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Jack Stoddard
Manatt, Phelps & Phillips, LLP
Direct Dial: (415) 291-7548
E-mail: jstoddard@manatt.com

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VIA FEDERAL EXPRESS AND E-MAIL

Mr. Robert B. Weisenmiller, Ph.D.
Chair
California Energy Commission
1516 Ninth Street
Sacramento, California 95814

Karen Douglas, J.D.
Commissioner
California Energy Commission
1516 Ninth Street
Sacramento, California 95814

Carla Peterman
Commissioner
California Energy Commission
1516 Ninth Street
Sacramento, California 95814

Robert Oglesby
Executive Director
California Energy Commission
1516 Ninth Street
Sacramento, California 95814-5512

Re: Docket Number – 02-REN-1038 — Notice of Protest and Demand for Withdrawal of March 2, 2012 Notice Concerning Status of Funds for Fuel Cell Systems Participating in the Emerging Renewables Program

Dear Mr. Weisenmiller, Ms. Peterman, Ms. Douglas and Mr. Oglesby:

Altergy Systems ("Altergy"), on behalf of its customers, hereby protests Commissioner Peterman's March 2, 2012 Notice concerning the status of funds for fuel cell systems participating in the Emerging Renewables Program ("March 2, 2012 Notice" or "Notice").[1] Specifically, Altergy protests (1) the Notice's conclusion that Emerging Renewables Program ("ERP") funds allocated for fuel cell rebates have been expended or reserved; (2) the Notice's unauthorized and improper reallocation of ERP funds, and (3) the Notice's refusal to process MetroPCS's pending rebate reservation application forms. The March 2, 2012 Notice is unlawful and contrary to the public interest.

[1] California Energy Commission, *Status of Funds for Fuel Cell Systems Participating in the Emerging Renewables Program*, dated March 2, 2012 ("March 2, 2012 Notice"), available at: http://www.energy.ca.gov/renewables/emerging_renewables/2012-02-02_Fuel_Cell_Funding_Expiration_Notice.pdf.

The Notice's declaration that funds have been expended and reserved, its reallocation of funds away from renewable fuel cell programs, and its refusal to process MetroPCS's completed reservation applications is arbitrary and capricious and constitutes a substantive change in the Emerging Renewables Program guidelines in violation of the process prescribed in the *Renewable Energy Program Overall Program Guidebook.*[2] Altergy and its customers relied in good faith upon the availability of ERP rebates in negotiating their contracts. Refusing to fund completed rebate reservations when Altergy invested considerable time and capital in order to meet the programmatic requirements established by the California Energy Commission ("Energy Commission") is contrary to the purposes of the ERP program, contrary to California Public Resources Codes section 25744, and contrary to the public interest. Accordingly, Altergy respectfully requests that the Energy Commission withdraw the March 2, 2012 Notice. In addition, Altergy respectfully requests that the Energy Commission clarify that public goods charge funds repaid from the General Fund and public goods charge funds collected between March 4, 2011 and December 31, 2011 will be used to fulfill pending rebate reservation applications that were submitted prior to December 31, 2011.

1. About Altergy and MetroPCS.

Altergy designs, manufacturers and sells renewable hydrogen fuel cells with capacities ranging from 1 kilowatt ("kW") to 30 kW. Altergy's primary market is providing backup generation for cellular network towers. Altergy is headquartered in Folsom, California, employs approximately 50 people full time and has a state of the art manufacturing facility located in Folsom. Altergy expended considerable amounts of money and four years of time developing commercial quantities of a renewable hydrogen fuel so that it could qualify as a renewable resource under ERP. Altergy's fuel cells have been certified by the California Air Resources Board as a zero emission distributed generation resource.

MetroPCS is the nation's leading provider of no annual contract, unlimited, flat-rate wireless communications service. MetroPCS has been among the fastest growing wireless broadband providers in the U.S. and is currently the fifth largest facilities-based wireless broadband provider in the U.S. based on number of customers served. MetroPCS provides wireless telecommunications service to customers throughout California.

