. In particular, PG&E notes that because it will retain the right to capacity and generation from the YB Project (rather than allowing a third party to schedule energy deliveries), PG&E can plan, optimize, and schedule water usage so that the cost benefits of the two hydro systems are maximized. PG&E further asserts that because the YB Project is located in an area that has been identified by the CAISO as capacity deficient to meet the North American Electric Corporation reliability standards, the project is uniquely qualified to support local reliability needs. Next, PG&E points out that the Chicago Park and Dutch Flat No.2 Powerhouses, over which the PPA gives PG&E scheduling rights, can provide spinning and non-spinning reserves and have relatively high ramp rates that can be used to respond to dispatch instructions as needed. Finally, because the project provides generation from eligible renewable resources, RPS-eligible project deliveries should count toward PG&E's present and future RPS obligations.[10]

3.4. Prior Authority

3.4.1. Commission Decisions

PG&E states that it intends to credit generation from the RPS-eligible powerhouses toward its RPS target on claims that the PPA satisfies all of the criteria used by the Commission to conclude that utility procurement of a renewable energy resource is reasonable.[11] PG&E argues that the project satisfies

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[9] Because the Commission's current RPS decision making uses the Least Cost, Best Fit (LCBF) analysis, the cost-reasonableness determination herein is based on the LCBF rather than the MPR analysis.

[10] Nothing in this decision should be read to allow generation from a resource that is not RPS-eligible to count toward PG&E's RPS compliance obligations.

[11] PG&E's RPS methodology is set forth in § 399.15(a).

the market valuation and portfolio fit criteria of the least-cost, best-fit model adopted in Decision (D.) 04-07-029. With regard to market valuation, PG&E compares the present value of the contract payment stream with the present value of the product's market value to determine the benefit (positive or negative) from the procurement of the resource and a net market value for the transaction. According to PG&E, the specific values of the YB Project constitute market-sensitive information. PG&E has provided us this information as well a more detailed analysis of the net market value of the PPA in a confidential exhibit. Based on this information, we conclude that the project satisfies the least-cost, best-fit criteria set forth in D.04-07-029.

PG&E also contends that the PPA provides a good match to its portfolio because deliveries from the YB Project are already integrated into PG&E's portfolio, are dispatchable, provide ancillary services, and occur in a capacity-deficient local area. We find these arguments persuasive, especially when taken in conjunction with the analysis of the YB Project's portfolio fit which PG&E provides in its Confidential Appendix A.

3.4.2. PG&E's Adopted RPS Procurement Plan

PG&E's 2011 RPS Procurement Plan was filed on May 4, 2011, in compliance with D.11-04-030 which was approved on April 14, 2011.[12] One goal of PG&E's 2011 RPS Plan is to procure deliveries from eligible renewable energy resources totaling approximately one to two percent of PG&E's annual retail sales volume, or 800 to 1,600 Gigawatt-hours (GWh) per year. Procurement from

[12] The Commission authorized PG&E to procure additional RPS resources in D.12-11-016, which approved PG&E's 2012 RPS Procurement Plan.

the three smaller powerhouses (133.3 GWh per year) is procurement from an RPS-eligible renewable energy resource.[13]

3.4.3. RPS Standard Terms and Conditions

Contracts for the purchase of electricity from eligible renewable energy resources must include the standard terms and conditions (STCs) set forth in D.08-04-009, and revised in D.08-08-028 and D.11-01-025. Generally, the purpose of the non-modifiable terms is to ensure that the conditions for counting the purchased power toward the buyer's RPS obligation are met. Here two standard terms and conditions have been modified.[14] PG&E claims this modification was made so as to avoid any mischaracterization of the Chicago Park Powerhouse facility as a renewable energy resource. The PPA procures generation from the Chicago Park Powerhouse, a large hydro facility, as well as RPS-eligible small hydro facilities. So as to explain that the output of the Chicago Park Powerhouse is not being procured for compliance with PG&E's RPS obligations, or that the Chicago Park Powerhouse is not an eligible renewable resource, PG&E modified two standard terms and conditions.

The first affected term is STC 1 which includes a finding that any procurement under the PPA will meet the Buyer's RPS procurement obligation. Since the Chicago Park Powerhouse is not RPS-eligible, the sentence, "[t]o the extent procurement pursuant to this Agreement is from the Chicago Park Powerhouse, subsection (b) above shall not apply" has been inserted at the end of the non-modifiable term. The second affected term is STC 6, under which

[13] Procurement from the three smaller powerhouses totals less than 30 MW.

[14] The modifiable and non-modifiable standard terms for RPS contracts are highlighted in the version of the PPA provided in Confidential Appendix B.

"Seller" warrants that the "Project" qualifies and is certified by the California Energy Commission as an Eligible Renewable Energy Resource, and that the "Project's" output delivered to Buyer qualifies under the requirements of the RPS.[15] The Chicago Park Powerhouse falls under the term "Project" in the PPA. According to PG&E, using some other term to distinguish this facility from the other three powerhouses would have caused confusion for plant operators and others who commonly refer to both the operating agreement and the PPA. The parties' agreed-upon solution was for the seller to warrant only that the Eligible Renewable Resource Powerhouse resources (which do not include the Chicago Powerhouse resources) are RPS-eligible for the term of the PPA.

