

DOCKETED

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Project Title:	Appeal by Los Angeles Department of Water & Power re Renewables Portfolio Standard Certification Eligibility
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California Energy Commission



**In re: Appeal by DWP re RPS
Certification/Eligibility**

Docket: 16-RPS-02

October 11, 2017

Issues to be addressed:

- Difference between § 399.16(d)(1) and §399.12(e)1)(C)
 - 399.16(d)(1)– grandfathers pre-June 2010 “contracts”
 - 399.12(e)(1)(C) – grandfathers pre-June 2010 “facilities”
- Respond to issues identified by Proposed Decision (PD)/Staff comments
- SBX1-2 legislative history
- DWP proposal for resolution of dispute

399.16.(d)(1) – grandfathers pre-June 2010 “*contracts*”

- “Any ***contract*** . . . originally executed prior to June 1, 2010, ***shall count in full*** towards [the RPS] if . . . (1) The ***renewable energy resource was eligible*** under the rules in place as of the date when the contract was executed.”

399.12(e)(1)(C) – grandfathers pre-June 2010 “*facilities*”

“A ***facility*** approved by [a POU governing board] prior to June 1, 2010, for procurement to satisfy [RPS] adopted pursuant to former Section 387, shall be ***certified*** as an ***eligible renewable energy resource*** by the Energy Commission . . . if the facility is a ‘***renewable electrical generation facility***’ as defined in Section 25741 of [Pub. Res. Code].”

399.16.(d)(1) – PD’s interpretation

- PD – finds Powerex facilities must “first meet” definition of “eligible renewable energy resource” at time contracts executed – PD p. 15
- “Any contract . . . originally executed prior to June 1, 2010, shall count in full . . . if . . . (1) The **eligible renewable energy resource was eligible** under the rules in place as of the date when the contract was executed **if the facility underlying the contract is a ‘renewable electrical generation facility’ as defined in Section 25741 of [Pub. Res. Code] .**”

Conclusion re 399.16(d)(1):

- Does not reference “eligible renewable energy resource”
- Does not reference “renewable electrical generation facility” under § 25741 Pub. Res. Code
- Despite plain language: PD finds each Powerex facility must meet this definition
- If Legislature wanted to include any such reference – knew how to do it – as it did in 399.12.(e)(1)(C)

Staff's "Hoover Dam" Argument

- Argument: if Legislature intended to grandfather all POU contracts – “then any resource . . . no matter how incongruent” could count toward a POU’s RPS – p. 12
- Same as Staff’s argument: contrary interpretation could lead to “44 different sets of rules”
- PD/staff conclusion: DWP interpretation that “rules in place” refers to POUs rules and not guidebook will lead to patchwork of eligible resources

Hoover Dam: response

- First – all other POU's resources have been verified – thus concern over “44 sets of rules” no longer true
- Issue limited to DWP – and DWP previously excluded Hoover
- Second - DWP's aqueduct “facilities” certified under **399.12(e)(1)(A)** – specific to hydro ≤ 40 MW “operated as part of water supply or conveyance system” – not 399.12(e)(1)(C) or 399.16(d)(1)
- Third – must give credit to POU's – as Legislature intended – no grandfathering non-renewable contracts – would be absurd result
- Conclusion: no risk of patchwork/non-renewable facilities being approved

SBX1-2 Legislative History

- No less than five bill analysis indicate Legislature intended to grandfather POUs' pre-June 2010 *contracts*
- **(1) Senate Energy, Utilities and Communications Committee, 2/5/11; (2) Senate Appropriations Committee Fiscal Summary, 2/23/11; (3) Senate Rules Committee Bill Analysis, 2/23/11; (4) Senate Energy, Utilities and Communications Committee fiscal hearing on AB 2196, 6/12/12; (5) Senate Floor Analysis AB 2196, 3rd reading, 8/31/12**

Legislative History (cont.)

- “Under the bill, ***all existing renewable energy contracts signed by June 1, 2010 would be ‘grandfathered’ into the program. Going forward***, new renewable energy contracts must meet a ‘loading order’ that categorizes renewable resources.
- “To finesse a transition from the 20 percent . . . to 33 percent, by 2020 . . . SBX1-2 ***grandfathered all RPS contracts entered into prior to June 1st, 2010, and provided that those contracts will count in full*** under the new program requirements.”

Legislative History (cont.)

- History = clear evidence of what Legislature *understood* at time it voted
 - Yet PD refers to history as mere “generalized statements”
- Juxtapose finding on legislative intent to: finding on retroactive impact of law
 - As Board President Levine stated - absent *express provision of* retroactive intent, law presumed to have *prospective* effect – i.e., “going forward”
 - No express statement anywhere that SBX1-2 intended to have retroactive impact
 - Indeed, PD states statute is “vaguely worded” regarding “rules in place” – p. 14
 - And yet – PD finds clear legislative history “generalized statements” but finds “vague” “rules in place” specifically refers to EC guidebook rules – rules to which DWP specifically exempt in 2007
- Impossible to reconcile juxtaposition

DWP Proposal

- PD acknowledges:
 - DWP’s section 387 “obligations ended on December 10, 2011” and began anew thereafter – P. 19
 - “SBX1-2 and its constituent statutes were prospective in operation and effect” – p. 19
- RECs at issue here under Powerex contracts limited to compliance period 1 – [Jan. 1, 2011 – Dec. 31, 2013]
 - Powerex contracts expired Dec. 31, 2011
 - Thus only energy associated with Jan.-Dec. relevant
- Consistent with DWP’s prior obligations – DWP to count Jan. 2011 – Dec. 9, 2011 RECs [400,000]
- Under 25218(e) Pub. Res. Code – EC may “take any action” deemed “reasonable and necessary” - liberally construed
 - Division 15 Pub. Res. Code not obstacle

Issue of compliance/non-compliance

- PD/Staff comments – “premature and speculative” to know whether DWP will/will not be in RPS compliance –
- DWP’s interpretation: PD will result in \$22M in penalties – for energy previously bought/paid for
- If EC/staff believe PD will not result in non-compliance, need to understand basis
- And if “premature,” DWP has proposal: if PD issued, should include stay of enforcement until such time as “complaint” filed