2. Background.

ERP provides rebates to end-use customers who purchase and install renewable energy technologies, specifically small wind systems and fuel cells, for on-site generation.[3] ERP

[2] California Energy Commission, *Renewable Energy Program Overall Program Guidebook* (3d Ed.), dated January 2011.
[3] California Energy Commission, *Emerging Renewables Program Guidebook* (11th Ed.) ("*ERP Guidebook*"), dated November, 2011, p. iv. Fuel cells and small wind turbines are the only eligible technologies under Cal. Pub. Res.

funding comes from the Renewable Energy Public Goods Charge and is held in trust by the Energy Commission on behalf of ratepayers. Seventy-nine percent of the money collected pursuant to the Renewable Energy Public Goods Charge must be used for ERP rebates for renewable fuel cells and small wind facilities.[4] ERP rebates are intended to"reduce the net cost of generating equipment using emerging renewable technologies and thereby stimulate the sales of such systems [in order to] encourage manufacturers, sellers, and installers to expand their operations and reduce their costs per unit."[5]

On March 4, 2011 the CEC Renewables Committee temporarily suspended ERP so that the CEC could review the ERP guidelines relating to rebates for wind energy systems.[6] The suspension was lifted on November 9, 2011.

MetroPCS has contracted to purchase approximately 2,500 renewable fuel cell systems from Altergy. The fuel cells will provide critical back-up generation at cellular tower sites throughout California. The contract is conditional upon the availability of ERP rebates. MetroPCS submitted 1,965 rebate reservation request forms on November 9, 2011, the same day the CEC lifted the temporary suspension. CEC staff acknowledged receipt of all 1,965 applications, placed them in queue in order of receipt, and processed 331 of the MetroPCS reservation requests before Commissioner Peterman issued the March 2, 2012 Notice terminating the program.

The March 2, 2012 Notice stated that (1) the funds allocated for fuel cell technologies participating in ERP have been expended or reserved; (2) the CEC would no longer be accepting new fuel cell rebate reservation requests; and (3) the CEC would not fund fuel cell rebate reservation requests that had been submitted prior to March 2, 2012 regardless of availability of funding.[7]

As of January 2011, the CEC reported $91 million dollars in loans from the ERP account outstanding. In addition, the Renewables Trust Fund should include additional unaccounted for renewable energy public goods charge monies that were collected between March 4, 2011 and December 31, 2011, 79 percent of which should flow to the ERP account.

Code §25744. Any funds for photovoltaic or solar thermal electric technologies shall be awarded under Cal. Pub. Res. code section 25780.

[4]*See* Cal. Pub. Res. Code § 25744; *See also* California Energy Commission , *Renewable Energy Program 2011 Report to the Legislature*, dated December 2011, p. 11.

[5] *ERP Guidebook*, p. 1.

[6] California Energy Commission, *Temporary Suspension of the Emerging Renewables Program*, dated March 4, 2011.

[7] March 2 2012 Notice.

3. Grounds for Protest and Demand for Withdrawal of March 2, 2012 Notice.

(a) Funding for fuel cells under ERP has not been exhausted.

Contrary to what the March 2, 2012 Notice says, funds allocated for fuel cell technologies have not yet been exhausted. The Renewable Energy Program 2011 Report to the Legislature states that, as of June 30, 2011 there were approximately $81 million in loans from ERP outstanding.[8] Many of these loans were loans to the State General Fund which, by law, must be repaid to the ERP trust account. The funds diverted from the ERP trust account are assets on the ERP balance sheet and must be repaid pursuant to state law.[9] The March 2, 2012 Notice acknowledges that the 2011-2012 Budget and 2012-2013 Budget provide for *repayment* of $101 million dollars.