While we are reluctant to excuse a party's non-compliance with the STCs, we do not favor form over function. Here, PG&E wisely provides a justification for its deviation from the STCs and allows for a more thorough review by proffering the modified terms as part of an application rather than an advice letter. Based on our review it appears deviation from the STCs was made so as to clarify which parts of the project were appropriately within our RPS rules. While we believe more careful drafting of the initial contract could have produced a document that complies with the STC language we require and makes clear which portions of the project are (not) RPS eligible, we will not require the parties to go back to the drawing board to achieve this result, in this instance. We will therefore permit deviation from the STCs in this instance.

3.4.4. Bilateral RPS Contract Rules

As set forth in D.09-06-050:

[15] This term appears in § 10.2(b) of the PPA.

> [L]ong-term bilateral contracts should be reviewed according to the same processes and standards as contracts that come through a solicitation." This includes review by the utility's Procurement Review Group and its Independent Evaluator. This requires only one adaptation to the current process. The MPR by its terms applies only to long-term contracts that come through a solicitation. It makes no sense, however, to develop an independent price evaluation tool for long-term bilateral contracts that are otherwise the same as long-term contracts that are the result of a solicitation. The MPR should therefore be used as a price benchmark for the evaluation of long-term bilateral contracts. In all other respects, including evaluation of price reasonableness, Energy Division's contract review processes should apply equally to bilateral contracts and contracts from a solicitation.

PG&E asserts that the cost of power procured under the PPA is confidential, market-sensitive information which is protected from public disclosure by agreement of the parties. In addition to providing complete PPA cost information in Confidential Appendix A to the application, PG&E notes that the PPA cost on a $/MWh basis is below that 2011 MPR established by Commission Resolution E-4442.[16]

3.4.5. Interim Emissions Performance Standard

D.07-01-039 implemented the California Emission Performance Standard (EPS). As set forth in D.07-01-039, "[t]he EPS applies to every electrical corporation, electric service provider, or community choice aggregator serving end-use customers in California."[17] The EPS applies to baseload generation, and

[16] This assumes average year hydrological conditions.

[17] *See* D.07-01-039, Attachment 7.

the requirement to comply with the EPS is triggered only if there is a long-term financial commitment by a load serving entity. PG&E correctly notes that baseload generation means electricity generation from a power plant with an annualized plant capacity factor of at least 60%.[18] Here the facts of record show that the annualized plant capacity factor is less than 60%. Therefore the EPS does not apply.

3.4.6. The Bundled Procurement

The 38 MW capacity of the Chicago Park Powerhouse that is not being procured pursuant to Commission approved Energy Efficiency or Demand Response programs, the RPS program, Combined Heat and Power program or the various distributed generation programs is subject to the "electric capacity procurement limits and ratable rates" in PG&E's Bundled Procurement Plan.[19] According to PG&E, "[t]he non-preferred capacity procurement under the PPA will not cause PG&E to exceed its electric capacity procurement limits in any delivery year associated with procurement that becomes effective in 2013.[20]

3.4.7. The Independent Evaluator

Consistent with D.09-06-050 the PPA was reviewed by an independent evaluator. The Independent Evaluator for PG&E's 2011 RPS Solicitation was Arroyo Seco Consulting. Arroyo Seco Consulting concluded that the negotiations with NID were conducted fairly, and based on the moderate to high

---

[18] Section 1(a) of the Adopted Interim EPS Rules provides that: "*Baseload generation* means electricity generation from a powerplant that is designed and intended to provide electricity at an annualized plant capacity factor of at least 60 percent …."

[19] These rates were adopted in D.12-01-033 and implements by PG&E Advice Letter 4026-E, as supplemented by Advice Letter 4206-E-A on May 20, 2012.

[20] *See* Application at 23.

valuation, low contract price, high viability, and moderate portfolio fit, the PPA merits Commission approval. Arroyo Seco Consulting's findings are contained in Appendix C and Confidential Appendix C-1.

3.4.8. Conclusion

For the reasons set forth above, we will approve the PPA between PG&E and NID and grant PG&E authority to recover the costs of the agreement in rates, without modification, subject to Commission review of PG&E's administration of the PPA.

4. Request for Confidential Treatment

Concurrent with its application, PG&E filed a separate motion requesting a protective order for what it claims is confidential market sensitive information. In particular, PG&E asks for a protective order that encompasses three appendices. The first is Confidential Appendix A which is a contract summary and analysis evaluating the benefits of the PPA. Next is Confidential Appendix B-1 which is the PPA that contains confidential market-sensitive terms. Finally, there's Confidential Appendix C-1 which is the confidential version of the Independent Evaluator's Report that includes market-sensitive terms concerning the fairness of PG&E's negotiations with NID and the merit of the transaction for Commission Approval.

The Commission, in implementing Public Utilities Code Section 454.5(g), has determined in D.06-06-066, as modified by D.07-05-032, that certain material submitted to the Commission as confidential should be kept confidential to ensure that market sensitive data does not influence the behavior of bidders in future RPS solicitations. D.06-06-066 adopted a time limit on the confidentiality of specific terms in RPS contracts. Such information, including price, is confidential for three years from the date the contract states that energy

deliveries begin, except contracts between IOUs and their affiliates, which are public.

