

BEFORE THE CALIFORNIA ENERGY COMMISSION

In the matter of:

Implementation of Renewable Investment
Plan Legislation

Staff Workshop on Possible Changes to the
Emerging Renewables Program Guidebook

Docket Number 02-REN-1038

(Guideline Revisions for
Emerging Renewables Program)

**OPENING COMMENTS OF UPSTAR ENERGY LLC REGARDING GUIDELINE
REVISIONS FOR THE CALIFORNIA ENERGY COMMISSIONS EMERGING
RENEWABLES PROGRAM.**

NOW COMES, UpStar Energy LLC, (“UpStar”), and requests an order from the California Energy Commission (“Commission”) that UpStar be allowed to comment in the above-captioned proceeding. In support of this opportunity to become Party and Comment, UpStar states as follows:

1. UpStar Energy, LLC, is a limited liability company formed under the laws of the State of Texas. UpStar is an Energy Service Company in the business of selling and installing renewable energy systems including wind energy systems. UpStar's business address is 4131 Centurion Way, Addison, Texas 75001. UpStar's telephone number is (713) 487-7827. UpStar is represented by its Managing Member, James Harris, whose address is the same as the UpStar's business address given above, and whose e-mail address is: upstar.energy@gmail.com

2. By its comment filing in Docket Number 02-REN-1038, UpStar intends to request that the Commission issue a consider declaratory order regarding several wind turbines issues that result in clarification and then eligibility to participate in the Emerging Renewables Program (“Program”).

UpStar alleges a direct and substantial interest in the outcome of the clarification of proposed Program Guidebook changes and clarification on eligible equipment, which flows from the fact that

UpStar has spent significant time, money and efforts negotiating contracts with companies selling Wind Turbines, as well as, educating Customers, permitting Officials and the general interested public about wind turbines. In addition, UpStar's customers who are Potential Participants ("Participants") in the Program prefer clarification on these Wind Turbine issues before entering into the Program.

The direct and substantial interests of UpStar are not represented or protected by another party.

3. Upon recent review of the wind equipment details on file and related information for Docket Number 02-REN-1038, UpStar realized that they may be negatively impacted by an unfavorable determination of the Commission in response to this request for clarification. Such an unfavorable determination would likely cause severe and unbearable financial harm to UpStar. Moreover, the UpStar represents potential Program Participants and thus seeks a determination from the Commission as to whether the requested clarification leading to a declaratory order on these issues will be allowed.

4. UpStar has a direct and substantial interest in the proceeding as required by the Commission's Rules of Practice and Procedure, and as a result, UpStar requests that they be permitted to intervene in Docket Number 02-REN-1038 and be permitted to participate fully as interveners in any hearings scheduled by the Commission on Rulemaking.

5. UpStar intends to provide testimony, review documentary evidence, participate in oral arguments as may be necessary to protect UpStar's interests and provide other information as new issues may arise to assure the Commission decision in this matter is based upon a fully informed record in any hearing to be scheduled in Rulemaking for Docket Number 02-REN-1038.

6. UpStar's intervention and participation, which is mandated by their own interest and the potential Participants interest, further requests that if hearings are scheduled prior to final Rulemaking, UpStar be permitted to participate as parties as their interest may appear in any such proceeding.

7. UpStar further requests that they be permitted to intervene and become parties of record in Rulemaking procedures of Docket Number 02-REN-1038, and that they be entitled to be served with copies of all pleadings, testimony, workpapers and exhibits heretofore filed or as may be filed hereafter by any party in interest.

8. While mindful of the Commission's interest in exploring only the relevant issues and in avoiding cumulative evidence or arguments, UpStar intends to present witnesses and evidence in the relevant Rulemaking. In this connection, UpStar contends that its participation in this Rulemaking will not unduly broaden the issues.