It is disingenuous and misleading for the Energy Commission to state that the ERP funds have been exhausted. The funds diverted from the ERP trust account are properly identified as assets on the ERP trust account balance sheet, and the repayment of these funds is required by law. In addition, the State Controller has stated that loans to the General Fund cannot interfere with the operations of special funds, such as ERP, and must be repaid upon demand.[10]

Once repaid, these funds should be used to fund pending fuel cell rebate reservation applications in accordance with the ERP guidelines. Patently, had the Legislature not illegally diverted this money to the General Fund, and kept it from the ERP trust fund, through a series of successive budget acts, it would be available to fulfill MetroPCS's reservation requests.

The March 2, 2012 Notice lacks any support for its conclusion that all funds have been expended or reserved. At a minimum the Notice should include a statement of the current balance and an accounting of the amounts spent or committed on each technology. It is likely that ERP funding is available because the Renewable Energy Public Goods Charge was continuously collected until December 31, 2011. Pursuant to statute 79 percent of the money collected through the Renewable Energy Public Goods Charge must be used to fund ERP rebates for distributed wind facilities and renewable fuel cells.[11]

(b) The Energy Commission may only use Public Goods Charge funds as authorized in the California Public Resources Code.

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[8] California Energy Commission , *Renewable Energy Program 2011 Report to the Legislature*, dated December 2011, p. 56.
[9] Id, p. 11.
[10] Letter from John Chiang, California State Controller to Governor and Legislative Leaders, dated January 22, 2010, p. 2.
[11] Cal. Pub. Resources Code § 25744(a).

The Energy Commission holds Renewable Energy Public Goods Charge funds in trust on behalf of California ratepayers. It is not within Commissioner Peterman's discretion to reallocate ERP funds for purposes other than those authorized in California Public Resources Code Chapter 8.6, which established the Renewable Energy Resources Program. Section 25744 provides that "[s]eventy-nine percent of the money collected pursuant to the renewable energy public goods charge shall be used for a multi-year, consumer-based program to foster the development of emerging renewable technologies in distributed generation applications." Eligible technologies are renewable fuel cells, including those that provide backup power, and small wind turbines.[12] Section 25744(7)(d) explicitly states that solar technologies cannot receive funding under section 25744. In other words, while the Energy Commission has some discretion to allocate the use of funds within ERP between renewable fuel cells and wind, the Energy Commission is prohibited from using 79 percent of Renewable Energy Public Goods Charge funds for anything other than renewable fuel cells and small wind.

In addition, while the Energy Commission has limited discretion to reallocate funds within ERP, as discussed further below Commissioner Peterman has no such discretion.

(c) The March 2, 2012 Notice is improper and does not conform with the relevant rules and guidelines.

The Overall Program Guidebook governs the process for reallocation of program funds and the process for making substantive revisions to the ERP guidelines. Pursuant to the Overall Program Guidebook substantive changes may be made on the *recommendation* of the assigned Committee with the approval of the Energy Commission pursuant to Public Resources Code section 25747 and must be adopted by the Energy Commission at a publicly noticed meeting. As defined in the Overall Program Guidebook, substantive changes include changes in eligibility and evaluation criteria, changes to funding and incentive levels, and reallocation of funds between program elements.[13] The Overall Program Guidebook also states that in order to reallocate funds between program elements "the [Renewables Committee] *may recommend reallocation* of funds" so long as the reallocation is consistent with the most recent legislative reports.[14]

The March 2, 2012 Notice is both a substantive revision to the ERP guidelines and a reallocation of ERP funds. It was not circulated for comment and it was not adopted by the Commission at a publicly noticed meeting. As such it violates the process described in the Overall Program Guidebook. The March 2, 2012 Notice meets the Overall Program Guidebook's definition of substantive revision because it (1) eliminates eligibility for fuel cells going forward; (2) reallocates funds away from the renewable fuel cell rebate program; and (3)

[12] Cal. Pub. Resources Code § 25744(b)(3).
[13] *Renewable Energy Program Overall Program Guidebook* (3d Ed.), dated January, 2011, pp. 4-5.
[14] *Id*, at 8. (emphasis added).

eliminates the rebate available to fuel cells. Since the Notice did not follow the Energy Commission's own process it is void and should be officially withdrawn.