PG&E asserts that information in Appendix A, Appendix B-1, and Appendix C-1, is confidential market sensitive information. We agree with PG&E and will place these documents under seal as set forth in the ordering paragraphs below.

5. Categorization and Need for Hearings

In Resolution ALJ 176-3297 dated July 12, 2012, the Commission preliminarily categorized this application as Ratesetting, and preliminarily determined that hearings were necessary. Because no hearings are required as a result to the parties' settlement of all issues in dispute, the hearings determination is changed to state that no evidentiary hearings are necessary.

6. Waiver of Comment Period

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to § 311(g)(2) of the Pub. Util. Code and Rule 14(c)(2) of the Commission's Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment is waived.

7. Assignment of Proceeding

The assigned Commissioner is Michel Peter Florio and the assigned Administrative Law Judge is Darwin E. Farrar.

Findings of Fact

1. NID is licensed by the FERC to operate four powerhouses within the YB Project under the terms of a 50-year agreement.
2. NID is currently in the process of obtaining a successor license from FERC which is expected to have a term of at least 30 years.

3. The PPA is a "hybrid" contract for dispatch rights and generic output and resource adequacy from the capacity from three RPS-eligible resources and one non-RPS eligible hydro resource, as well as Renewable Energy credits from the three RPS-eligible resources.

4. The PPA procures RA capacity in the California CAISO - defined capacity-deficient South of Palermo sub-area within the Sierra Local Area.

5. The PPA satisfies the criteria used by the Commission to conclude that utility procurement of a renewable energy resource is reasonable.

6. Approximately half of the resource at issue in the Agreement is RPS-eligible and the other half is large hydro.

7. Two RPS non-modifiable terms have been modified.

8. The YB Project is hydrologically linked to PG&E's 190 MW DS Project.

9. The output of all four powerhouses within the YB Project will be covered by the new PPA.

10. PG&E currently procures the output from the YB Project under the YB Project Power Purchase Contract and the Bowman Powerhouse SO 4 contract.

11. Assuming average hydrological conditions over the term of the agreement, the cost of power on a $/MWh basis would equate to a price below the current 2011 MPR.

12. PG&E's 2011 RPS Procurement Plan was filed on May 4, 2011, in compliance with D.11-04-030, and approved on May 11, 2011.

13. One goal of PG&E's 2011 RPS Plan is to procure deliveries from eligible renewable energy resources totaling approximately one to two percent of PG&E's annual retail sales volume, or 800 to 1,600 GWh per year.

Conclusions of Law

1. NID's obtaining a successor license from FERC is a condition precedent to the Agreement.

2. The project's value is reasonable based on the market valuation and portfolio fit criteria set forth in the least-cost, best-fit model adopted in D.04-07-029.

3. RPS eligible project deliveries should count toward PG&E's RPS obligations.

4. Contracts for the purchase of electricity from eligible renewable energy resources must include the STCs set forth in D.08-04-009, and revised in D.08-08-028 and D.11-01-025.

5. We will permit deviation from the STCs here because PG&E provides a justification for its deviation that shows its intention to comply with our rules and policies, and because PG&E provides for a more thorough review by proffering the modified terms as part of an application rather than an advice letter.

6. The PPA is not a form of covered procurement subject to the EPS because the forecast annualized capacity factor of each of the hydroelectric facilities is less than 60%.

7. Other than the 38 MW capacity of the Chicago Park Powerhouse that is not being procured pursuant to Commission approved Energy Efficiency or Demaned Response programs, the RPS program, or the various distributed generation programs, procurement pursuant to the PPA is, subject to verification by the California Energy Commission, procurement from eligible renewable energy resources for purposes of determining PG&E's compliance with any obligation that it may have.

8. Hearings are not necessary.

O R D E R

IT IS ORDERED that:

1. The Power Purchase Agreement between the Pacific Gas and Electric Company and the Nevada Irrigation District is approved.

2. Pacific Gas and Electric Company is granted authority to recover the costs of the agreement in rates, subject to a review of Pacific Gas and Electric Company's administration of the power purchase agreement.

3. No finding of fact or conclusion of law in this decision allows generation from any resource that is not an eligible renewable energy resource under the California renewables portfolio standard (RPS) to be counted toward any obligation of Pacific Gas and Electric Company under the RPS

4. Pacific Gas and Electric Company's request for confidential treatment of Confidential Appendix A (a contract summary and analysis evaluating the benefits of the Power Purchase Agreement (PPA)), Confidential Appendix B-1 (the PPA), and Confidential Appendix C-1 (the confidential version of the Independent Evaluator's Report) is granted. These documents shall remain under seal for three years from the effective date of this order. During that time the documents shall not be made accessible or disclosed to anyone other than Commission staff, except pursuant to an order or on further ruling of the Commission, the assigned Administrative Law Judge, or the Administrative Law Judge then designated as the Law and Motion Judge.

5. The hearing determination is changed – no hearings are necessary.

6. Application 12-06-014 is closed.

The order is effective today.

