INDEPENDENT
ENERGY
PRODUCERS

02-REN-1038

October 12, 2007

California Energy Commission
Attn: Docket Office
1516 Ninth Street, MS-4
Sacramento, CA 95814-5504

RE: Independent Energy Producers Association Comments
RE Guideline Revisions for Renewable Energy Program and Renewables Portfolio Standard Implementation:
Staff Draft Guidebook
Docket Number 02-REN-1038 Renewable Energy Program
Docket Number 03-RPS-1078 RPS Proceeding

Dear CEC Renewables Committee:

The Independent Energy Producers appreciates the opportunity to comment on the proposed Guideline Revisions for the renewable energy program and the renewables portfolio standard implementation. IEP's comments are in response to the committee's workshop discussions on September 26 and review of the Staff Draft Guidebook, dated September 2007 (Draft Guidebook). IEP's comments address four issues:

- ***Treatment of Out-of-State/Out-of-Country Resources.***
- ***Change in Law Provisions;***
- ***Delivery Requirements, and***
- ***WREGIS Participation***

1. Treatment of Out-of-State/Out-of-Country Resources.

The RPS statute conditions eligibility of out-of-country facilities on the following: "...it is developed and operated in a manner that is as protective of the environment as a similar facility located in the state." In addition, the statute prescribes "...it will not cause or contribute to any violation of a California environmental quality standard or requirement." As a practical matter, IEP appreciates staffs' attempt to design regulatory guidelines that conform to these statutory provisions. The statutory language itself raises the specter of imposing

California laws, ordinances, regulations, and standards (LORS) on extra-jurisdictional entities. The core problem rests with the statutory prescription(s) and the solution probably rests in statutory modifications. The staff's efforts to mold the guidelines to match what IEP considers problematic statutory directives are much appreciated.

While appreciating staff's efforts to mold guidelines that match statutory prescription(s), the draft Guidebook proposes to require out-of-*country* facilities, in addition to the requirements imposed for out-of-*state* facilities, to 1) identify the environmental quality standards that would apply if the facility were located in California AT A SITE DESIGNATED BY THE APPLICANT, 2) assess whether its development or operation will cause or contribute to a violation of those standards, and 3) explain how the standards will be met or mitigated.

As noted above, the statue conditions eligibility of out-of-state facilities on the following: "...it will not cause or contribute to any violation of a California environmental quality standard or requirement." The draft Guidebook, therefore, proposes to implement this provision by requiring an assessment of impacts on such standards IN CALIFORNIA. On its face, the statute appears to place a greater obligation on out-of country facilities than out-of-state facilities, even where the facility does not have an impact inside California. It accomplishes this by imposing the presumption that the out-of-country facility IS LOCATED in California AND subject to the applicable environmental standards of the in-state, California-specific location. This effect exist, even though the draft Guidebook provides the flexibility to the developer/operator to designate a site location within California of its choosing and apply the applicable LORS of that in-state area based on the 16 CEQA related factors outlined in the Guidebook [see Guidebook, at p. 46]

It may ultimately be counter-productive, problematic, and unworkable to apply any particular CA location LORS and LORS remedies to an out-of-country location. A more meaningful option is for the proponent to provide the CEC with a CEQA resource area evaluation (i.e. checklist) and for the CEC to make an eligibility determination, including the "no significant impact" or "significant impact but over-riding considerations" determination, as appropriate upon review.

2. Change in Law Provisions

Currently, the draft Guidebook states that "Certification and pre-certification must be renewed at least every two years to confirm that facilities certified as renewable energy resources remain eligible for the RPS. In addition, facilities may be required to renew their certification based on changes in the law after being notified in writing by the Energy Commission." [Draft Guidebooks, at p. 39]

IEP is in agreement with other parties' comments at the Workshop that the change in law provisions raises barriers to renewable development. It's IEP's

understanding one California investor-owned utility (SCE) includes in its current RPS contracts language that ties the developer to the RPS eligibility standards in place "at the time the contract was entered." This seems appropriate. It would not be appropriate nor efficient for a LSE to impose on the renewable developer via its contract the obligation to maintain RPS eligibility throughout the term of the contract, even in the instance of changes in law that would make a previously RPS eligible facility ineligible on a going forward basis. Potentially as risk is the replacement cost of RPS energy for the duration of the contract. The potential liability faced by the developer when committing to such a "change in law" provision undermines the efficient pricing of renewable resources. Furthermore, it risks creating barrier to the development of cost-effective new renewable resources, as otherwise viable developers shy away from assuming this risk which is difficult to quantity and, hence, manage. Unfortunately, the certification provisions in the Guidebooks trigger this "change in law" concern.

A. On the one hand, the issue is contractual. As a result, IEP urges the commission to encourage utilities to not impose a "change in law" eligibility requirement in their contracts with renewable developers. Rather, the commission should simply support language and bilateral commitments that require developers to be contractually bound for the duration of the contract to RPS eligibility standards in place at the time the contract was executed.