In support of the termination of funding for the MetroPCS reservation requests, the March 2, 2012 Notice misleadingly pieces together quotes from the ERP Guidebook: "if more funds are made available, additional allocations may be made for each technology. [...] The Energy Commission will issue a public notice announcing any changes to the allocation of funds 30 days before the changes go into effect." These two sentences are taken out of context and do not support the outcome here.

First, as discussed above, ERP funding has not been exhausted and the funds borrowed by the Legislature do not constitute "additional" funds. Second, the ERP Guidebook's statement regarding reallocation of program funding must be read within the context of the Overall Program Guidebook's provisions regarding reallocation of funds. The ERP Guidebook states that the Energy Commission "reserves the right to *adjust* allocation of funds between technologies at any time" and that it will "issue a public notice announcing any changes to the allocation of funds 30 days before the changes go into effect."[15] The wholesale elimination of rebates for renewable fuel cells, both prospective and retroactive is not an adjustment to funding allocations. It is a substantive change to the programmatic requirements concerning eligibility and funding. Furthermore the Notice does not include any reasoning or justification as a basis for the reallocation of funds away from fuel cells nor does it state what those funds will be used for instead. Since the Notice does not offer a rational basis for this substantive change in policy and process, the March 2, 2012 Notice is arbitrary and capricious.[16] While the Energy Commission does not offer any explanation for what it intends to do with the remaining ERP funds, it would be unlawful to use it for any purpose other than funding rebates for renewable fuel cells and small wind turbines.[17]

Finally, to the degree that the programmatic changes in the March 2, 2012 Notice fall outside the scope of the Overall Program Guidelines adopted pursuant to California Public Resources Code section 25747, Commissioner Peterman is acting outside the scope of her authority and additional procedural requirements under the Administrative Procedure Act apply.

(d) Refusing to fund completed rebate reservations is contrary to law, contrary the purposes of the ERP program and contrary to the public interest.

California Public Resources Code section 25744, which authorizes ERP, requires that "funding for emerging technologies shall be provided through a competitive, market-based

[15] ERP Guidebook, p. 12. (emphasis added).
[16] An agency action is arbitrary and capricious if it takes a regulatory action that is not supported by substantial evidence in the administrative record.
[17] Cal. Pub. Res. Code § 25744, subs. (a), (b)(3), and (d).

process that is in place for a period of not less than five years, and is structured to allow eligible emerging technology manufacturers and suppliers to anticipate and plan for increased sale and installation volumes over the life of the program." ERP funds are collected from California ratepayers and are held *in trust* by the Energy Commission on their behalf.

Altergy invested considerable capital over four years developing a commercially viable renewable source of hydrogen fuel and constructing a state of the art manufacturing line in Folsom. During that time the Energy Commission processed few or none rebate applications for renewable fuel cells. The renewable energy public goods charge funding allocated for renewable fuel cell rebates accrued in the ERP account or was loaned to the General Fund. Altergy's investment in developing renewable hydrogen and a state of the art manufacturing facility is exactly what the Legislature was trying to encourage through an ERP program that was "structured to allow eligible emerging technology manufacturers and suppliers to anticipate an plan for increased sale and installation volumes." If the Energy Commission fulfills the pending rebate requests with the remaining ERP funds, the program will have succeeded in accomplishing what it set out to achieve. Terminating rebate funding for renewable fuel cells just as those funds are needed, on the other hand, does the exact opposite – it undermines certainty and discourages investment. Terminating rebate funding for the pending rebate applications would also undermine State greenhouse gas reduction goals since it would force MetroPCS to procure cheaper diesel generators to replace the approximately 1600 renewable fuel cells that it contracted to purchase from Altergy but which are contingent upon the availability of ERP rebates.