Dated March 21, 2013, at San Diego, California.

MICHAEL R. PEEVEY
President
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK J. FERRON
CARLA J. PETERMAN
Commissioners

Appendix

Term	Acronym
Pacific Gas & Electric Company	PG&E
Power Purchase Agreement	PPA
Nevada Irrigation District	NID
Resource Adequacy	RA
California Independent System Operator	CAISO
Renewables Portfolio Standard	RPS
Yuba-Bear Hydroelectric Project	YB Project
Megawatt	MW
Drum-Spaulding	DS
Qualifying Facility Standard Offer 4	SO4
Federal Energy Regulatory Commission	FERC
California Public Utilities Commission	Commission
Scheduling Coordinator	SC
Megawatt hour	MWh
Market Price Referent	MPR
Decision	D.
Gigawatts	GW
Standard Terms and Conditions	STCs
California Emission Performance Standard	EPS

(END OF APPENDIX)

TAB 7

Lead Commissioner WORKSHOP

RPS Guidebook Scoping Workshop

Mark Kootstra
Renewable Energy Division

Hearing Room A
9:30 a.m.
January 28, 2014

Thank you for your participation – the workshop will begin shortly.
Please take advantage of the WebEx call-back function.

Workshop Agenda

- Welcome & Housekeeping
- Discussion of Topics Identified by the Energy Commission
- Lunch ~ 12 pm to 1 pm
- Continued Discussion of Topics Identified by the Energy Commission
- Discussion of Stakeholder Presented Topics
- Next Steps

Eligibility Date: Revisions

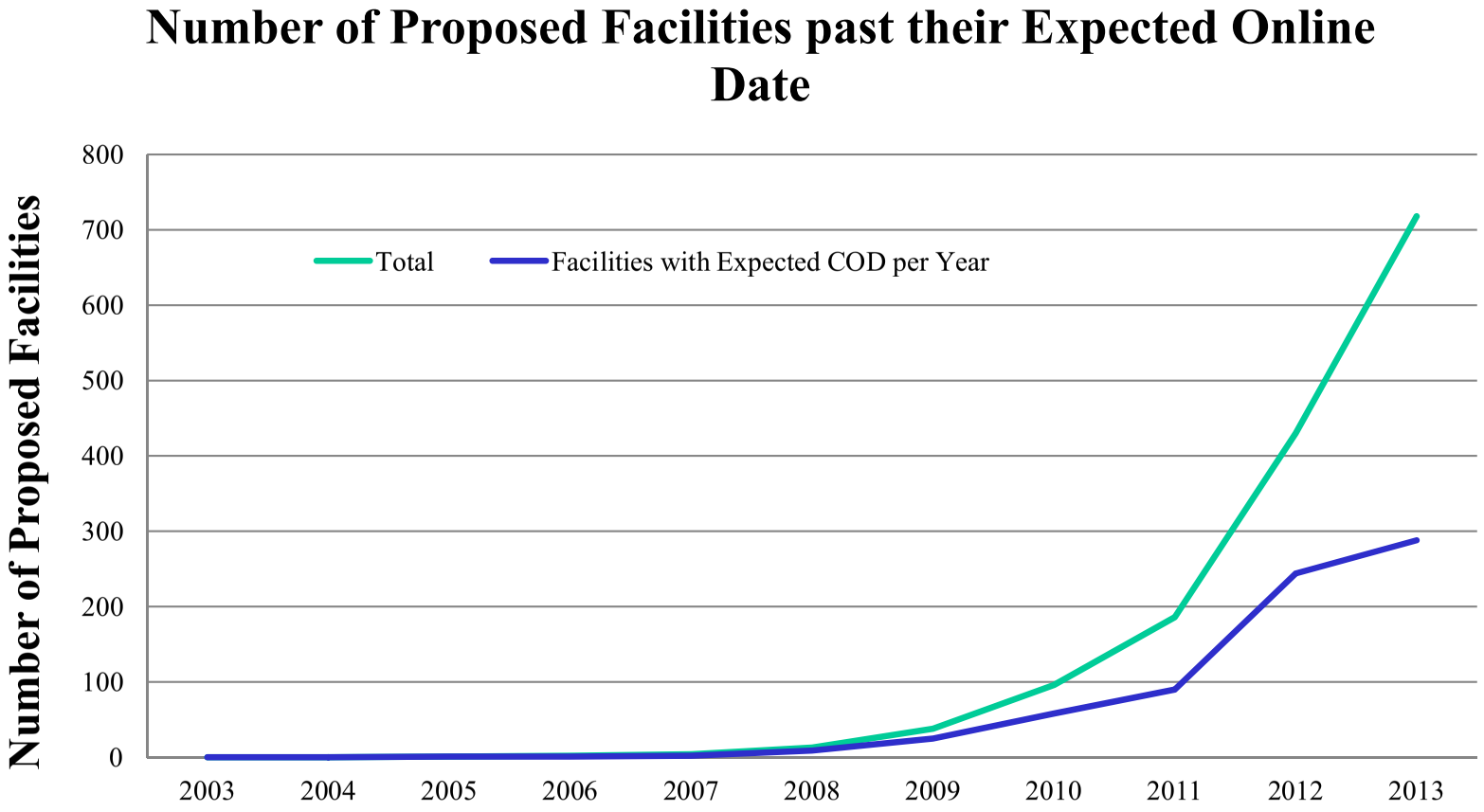
- Eligibility date is the first month in which generation from a facility may be eligible for California's RPS.