CONTINUING, in light of the important policy concerns encompassed, UpStar respectfully requests that the Commission consider and respond to the following:

A. Small Wind Turbines

Wind Industry Standards define “Small Wind Turbines” as small electricity-producing, wind-driven generating systems with a rated electrical generating capacity no greater than 100 kilowatts. The Commission should reconsider using a lower “no greater than 50 kilowatts” that may have negative consequences to any Renewable Energy Programs, both, domestic and International, that rely on the Commission's equipment list (including California’s Self-Generation Incentive Program) and leadership.

B. Program Requirements

Pursuant to Program Rules, in order to be eligible to participate in the Program, an applicant must, among other things, meet the qualifications set forth in the regulations. Among these qualifications is a requirement that the wind energy system has never been previously installed or used. Additionally, in order for a Participant in the Program to claim incentives at the completion of his or her project, the Participant must provide claim forms which, among other things, provide an invoice for the wind energy systems to ensure that the wind energy system equipment is new and has not been previously installed.

Specifically in the above referenced Program rule the issue of whether some limited number of remanufactured parts could be used in building wind turbines was not thoroughly addressed. Based on the limited history available regarding this issue, it appears as though the concern around not using new turbines was that individuals may attempt to install the same equipment at different locations and receive multiple incentives on the same equipment. Since at least eighty percent (80%) of the value of the parts and equipment in the remanufactured turbine are new, this insures that the new turbine has never been installed or used in the State of California, nor anywhere else, and therefore, have never received incentives in California or any other State.

C. “New and Not Previously Installed” Does Not Mean Absolutely Unused.

UpStar believes that the Program should adopt the guidelines issued by the U. S. Treasury Department (the “**U.S. Treasury**”).

In July of 2009, the U.S. Treasury provided program guidance for the energy incentive programs provided in accordance with Section 1603 or the American Recovery and Reinvestment Act of 2009 (the “**ARRA Program**”). Section III of the program guidance states: “For an applicant to be eligible to receive a Section 1603 payment it must be the owner or lessee of the property and must have originally placed the property in service.” Similarly, Section IV.G of the program guidance states: “The original use of the property must begin with the applicant.” Clearly, the U.S. Treasury does not intend to make a grant to an applicant that is not the original user of the property. From this position, it can be concluded that the U.S. Treasury intends for property to be new in order to receive a grant. However, the U.S. Treasury also provides explicit guidance explaining that the use of some used property is acceptable. Specifically, Section IV.G of the program guidance states, with respect to property that contains “used parts,” that if “the cost of the used parts contained within a facility is not more than 20 percent of the total cost of the facility (whether acquired or self-constructed), an applicant will not fail to be considered the original user of property because the facility contains used parts.” The program guidance illustrates that, at least at a Federal level, the use of some used parts does not, and was never intended to, disqualify an applicant from receiving incentives based on the use of some minimal level of used parts.

Furthermore, for years prior to the time when the ARRA Program was introduced, incentives were offered for specified energy property in accordance with Sections 45 and 48 of the Internal Revenue Code. These Internal Revenue Code sections were the basis for the incentives offered through the ARRA Program. Even under these provisions of the Internal Revenue Code, taxpayers were able to receive incentives in-spite of using some used/reconditioned property. This was confirmed by the Internal Revenue Service’s Revenue Ruling 94-1 which states that a facility will qualify as “originally placed” so long as at least 80% of the total value of the facility is unused. Rev. Rul. 94-31, 1994-1 C.B. 16 (1994). Thus, the use of some minimal level of used/remanufactured parts does not result in an absolute disallowance of incentives or tax credits.

D. Ambiguity Exists in the Regulation.

Pursuant to Program Rules, a wind energy system must be “new”. The regulation, however, does not define what it means to be “new”, and more specifically, whether a wind turbine deriving a small

amount of its total value from remanufactured parts is considered new. While the question of what constitutes “new” is a matter of conjecture with regard to wind turbines, it has been analyzed in other, analogous situations. Various federal statutes and regulations, the California Revised Statutes, the California common law, and the American Law on Products Liability support the notion that, in order to qualify and be treated as “new”, an object need not be entirely unused.

