STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

Implementation of Renewables Investment Plan Legislation and Implementation of Renewables Portfolio Standard Legislation	)	**Docket No. 02-REN-1038** **Docket No. 03-RPS-1078**

WORKSHOP COMMENTS OF EAST BAY MUNICIPAL UTILITY DISTRICT REGARDING RPS IMPLEMENTATION

In accordance with the December 21, 2006 Notice of Committee Workshop on Guideline Revisions for the Renewable Energy Program and RPS Implementation, East Bay Municipal Utility District ("EBMUD") respectfully submits the following comments regarding proposed revisions to the RPS Guidebook.

I. Introduction and Background

EBMUD appreciates the time and effort that Commission Staff have devoted to implementing the detailed and sometimes confusing statutes governing California's Renewable Portfolio Standard ("RPS") requirements. For the most part EBMUD supports the draft revisions to the RPS Guidebook. However, there is one very important area in which the current draft does not correctly reflect legislative language and intent.

Sections II.B.3 (Small Hydroelectric) and III.A (Applying for Certification and Pre-Certification) of the 2006 proposed revisions to the Draft Renewables Portfolio Standard ("RPS") Eligibility Guidebook construe a recently adopted statute, Senate Bill 107 ("SB 107"), in a manner that would result in excluding otherwise eligible small hydro resources from certification as an eligible RPS resource. As discussed further below, it

appears that the error lies in reading certain language amending the definition of "Eligible Renewable Energy Resource" (codified in Public Utilities Code section 399.12(h)) without reference to other statutory provisions enacted as part of SB 107, and without reference to the overall purpose of the statute.

EBMUD urges the Commission to revise the RPS regulations applicable to small hydro to effectuate the plain meaning of Public Utilities Code section 387(b)(2), which was amended by SB 107 to clarify that:

> ... Electricity shall be reported as having been delivered to the local publicly owned electric utility from an eligible renewable energy resource when the electricity would qualify for compliance with the renewables portfolio standard if it were delivered to a retail seller.

Otherwise, the Guidebook will result in small hydro facilities being excluded from RPS certification solely on account of being owned or procured by a publicly-owned utility rather than a "retail seller" (i.e. utility, community choice aggregator, or energy service provider). This outcome would not only eviscerate the above language from section 387(b)(2), but also would result in a statutory construction contrary to AB 107's stated purpose of encouraging renewable development and eliminating barriers to procuring renewable resources.

II. The Proposed Guidelines regarding RPS eligibility for small hydro facilities are not consistent with SB 107

A. SB 107 has created an ambiguity regarding the RPS eligibility of small hydro facilities selling energy to publicly-owned utilities as of December 31, 2005.

Through what appears to be a drafting oversight, two sections of the Public Utilities Code amended by SB 107 conflict with each other, and have created an ambiguity potentially affecting sellers and owners of power from existing in-state small

hydroelectric generating facilities. Section 399.12(b) of the Public Utilities Code reads in relevant part:

> 399.12. For purposes of this article, the following terms have the following meanings:
> (a) "Delivered" and "delivery" have the same meaning as provided in subdivision (a) of Section 25741 of the Public Resources Code.
> (b) "Eligible renewable energy resource" means an electric generating facility that meets the definition of "in-state renewable electricity generation facility" in Section 25741 of the Public Resources Code, subject to the following limitations:
> (1)(A) *An existing small hydroelectric generation facility of 30 megawatts or less shall be eligible only if a retail seller owned or procured the electricity from the facility as of December 31, 2005.* A new hydroelectric facility is not an eligible renewable energy resource if it will require a new or increased appropriation or diversion of water from a watercourse.

Section 399.12(h) defines "Retail seller" as including electrical corporations, community choice aggregators, and electric service providers, but excluding a "local publicly owned electric utility." Therefore the language above from section 399.12(b) could be read as excluding from the definition of "eligible renewable energy resource" an existing small hydro facility that was either owned by or selling electricity to a publicly owned utility as of December 31, 2005.