- Date generally coincides with date the first approved application for certification or precertification is received.

Eligibility Date: Revisions

- Date can change due to:
  - Failure to submit a certification application within 90 days of COD, if precertified.
  - Failure to submit an amended certification application with 90 days requiring an amendment, including termination of a utility contract for utility certified facilities.
  - Other reasons relating to the ineligibility of the facility.

Eligibility Date: Revisions



Eligibility Date: Revisions

- Deadlines were added to ensure quality of data and timely completion of the verification process.

- Resulted in unanticipated negative consequences to facility owners.

Eligibility Date: Revisions

- Possible alternatives include:
  - Extend deadlines (e.g., 180 days).
  - Allow deadline waivers if good cause can be demonstrated.
  - Removal of requirement; if facility is not certified by the utility reporting deadline, generation cannot be reported until the next reporting period.

Eligibility Date: Revisions

1. Is this a reasonable requirement? Why or why not? If not, is there a more reasonable timeframe for applying for certification?
2. Is there another approach to ensure the Energy Commission receives important facility information in a timely manner?
3. Should a facility remain precertified if the estimated commercial operations date passes and the facility does not submit an application for certification within the specified timeframe?

TAB 8

GLOBAL DISCOVERIES, LTD., Plaintiff and Appellant, v. ANN K. BARNETT, as Auditor etc., Defendant and Respondent; FELORINO P. TONGCO et al., Real Parties in Interest and Respondents.

F054937

COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

2008 Cal. App. Unpub. LEXIS 10073

December 16, 2008, Filed

PRIOR HISTORY: [*1]

APPEAL from a judgment of the Superior Court of Kern County. Super. Ct. No. S-1500-CV-260222 NFT. Linda S. Etienne, Judge.

COUNSEL: McCann & Carroll and C. Daniel Carroll for Plaintiff and Appellant.

B.C. Barmann, Sr., County Counsel and Jerri S. Bradley, Deputy County Counsel for Defendant and Respondent.

No appearance for Real Parties in Interest and Respondents.

JUDGES: HILL, J.; WISEMAN, Acting P.J., GOMES, J. concurred.

OPINION BY: HILL

OPINION

Global Discoveries, Ltd. (Global) appeals the denial of its petition for a writ of mandate, which sought to reverse the Kern County auditor's denial of its claim to excess proceeds from the tax sale of certain real property. Global made a timely claim to the auditor, but failed to provide all the original documentation required by the auditor as proof of the claim within the time allowed by resolution of the Board of Supervisors. The auditor denied Global's claim, concluding she had no discretion to allow Global further time to furnish the missing documentation.

FACTUAL AND PROCEDURAL BACKGROUND

On February 7, 2005, two parcels of real property were sold at auction by Kern County for delinquent taxes. The

tax collector's deeds to the purchasers of the properties were recorded on April **[*2]** 5, 2005. The county received funds in excess of those necessary to satisfy the delinquent taxes and costs of sale, totaling approximately $ 13,000.

On or about April 5, 2006, Global filed claims to the excess proceeds from the two parcels with respondent, the Kern County Auditor-Controller-County Clerk (auditor). Real parties also filed timely claims to the excess proceeds.

Documents Global submitted with its claim indicated the basis of its claims, as follows. In 1992, Dreamland Investment Corporation executed promissory notes secured by deeds of trust on the two parcels of real property, which it owned. The beneficiary of the deeds of trust was the Josephine R. Debs Irrevocable Trust. In 1993, by grant deed, Dreamland conveyed its interest in the two parcels to the real parties in interest. The real parties executed promissory notes, secured by an All-Inclusive Deed of Trust to Dreamland, which stated it was "subject and subordinate to" the deeds of trust to the Josephine R. Debs Irrevocable Trust.

Global's claims also included copies, rather than originals, of assignments, purporting to show that, on March 31, 2006, the Josephine R. Debs Irrevocable Trust assigned its rights and interests **[*3]** in Dreamland's promissory notes and deeds of trust to Global; the assignments expressly included the right to submit a claim for the excess proceeds from the tax sale of the properties.

On September 19, 2006, the auditor sent Global a letter requesting the originals of the assignments and stating: "These documents must be *in our office* within 35 days of this letter or your claims will be denied as incomplete." Global asserts that, due to a change in its office personnel, the letter was misplaced. Global failed to respond within 35 days, and the auditor sent it another letter on November 21, 2006, advising that the excess proceeds would be paid to the real parties in interest, and that Global had 90 days to contest the distribution pursuant to *Revenue and Taxation Code section 4675, subdivision (g)*. On December 5, 2006, Global sent the original assignments to the auditor, asking that they be accepted despite their tardiness. On December 14, 2006, the auditor responded, stating that, pursuant to a resolution of the Board of Supervisors, she was authorized to allow a claimant 30 days to provide required documentation, but was not authorized to allow any additional time, and therefore, "we **[*4]** must deny your claim."