Unfortunately, a draft decision currently before the CPUC would require the following non-modifiable terms in future RPS contracts:

> **STC6: Eligibility**
> Seller, and if applicable, its successors, represents and warrants that throughout the Delivery Term of the Agreement: (i) the Project qualifies, is certified by the CEC, and, in the event of changes in law continues to be certified by the CEC, as an eligible Renewable Energy Resource; and (ii) the Project's output delivered to Buyer qualifies under the requirements of the California Renewables Portfolio Standard.
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> [See Proposed Decision of ALJ Mattson, mailed 10/1/2007, "Opinion on Amended Petition for Modification of Decision 04-06-014 Regarding Standard Terms and Conditions]

If adopted as a non-modifiable, standardized term of future RPS contracts, this language will exacerbate the barriers to renewable development occurring today. IEP urges the Commission to use its good offices to consult with the CPUC on this matter.

B. On the other hand, the CEC is faced with legislative directives to certify renewable resources for purposes of the California RPS. To bridge the contractual issues and meet the regulatory directives, we recommend that the Commission certify resources once, and then rely on contractual language to

bind that renewable generating resource to maintain its operations in conformance with the standards in place at the time of execution of the contract. Unless an issue of eligibility is brought directly to the Commission's attention in succeeding years, there should not be a need to re-certify during the pendency of the contract. This approach will have the positive affect of (a) increasing the probability that the projects with whom the LSE's contract under the RPS remain eligible for counting purposes, and (b) removing the risk that "change in law" provisions be included in bilateral contracts.

IEP's specific recommended language change is as follows:

> ~~Certification and pre-certification must be renewed every two years to confirm that facilities certified as renewable energy resources remain eligible for the RPS. In addition,~~ Facilities may be required to ~~renew their certification based on changes in the law, after being notified by the Energy Commission~~ provide information to the Energy Commission, upon request, demonstrating that there has been no material change in the factual conditions supporting its original certification or pre-certification.
>
> [See Guidebook, at page 39]

3. Delivery Requirements

The draft Guidebook provides examples of contracting structures that could meet the RPS-delivery requirements [Footnote 11, at p. 31]. The examples provided are not meant to be exhaustive and, indeed, the footnote makes clear that other contracting structures could also qualify. For purposes of illustration and clarity, IEP recommends expanding the list of examples of contracting structures that could be used to meet the RPS-delivery requirements. The examples primarily focus on the retail seller and/or a third-party. However, from a generator perspective, an example of the type of contractual requirements into which a generator may enter will provide helpful guidance.

We recommend the following additional example that could be included in Footnote 11:

> "The RPS-eligible facility could (a) enter into a banking and shaping services agreement with a third party wherein it sells the energy generated by the facility, but not associated RECs, and then re-purchases an equivalent but firm volume of energy, and/or (b) enter into a power purchase agreement (PPA) with the retail seller to sell that banked and shaped firm energy, whether generated in California or out-of-state, and the RECs originally generated by the facility for import into Califomia."

This language will help illustrate that, while third parties may provide banking and shaping services, it does not matter whether it is a third-party or the RPS-eligible facility that sells the unbundled energy to the retail seller in California.

4. WREGIS Participation

Currently, the Guidebook states that "Effective January 1, 2008, the Energy Commission requires RPS and SEP certified facilities, retail sellers, and procurement entities to participate in the WREGIS as part of RPS compliance. [Guidebooks, at p. 53] IEP believes that this directive is misplaced and fails to recognize the form and structure of WREGIS.

WREGIS is a voluntary organization. Furthermore, "RPS compliance" is an obligation faced by load-serving entities in California. It is not an obligation faced by renewable facilities *per se*. Rather, renewable facilities are planned and operated to meet the needs of the RPS obligated entities.

While the Commission has various authorities to incent renewable generators to participate in WREGIS (e.g. linking renewable payments from the Existing Account and/or SEP account to WREGIS participation), the Commission does not have the authority, in IEP's estimation, to require WREGIS participation of all renewable facilities employed by the LSE's to meet that LSE's RPS obligation. For example, a number of QF facilities are being used to meet IOU RPS obligations. However, nothing in those QF contracts require WREGIS participation. If a QF was not incented to participate in WREGIS due to the Commission's support payment programs, the QF faces no requirement that stems from its QF contract to participate in WREGIS. IEP recommends that the section related to WREGIS participation be modified to reflect this reality.

IEP appreciates the opportunity to provide these comments and recommendations. We look forward to working with the Renewables Committee on the renewable energy program in general and the implementation of California's RPS in particularly.

Respectfully submitted,

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October 12, 2007

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Date: 10/12/2007 2:03 PM
Subject: IEP CEC Filing
Attachments: IEP_Comments_-_Guideline_Revisions_Sept_07 - FINAL 10-12-07.DOC

Please find attached the IEPA Comments re Guideline Revisions for Renewable Energy Program and Renewables Portfolio Standard Implementation: Staff Draft Guidebook.

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Best Regards,

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