The California Supreme Court has stated that, given an ambiguous statute, the court must interpret the statute in light of the policy and the spirit of the law, and the interpretation should avoid absurd results. Additionally, the court will resolve any doubt as to the Legislature's intent in favor of what is reasonable. The Commission should apply the same rules while analyzing an ambiguous regulation as the court would resolve ambiguity in a statute. The interpretation that the wind turbine would fail to be classified as “new” for the purposes of the Incentive, despite being remanufactured with almost entirely brand new parts, is not reasonable and in conflict with the directives of the California Supreme Court.

E. Building of the Turbine

UpStar believes a wind turbine should qualify as “new” for the purposes of the Program if than 20% or less of the total value of the wind turbine is derived from previously used parts is consistent with the U. S. Treasury’s and other definitions of “new” for wind energy systems.

These turbines contain only a minimal amount of remanufactured/like new parts, while the rest of the parts used to build the turbines are completely new. These remanufactured parts constitute 20% or less of the total value of the wind turbines, which is consistent with the U. S. Treasury’s and others definition of “new” for wind energy systems. The warranty for these turbines meets or exceeds the warranty required under the Program.

F. List of Approved Turbines

As noted in the Program Handbook, pursuant to the program rules, in order to qualify for incentives offered through the Program, the wind generating equipment must be listed or certified by the California Energy Commission. Remanufactured turbines are included in the approved list of wind turbines for the California Energy Commission, American Wind Energy Association, New York State Energy Research and Development Authority and RenewableUK.

G. If Turbines do not Qualify, the Commission Should Deviate from Requirements

If the Commission determines that the Turbine does not qualify as “new and not previously installed” for purposes of the Program, the Commission should deviate from these requirements and follow the guidelines set by the U. S. Treasury. The Commission has the authority to deviate from these provisions due: (a) good cause for the deviation appears; (b) the requested the deviation provides specific; and (c) the Commission finds that the deviation is in the public interest and is not contrary to statute.

Good cause exists for the deviation from the requirement that wind turbines must be - new and not previously installed. One of the main purposes of the Program is to facilitate the continual growth of renewable energy in the State of California. To counteract high capital investments and a long return on investment period, the Program has provided incentives to customers who install wind generation systems on their property. Qualifying remanufactured turbines for the purposes of the Program will serve to further the California Public Utility Commission’s intent in facilitating the installation of renewable energy systems in California by providing an economical efficient alternative. Without such deviation, Participants of the program may not likely be able to purchase a wind energy system, resulting in a direct significant burden on program participants and/or directly restrict the success of the formation, operation or expansion of the Program. This would act to substantially hinder the Program’s goal of installing and producing clean renewable wind energy in the State of California. The purpose of these requirements is to prevent a wind energy system to qualify twice for the incentive. These remanufactured turbines have never received a rebate or Program incentive from the State of California.

UpStar requests for a deviation of the requirements of - new and not previously installed. UpStar request the Commission adopt the guidelines issued by the U. S. Treasury.

Deviation from the requirements of -new and not previously installed- is in the public’s interest for all the previously stated reasons. By deviating from the regulations, the Commission will allow Participants access to economical, highly effective and proven wind turbines, which in turn will help ensure the financial success of the Program by reducing costs associated with electric energy. Such installation of Remanufactured Turbines will also avoid the emission of greenhouse gases, thereby combating global warming and climate change.

H. Commission Should Consider Clarification to Avoid Future Delay

As set forth above, UpStar and the Participants have already spent a significant amount of time and money to position the turbines within the prescribed Program period. The potential delay caused by

the new concern that Remanufactured turbines may not qualify for incentives under the Program may make it effectively impossible to install all of the turbines within the period described in the Program.

I. Request for Relief

A declaratory ruling interpreting the intent and application Program guidelines is necessary in order to proceed with the installation of Remanufactured Turbines and installation of Remanufactured Turbines for Participants. Furthermore, such a ruling will positively affect the continued development and success of the Program on a going forward basis for multiple parties, including various schools, farmers, private residents, small businesses and other public property customers.