On February 21, 2007, Global filed its petition for writ of mandate, seeking a writ compelling the auditor to distribute all of the excess proceeds from the tax sale to Global. After a hearing, the trial court found the auditor did not abuse her discretion in requiring original documents or in applying the 35-day time period; it denied the petition. Global appeals.

DISCUSSION

I. Standard of Review

Global petitioned for a traditional writ of mandate under *Code of Civil Procedure section 1085*. Such a writ "is a method for compelling a city to perform a legal, usually ministerial duty." (*Kreeft v. City of Oakland (1998) 68 Cal.App.4th 46, 53*.) "When a court reviews an administrative decision pursuant to *Code of Civil Procedure section 1085*, it merely asks whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support, or whether the agency failed to follow the procedure and give the notices the law requires. [Citation.] In reviewing a trial court's judgment on a petition for writ of ordinary mandate, we apply the substantial evidence test to the trial court's factual findings. However, we exercise our independent judgment on legal **[*5]** issues, such as the interpretation of statutory ... provisions." (*Ibid.*) "'Mandamus is an appropriate remedy to compel the exercise of discretion by a government agency, but does not lie to control the exercise of discretion unless under the facts, discretion can only be exercised in one way. [Citations.]' [Citation.]" (*MCM Construction, Inc v. City and County of San Francisco (1998) 66 Cal.App.4th 359, 368*, last bracketed insertion added.)

II. Statute and Resolution

Excess proceeds from a tax sale "may be claimed by parties of interest in the property as provided in, *Section 4675*

." (*Rev. & Tax. Code, § 4674*.) [1] *Section 4675* provides, in relevant part:

> "(a) Any party of interest in the property may file with the county a claim for the excess proceeds ... at any time prior to the expiration of one year following the recordation of the tax collector's deed to the purchaser.
>
> "(b) After the property has been sold, a party of interest in the property at the time of the sale may assign his or her right to claim the excess proceeds only by a dated, written instrument that explicitly states that the right to claim the excess proceeds is being assigned .... [P] ... [P]
>
> "(d) The claims shall contain any **[*6]** information and proof deemed necessary by the board of supervisors to establish the claimant's rights to all or any portion of the excess proceeds.
>
> "(e) No sooner than one year following the recordation of the tax collector's deed to the purchaser, and if the excess proceeds have been claimed by any party of interest as provided herein, the excess proceeds shall be distributed on order of the board of supervisors to the parties of interest who have claimed the excess proceeds in the order of priority set forth in subdivisions (a) and (b). For the purposes of this article, parties of interest and their order of priority are:
>
> "(1) First, lienholders of record prior to the recordation of the tax deed to the purchaser in the order of their priority.
>
> "(2) Second, any person with title of record to all or any portion of the property prior to the recordation of the tax deed to the purchaser. [P] ... [P]
>
> "(g) Any action or proceeding to review the decision of the board of supervisors shall be commenced within 90 days after the date of that decision of the board of supervisors."

1 All further statutory references are to the Revenue and Taxation Code, unless otherwise indicated.

"The board of supervisors **[*7]** ... may ... authorize any county officer to perform on its behalf any act required or authorized to be performed by the board of supervisors under *Section 4675*." (§ 4675.1.)

In 1982, the Kern County Board of Supervisors (board) passed resolution 82-363, "to establish rules and procedures for dealing with and disposing of" excess proceeds claims. The resolution requires that claims under *section 4675* be filed with the auditor, and provides that no claim "shall be treated by the Auditor as ready for approval" unless it meets requirements set out in the claim form and "the claim contains or incorporates all such other information as the Auditor, in the discretion of the Auditor (as authorized agent of the Board of Supervisors in these matters), reasonably deems necessary to establish or refute the claim in whole or in part." The resolution adds: "Further, any claimant failing to furnish written information required or requested ... within 30 days after reasonable request was sent by the Auditor, will have his or her claim rejected." The resolution delegates to the auditor the authority to approve or deny claims and to distribute the excess proceeds to claimants whose claims are approved by the **[*8]** auditor.

Resolution 82-363 effectively delegates to the auditor the authority to determine what proof is reasonably necessary to establish a claimant's claim to excess proceeds of a tax sale. The auditor requires that claimants submit original documents or certified copies if the document has been recorded, as proof of their claims for excess proceeds. When a party claiming excess proceeds does so as an assignee of the party who held the right of record at the time of the tax sale, the auditor requires submission of the original assignment as part of the claim.

When a claim for excess proceeds is timely filed with the auditor, but the accompanying proof is incomplete or

deficient, resolution 82-363 prohibits the auditor from treating the claim as "ready for approval." The auditor requests the missing information or documentation from the claimant. The deadline the auditor sets for the claimant's response is either one-year from the recordation of the tax deed (i.e., the end of the one-year period for filing the excess proceeds claim) or 35 days from the request letter, whichever is later. Thus, if the request for further information is made well within the one-year statutory claim period, **[*9]** the claimant may submit the required information and complete its claim within the one-year period. When, however, the auditor does not discover, or does not notify the claimant of, the deficiency prior to expiration of the one-year period, the claimant cannot be expected to cure the deficiency during that period. In that situation, under the resolution, the auditor requests the needed information or documentation and allows the claimant 30 days in which to provide it, extended by five days for mailing. If the requested documentation is not provided within that time period, the auditor denies the claim.