This reading would, however, directly conflict with Section 387(b)(2) of the Public Utility Code, which was also added by SB 107, and clarifies that for publicly owned utilities:

> (2) ... [RPS] Reports shall contain the contribution of each type of renewable energy resource with separate categories for those fuels that are eligible renewable energy resources as defined in Section 399.12, except that the electricity is delivered to the local publicly owned electric utility and not a retail seller. *Electricity shall be reported as having been delivered to the local publicly owned electric utility from an eligible renewable energy resource when the electricity would qualify for compliance with the renewables portfolio standard if it were delivered to a retail seller.* (emphasis added)

Thus, under section 387(b)(2), small hydro owned by or sold to a publicly owned utility is very specifically classified as an eligible energy resource for RPS purposes, just as it would be if it were owned by or sold to a "retail seller."

For the reasons discussed below, the clarity and specificity of section 387(b)(2) as well as the intent underlying SB 107 should dictate resolution of this conflict in statutory language in favor of section 387(b)(2). The RPS Guidebook should be revised accordingly to clarify that otherwise eligible small hydro facilities delivering energy to publicly owned utilities will be treated as "eligible renewable energy resources" under the RPS if they would qualify as such by delivering energy to a "retail seller."

B. The inconsistency between sections 399.12 and 387(b)(2) should be resolved in favor of eligibility.

i. Well established principles of statutory construction support finding that eligible small hydro facilities should be certified even if they were selling to publicly-owned utilities on December 31, 2005.

Given that one of the statutory provisions above could arguably be read to exclude small hydro sold to a publicly owned utility as of December 31, 2005, and the other clearly includes the same resource for purposes of RPS eligibility, the Commission needs to examine the construction of the two statutes in light of legislative intent.

It is a fundamental principle of statutory construction that where there is a conflict between two statutes, the more specific statute controls over the more general. *Prudential Reinsurance Co. v. Superior Court*, (1992) 3 Cal.4th 1118, 1148 (1992), citing 2B Sutherland, Statutory Construction (5th ed. 1992) § 51.02, p. 121). A specific provision relating to a particular subject will govern a general provision, even though the general provision standing alone would be broad enough to include the subject to which

the specific provision relates. Id.; *Woods v. Young*, (date) 53 Cal.3d 315,325, quoting *People v. Tanner* (1979) 24 Cal.3d 514, 521. The California Legislature itself has similarly declared that "when a general and [a] particular provision are inconsistent, the latter is paramount to the former. So that a particular intent will control a general one that is inconsistent with it." Code Civ. Proc., § 1859.

Applying this rule, the Commission clearly should establish RPS rules that are consistent with Public Utilities Code section 387(b)(2). Section 387(b)(2) precisely and very specifically states that all electricity that would qualify as "an eligible renewable energy resource" if it were delivered to a retail seller will be included for purposes of compliance with the RPS if it is delivered to a local publicly owned electric utility. This provision is specific to local publicly owned utilities' procurement of renewable energy resources and it specifically applies to RPS compliance. By comparison, the arguably conflicting language in section 399.12(b) is less specific, in that it is part of a definition of general application.

ii. Resolving the statutory ambiguity in favor of inclusion is consistent with the intent underlying SB 107.

Where the provisions of a statute are ambiguous or conflict, the ambiguity or conflict should be resolved consistent with legislative intent. *Palmer v. GFT California, Inc.* (2003) 30 Cal.4th 1265, 1271; *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d. 1379, 1387. Once the legislative intent has been ascertained, a statute must be given a reasonable construction, which conforms to that intent, even though it may not be consistent with the strict letter of the statute. *Alameda County v. Kuchel* (1948). If following the plain meaning of a statute would frustrate the manifest purpose

of the legislation or lead to an absurd result, a literal interpretation may be rejected. *People v. Belleci* (1979) 24 Cal.3d. 879, 884.