Furthermore, refusal to fund pending rebate reservation applications is inconsistent with prior Energy Commission actions. On March 4, 2011 the Energy Commission temporarily suspended ERP in order to review and address deficiencies with program requirements relating to small wind systems.[18] Despite reflecting serious concerns regarding the structure of the rebate program for wind facilities, the March 4, 2011 suspension was strictly prospective. The March 4, 2011 Notice was clear that the Energy Commission would continue to process payment claims for rebate reservations submitted before the effective date of the suspension notice. The March 2, 2012 Notice is inconsistent with the Energy Commission's prior course of action because it retroactively applies to completed rebate applications that were submitted months prior.

(e) MetroPCS and Altergy reserved funding when they submitted completed rebate reservation requests.

[18] California Energy Commission, *Temporary Suspension of the Emerging Renewables Program*, dated March 4, 2011, available at: http://www.energy.ca.gov/renewables/notices/2011-03-04_Notice_of_ERP_Suspension.pdf.

MetroPCS and Altergy are entitled to the reserved rebates. Since ERP funding is available, approving the completed rebate applications is a ministerial act. The ERP guidelines do not give the Energy Commission discretion to reject the rebate applications on account of some unstated policy preference. The ERP Guidebook states that "a funding reservation provides the purchaser assurance that the reserved funds will be available when the payment claim is made" and that "reservations are made on a first-come, first-served basis until program funding is exhausted."[19] As described in Section IV regarding the reservation process, rebate reservations are deemed accepted if not returned as incomplete.[20]

MetroPCS submitted 1,965 rebate reservation requests that varied as to the details of the particular sites but were otherwise identical in form and content. CEC staff processed 331 of the submitted requests and then informed Altergy that it was conducting an audit to determine the amount of remaining funds in the program. Altergy heard nothing else regarding the status of ERP account balances until the March 2, 2012 Notice. None of the MetroPCS rebate reservation requests were rejected on the grounds of insufficient information or any other grounds. The MetroPCS reservation applications are the only rebate reservations for renewable fuel cells currently pending. Since the rebate reservation applications are complete, under the program guidelines and relevant law, the CEC cannot simply refuse to process them. To do so deprives MetroPCS and Altergy of the value of the expected rebates.

(f) Projects with pending rebate applications should remain in rebate queue in case projects with approved rebate applications are terminated.

MetroPCS's pending rebate reservation applications should remain in the queue until all reserved rebates have been disbursed so that ERP rebates can be utilized if projects with approved payment claims are terminated. Individual projects with rebate reservations may drop out as circumstances change. When this has occurred in the past, it has been the Energy Commission's practice to move to the next application in the rebate queue. This practice has applied to solar, wind and fuel cell programs, and it apparently continues to be the practice with technologies other than fuel cells. The CEC should clarify that if any of MetroPCS's 331 rebate applications that have already been processed are withdrawn, the funding made available by the withdrawal will be reallocated to the next application in the queue, on a first-come, first-served basis in accordance with Energy Commission rules and practice.

4. Conclusion

For the above stated reasons, Altergy protests the March 2, 2012 Notice. The Notice is contrary to applicable law, ERP guidelines, and the public interest. The Energy Commission

[19] ERP Guidebook, p. 14.
[20] Id. *See also* Id, p. 2 ("In most, cases an applicant submits a Reservation Request Form and supporting documentation *to reserve a fixed amount of program funds*. For fuel cell systems, a CEC-1038 is also required...").

should withdraw the Notice and clarify that renewable energy public goods charge funds repaid from the General Fund and public goods charge funds collected between March 4, 2011 and December 31, 2011 will be used to fulfill pending rebate reservation applications that were submitted prior to December 31, 2011.

Sincerely,

F. Jackson Stoddard
MANATT, PHELPS & PHILLIPS, LLP
Attorney for Altergy Systems

cc: Jennifer Jennings, Public Adviser
Michael Levy, General Counsel
Terry D. Carlone, Altergy Systems
James Oros, Altergy Systems
Chief Counsel
(all via U.S. Mail)

A copy is being submitted to the Docket Office.