III. Abuse of Discretion

Global contends the board abused its discretion or acted beyond its authority by imposing a 30-day time limit on the submission of additional proof of a claimant's claim when that proof is requested by the auditor. It contends the auditor abused her discretion by denying its claim to the excess proceeds instead of accepting the original assignments despite their late submission. More specifically, Global contends the auditor abused her discretion by implementing the board's 30-day time limit strictly and by erroneously interpreting the statute and resolution to **[*10]** preclude granting relief from default.

A. Board of Supervisor's 30-day time limit

Global filed its claim, along with supporting documentation, with the auditor on the last day of the one-year period set out in *section 4675, subdivision (a)*. Global claimed as an assignee, but submitted only a copy of the assignments, not the originals. Because the auditor did not discover any deficiency in the claim in time to notify Global and have Global rectify it within the one-year period, in accordance with resolution 82-363, the auditor requested the original assignments and gave Global 35 days to provide them. Global did not respond within the 35-day period, and the auditor denied its incomplete claim. One week after it received notice of that denial, Global sent the originals of the assignments to the auditor. The auditor refused to consider them.

Resolution 82-363 allows an excess proceeds claimant 30 days to provide additional documentation when the auditor notifies the claimant that the documentation is needed. Global contends the board was not authorized by *section 4675* to set such a time limit. It asserts *section 4675* authorizes counties to require the proof they deem necessary to establish **[*11]** excess proceeds claims, but does not authorize them to "establish secondary statutes of limitation, or to impose short-fuse time restrictions" on submission of additional documents requested by the auditor.

Section 4675 requires that the claim, containing "any information and proof deemed necessary ... to establish the claimant's rights to all or any portion of the excess proceeds," be filed within one year after recording of the tax collector's deed to the purchaser. (*§ 4675, subd. (d)*.) Consequently, if, as Global asserts, the board was not authorized to allow an additional 30-day period for providing requested documentation after expiration of the one-year period, then the only applicable time limit was the one-year period established by *section 4675*. Global did not meet that deadline. Thus, if the 30-day time limit was unauthorized, Global was not prejudiced by its enactment, because the necessary proof of Global's claim was not submitted within the one-year statutory filing period, and its claim would have been denied as incomplete anyway.

B. Auditor's strict application of deadline

Global contends the auditor abused her discretion by applying the 30-day time limit strictly and refusing **[*12]** to grant relief from Global's failure to meet the deadline. The auditor, believing she had no discretion to extend the 30-day period, did not consider Global's request for relief from the failure to meet the deadline, but denied its claim because the original documents she requested were not submitted within the 30-day period. The auditor's authority to act in

connection with claims to excess proceeds of tax sales of real property is derived from the board's resolution delegating to her those tasks. The board's authority, in turn, is derived from *section 4675*.

When "a public official's authority to act in a particular area derives wholly from statute, the scope of that authority is measured by the terms of the governing statute." (*Lockyer v. City and County of San Francisco (2004) 33 Cal.4th 1055, 1086*.) However, "[i]t is well settled in this state that governmental officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as may fairly be implied from the statute granting the powers." (*Dickey v. Raisin Proration Zone (1944) 24 Cal.2d 796, 810*, italics omitted.) To determine whether the auditor **[*13]** had discretion to grant relief, we consider the purpose and provisions of *section 4675* and the board's resolution.

Under prior law, excess proceeds from a tax sale remained the property of the state. (*Fjaeran v. Board of Supervisors (1989) 210 Cal.App.3d 434, 439*.) In 1976, the Legislature enacted *section 4675*, which for the first time authorized those who held an interest in the property to file claims for and receive distributions of the excess proceeds. (Stats. 1976, ch. 113, § 6, p. 177; *Fjaeran, supra, at p. 439*.) Claims may now be made by lienholders and title holders of record prior to recordation of the tax deed. *Section 4675* requires the claimant to prove its claim and specifies the priority to be given to competing claims. The apparent purpose of the statute was to permit the county to recover the delinquent taxes due on the property, but preserve the former owner's and the former lienholder's interests in the property, if the proceeds from the sale exceed the amount due to the county for taxes.

Section 4675 delegates to the board of supervisors the determination of the proof needed to establish a claimant's claim and the approval or denial of claims. It also authorizes the **[*14]** board to distribute the excess proceeds to claimants with approved claims, in accordance with the order of priority set out in the statute. Section 4675.1 authorizes the board of supervisors to delegate to a county officer any of the acts required or authorized by *section 4675*, and requires that the board "specify administrative rules and procedures" for the delegated acts. [2]

> 2 Section 4675.1 provides, in pertinent part: "The board of supervisors of any county may, by resolution, authorize any county officers to perform on its behalf any act required or authorized to be performed by the board of supervisors under *Section 4675*. [P] The resolution shall enumerate the section, or those portions of the section, to which the authorization is to apply, and shall specify administrative rules and procedures concerning any act performed under the authorization."