The clear and manifest purpose of SB 107 is to support and encourage development of renewable energy in the state of California. This is reflected in the Senate Bill Analysis, which states:

> The purpose of this bill is to accelerate the state's existing RPS requirements so that 20 percent of retail sales of electricity in California come from renewable resources by the year 2010 *and to address issues that may make compliance with the RPS difficult.* (emphasis added)

In order to encourage compliance with the goals of SB 107, the RPS rules – both for retail sellers and for publicly owned utilities – must be clear and consistent. Interpreting section 387(b)(2) in accordance with its plain meaning will serve this purpose. It will result in rules that are fair and consistent between publicly-owned utilities and retail sellers. It will assist publicly owned utilities in "implementing and enforcing a renewables portfolio standard that recognizes the intent of the Legislature to encourage renewable resources," as required under Public Utilities Code section 387(a).

Interpreting SB 107 as including within the RPS all eligible small hydro will also be consistent with this Commission's own reading of the intent of SB 107. For example, in the most recent update to the Integrated Energy Policy Report Update, the Commission states:

> The 2005 Integrated Energy Policy Report recommended applying RPS rules consistently to all entities, including POUs. *Toward this end, the recently passed SB 107 clarifies that renewable energy claimed by POUs for RPS compliance must meet the same eligibility requirements as those applied to the IOUs.*

2006 Integrated Energy Policy Report Update (January 2007) at 12 (emphasis added).

If the proposed language in the Draft RPS Guidebook excludes small hydro owned by or procured by a publicly owned utility as of December 31, 2005, the Guidebook would introduce a glaring inconsistency between POUs and IOUs.[1] There is no language anywhere in SB 107, in the legislative history of the statute, or anywhere else in the Public Utilities Code provisions relevant to the RPS suggesting that the Legislature intended to create such inconsistency, or to discriminate against publicly owned utilities in the implementation of RPS rules.

In order to effectuate the purpose of SB 107, the Commission should revise the draft language in the RPS Guidebook to clarify that, consistent with Public Utilities Code § 387(b)(2), all small hydro resources that "would qualify for compliance with the RPS if it were delivered to a retail seller" will likewise qualify if delivered to a publicly owned utility, regardless of whether the facility's output was sold to a retail seller or publicly owned utility on December 31, 2005. EBMUD suggests specific changes below.

III. Summary of proposed changes

- Section II.B.3 (Small Hydroelectric) should be revised to eliminate item 3 under the first bullet under "RPS Eligibility."
- Section II.B Table 1 should be revised by either eliminating the second sentence in the "RPS Eligibility" section for Hydro resources, or by adding "or publicly owned utility" after "retail seller".
- Section III.A (Applying for Certification and Pre-Certification) should be revised to eliminate the paragraph relating to small hydro (including the language stating that small hydro sold to a publicly owned utility on December 31, 2005 is eligible for "pre-certification" but not for certification.[2]
- The Overall Program Guidebook glossary definition of "Small hydro" should be revised consistent with the above changes.
- Corresponding changes as needed in draft forms.

---

[1] The proposed language would also create other absurd distinctions. For example, existing conduit hydro would qualify if sold to a publicly owned utility as of December 31, 2005, while small hydro would not.

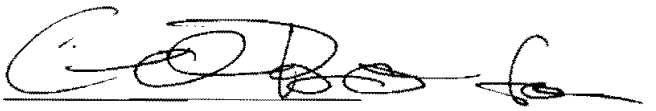
[2] EBMUD is puzzled by this language, which suggests that the Commission intends to create a category of permanently "pre-certified" resources that will never receive full certification. This seems contrary not only to the intent of SB 107, but also to language one page earlier in the same section of the Guidebook stating that "Pre-certification" is "available for applicants whose facilities are not yet online."

IV. Conclusion

In order to implement SB 107 in a manner that results in fair and consistent administration of the RPS for both retail sellers and publicly owned utilities, EBMUD urges the Commission to revise the Draft Guidebook in the manner described above.

Dated: January 22, 2007

Respectfully submitted,

By: 

Lynn Haug
ELLISON, SCHNEIDER & HARRIS L.L.P
2015 H Street
Sacramento, CA 95814
Telephone: 916-447-2166
Fax: 916-447-3512
lmh@eslawfirm.com

Attorneys for East Bay Municipal Utility District