J. Eligible Rebate Amount

The total eligible rebate amount available for any energy system shall not exceed 50 percent of the **GROSS** purchase price of the system (before ERP incentives). The Commission should reconsider using a lower “net” that may have negative consequences and may be confusing to Program Participants.

K. Only Other California Incentives Should Affect Rebate Amount

The rebate amount received from the Energy Commission may be reduced for applicants who receive incentives from **California sources** other than the Program that lower the cost of a generating system. The Commission should reconsider including “federal government sponsored incentive programs, other than tax credits” to lower the Program rebate amount. Many potential Participants will not be able afford such renewable energy systems without Federal incentives, thus causing negative consequences to Program intent by making installations cost prohibitive to Program Participants.

L. Utilities Construe Each Meter To Be A Customer

In cases where there are multiple utility meters on the same parcel, such as vineyards or

other agricultural properties, each meter should be eligible for separate rebates. The Commission should reconsider limiting owners of multiple meters to 30kW rebate limits. Many potential Participants have many meters and will not be able afford such renewable energy systems without consistency of the Utilities position of each meter is a customer. This may cause negative consequences to Program intent by making installations cost prohibitive to Program Participants who are sole proprietors, especially in the agricultural industry.

M. Many Meters Do Not Have Site Addresses

The Commission should reconsider requiring a site address for each installation. Many potential Participants have many meters with no site address and will not be able to meet the rule. This may cause negative consequences to Program intent by making installations prohibitive to Program Participants with no site address, especially meter owners in the agricultural industry.

N. Evidence Of Site Electricity Load

The Commission should reconsider requiring utility bills be no older than six months from the date of application. Many potential Participants have many meters with little usage during seasonal cycles and will not be able to meet the rule. This may cause negative consequences to Program intent by making installations prohibitive to Program Participants with no site address, especially meter owners in the agricultural industry who have overall heavy loads but not six month loads.

O. Assignment of Rebate Payment Must Be Irrevocable

After executing an installment contract, the designated payee of the rebate payment may assign his or her right to receive the payment to a third party under irrevocable terms only. Further this should be reflected in the Reservation Payment Assignment Form (CEC-1038 R5) and Payment Claim Form (CEC-1038 R2). The Commission should reconsider allowing potential Participants to change financial assignments. This may cause negative consequences to Program intent by making installations prohibitive to Program Participants who must finance the system installations. Lenders will never consider potential rebates in loan scenarios without irrevocable assignment.

P. Time Extension Requests

Time extensions to a reservation should be available under the circumstances of unfounded investigation. Applicants failing to install their systems and submit a complete reservation payment claim within the reservation period due to unfounded Commission investigation should be able to continue under a time tolling format with no penalty.

Q. Data Reporting on System Costs Are Eligible

In addition to the cost of permits issued by local building departments or appropriate government entities, the labor to install the electricity generation system and sales tax, the program should cover the additional costs from the proposed Data Reporting. The Commission should consider specifically allowing Data Reporting on system costs as eligible. This will help avoid negative consequences to Program intent by making after-installations costs prohibitive to Program Participants.

R. Special Requirements for Leased-to-Own Systems

The Commission should consider Leased-to-Own Systems separate from Lease agreements and Power Purchase Agreements. Leased-to-Own Systems should have an initial term of no less than **5 years** to be consistent with State and Federal guidelines for such transactions. The Commission should reconsider viewing different financial transactions and financing under such a broad scope. This may cause negative consequences to Program intent by making installations prohibitive to Program Participants who must finance the system installations.

WHEREFORE, UpStar requests that this Commission issue a confirming order:

1. Granting the Comments to be filed so as to permit UpStar the right to participate fully as Party, as their interests may appear in rulemaking, and to grant such Petition in all other respects; and

2. For such other and further relief as the Commission deems just and proper.

Respectfully submitted this 12th day of August.



UpStar Energy LLC

James Harris, Managing Member

4131 Centurion Way, Addison, Texas 75001

Email: upstar.energy@gmail.com