Resolution 82-363 effectively delegates to the auditor receipt of claims, determination of what information is necessary to establish or refute claims, authority to request omitted information from the claimant, approval of claims, and distribution of excess proceeds. Exhibit A to the resolution sets out procedures for handling claims. **[*15]** Those procedures include: "Claims will be filed with the Auditor-Controller who will verify the timeliness of the claim and see that appropriate information and documentation are included. Incomplete or questionable items will be reviewed and resolved as soon as possible by: consultation with the claimant where appropriate, checking of County records, and consultation with the other County offices where appropriate. If requested documentation from claimant is not received by the Auditor-Controller within 30 days of its request, the claim will be denied as incomplete." The resolution also provides that there is no right of appeal to the board, except in extraordinary cases.

Section 4675 is designed to ensure that those with an interest in the property sold at a tax sale, rather than the state or county, receive the benefits of any excess value of the property over the delinquent taxes. The statute defines the "parties of interest" who may file claims for the proceeds and specifies the priority of such claims. (*§ 4675, subd. (e)*.) *Section 4675* leaves substantial discretion to the board or its designee to determine what proof of claims is required, to approve or deny claims, and to determine **[*16]** their order of priority. If claims have been filed, the board must distribute the excess proceeds "[n]o sooner than one year following the recordation of the tax collector's deed to the purchaser." (*Id.,* subd. (e).) Thus, while the statute requires that the board wait until after the one-year period for filing claims has passed before distributing the excess proceeds, it does not set any deadline by which the claims must be approved or denied or by which the distribution must be made.

The board's resolution and procedures implement the statute, delegating much of the responsibility to the auditor. The auditor is expected to resolve problems with incomplete or questionable claims by consulting the claimant, county records, or other county offices "where appropriate." **[*17]** It is left to the auditor to determine the exact means to use in attempting to resolve problems in each individual case. The requirement that the auditor review and resolve incomplete claims, combined with the lack of an available appeal to the board, suggests the board intended the auditor to take the time necessary to resolve the problem and arrive at a correct result as to the approval or denial of the claimant's claim.

The resolution provides that "any claimant failing to furnish written information required or requested ... within 30 days after reasonable request was sent by the Auditor, will have his or her claim rejected." This provision does not use the customary language of mandate, "shall," [3] although that term is used elsewhere in the same paragraph of the resolution. [4] Nor does the resolution expressly mandate that the auditor reject a claim if the claimant does not provide requested information within the 30-day time period, or deny the auditor discretion to vary the 30-day period. Rather, the 30-day period appears to be a deadline for the claimant, which the auditor could extend as necessary to satisfy her obligation to resolve incomplete or questionable claims in order **[*18]** to make a proper distribution of the excess proceeds.

> 3 It is a well-settled principle of statutory construction that the word "'may'" is ordinarily construed as permissive, whereas "'shall'" is ordinarily construed as mandatory, particularly when both terms are used in the same statute. (*Common Cause v. Board of Supervisors (1989) 49 Cal.3d 432, 443*.)
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> 4 The same paragraph states: "A claim ... shall be filed with the Auditor," and "[n]o claim shall be treated by the Auditor as ready for approval unless ...."

This interpretation is consistent with the auditor's addition to the 30-day period of five days for mailing of the request for further documents. If, as the auditor now contends, she had no discretion to increase the 30-day period, she would have no discretion to add five days to it due to the mailing of the request. The resolution has been in effect since 1982. The record does not indicate when the addition of five days for mailing was implemented, but apparently it has remained in effect without objection from the board.

In light of the language and purpose of the statute and resolution, we believe the auditor's discretion to accept proof of a claim at a time beyond the 30-day period, **[*19]** when good cause is shown and the excess proceeds have not yet been distributed, is an "additional power[] ... necessary for the due and efficient administration of powers expressly granted" by *section 4675* and the resolution or "fairly ... implied from the [provisions] granting the powers." (*Dickey v. Raisin Proration Zone, supra, 24 Cal.2d at p. 810*, italics omitted.) We conclude that power included the discretion to grant relief after expiration of the 35-day period on a showing of good cause, equivalent to a showing under *Code of Civil Procedure section 473*. (See *Kupka v. Board of Administration (1981) 122 Cal.App.3d 791, 795*, "courts have interpreted the 'good cause' standard as equivalent to a showing under *section 473*.")

A writ of mandate may be used to compel the exercise of discretion, but not to control it. (*MCM Construction, Inc. v. City and County of San Francisco, supra, 66 Cal.App.4th at p. 368*.) The auditor failed to exercise her discretion to grant or deny relief from Global's failure to meet the 30-day deadline, because of her belief that the 30-day period was absolute and she had no discretion to deviate from it. She cannot be compelled by writ of mandate to exercise her **[*20]** discretion in any particular way. She can only be compelled to exercise her discretion to grant or deny Global's request for relief.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to grant Global's petition for a writ of mandate directing the auditor to exercise her discretion to grant or deny Global's request for relief from its failure to respond to the auditor's request for original documents within the 35-day period. Global is awarded its costs on appeal.

HILL, J.

WE CONCUR:

WISEMAN, Acting P.J.

GOMES, J.