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COMMENTS OF THE UTILITY REFORM NETWORK, THE LARGE-SCALE SOLAR ASSOCIATION AND THE CALIFORNIA WIND ENERGY ASSOCIATION ON THE CONCEPT PAPER FOR THE IMPLEMENTATION OF ASSEMBLY BILL 2196

In response to the January 25, 2013 notice, The Utility Reform Network (TURN), the California Wind Energy Association (CalWEA), and the Large-scale Solar Association (LSA) (*hereafter Joint Parties*) submit these comments on the staff concept paper for the implementation of Assembly Bill 2196. The Joint Parties believe that the concept paper makes a reasonable effort to interpret the provisions relating to contracts executed after March 28, 2012 but fails to adhere to the clear statutory language and legislative intent relating to contracts executed before March 29, 2012.

I. PRODUCT CONTENT CATEGORIZATION

The concept paper proposes that procurement associated with any contract executed after June 1, 2010 and before March 29, 2012 “should qualify as PCC [Portfolio Content Category] procurement” rather than being treated as “count-in-full” procurement.¹ However, there is no reference to how the Commission should determine the appropriate Portfolio Content Category for contracts executed during this period. The Joint Parties believe that the Commission must undertake a comprehensive review of these transactions to determine how they align with the characteristics of the three different PCCs.

To date, neither this Commission nor the Public Utilities Commission have reached any determinations regarding the PCC treatment of pre-March 29, 2012 contracts for pipeline biomethane. In Decision 11-12-052, the Public Utilities Commission declined to categorize pipeline biomethane transactions under the PCC structure established in §399.16 of the Public Utilities Code. Instead, the Public Utilities Commission noted that “it is premature for this Commission to address the place of generation using pipeline

¹ Concept Paper, pages 4-5.

biomethane as a fuel source in the new portfolio content categories while the CEC is considering changes to the eligibility criteria for pipeline biomethane.”²

AB 2196 directs the Commission to assign a PCC to procurement associated with post-March 29, 2012 contracts based on the characteristics associated with the procurement of electricity from the generating facility.³ To the extent that the biomethane fuel meets the particular standards outlined in §399.12.6(b) and is associated with a contract executed after March 29, 2012, the Commission is directed to apply the appropriate PCC based on the characteristics of the electricity procured from the generating facility. There is no comparable statutory language that provides similar guidance with respect to pre-March 29, 2012 contracts.

It is a basic principle of statutory interpretation that the inclusion of language in one statutory section, and its omission in another section, should be understood to be a deliberate act by the Legislature.⁴ Where the Legislature “has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded.”⁵ These precedents apply in this circumstance since the Legislature directed the Commission to apply one standard for post-March 29, 2012 contracts meeting certain criteria with respect to the fuel but did not provide the same treatment for pre-March 29, 2012 contracts involving fuel that fails to meet the standards in §399.12.6(b). Had the Legislature intended for the Commission to apply the same standard to all contracts involving different types of biomethane transactions, there would be no date restriction included in §399.12.6(e).

² Decision 11-12-052, page 43.

³ Public Utilities Code §399.12.6(e) (“For contracts initially executed on or after March 29, 2012, or for quantities of biomethane associated with contract amendments executed after March 29, 2012, the use of biomethane shall be assigned to the appropriate portfolio content category based on the application of the criteria in subdivision (b) of Section 399.16 to the procurement of electricity by the retail seller or local publicly owned electric utility from the generating facility consuming the biomethane.”)

⁴ *Wells v. OneZone Learning Foundation* (2006) 39 Cal.4th 1164, 1190.

⁵ *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 576.

The potential for differential PCC treatment of pre-March 29, 2012 and post-March 29, 2012 biomethane contracts has been acknowledged by many of the POUs. In minutes from meetings by local governing authorities, POUs have conceded that AB 2196 does not guarantee their preferred PCC treatment.⁶ Moreover, many POUs insisted on contractual clauses that allow unilateral termination of pre-March 29, 2012 biomethane supply agreements without penalty if the associated electricity is not considered a Category 1 product by the Commission.

The Commission must therefore undertake a comprehensive review of all contracts executed after June 1, 2010 and before March 29, 2012 to determine how the biomethane provided to the California POU or ESP under these agreements matches the characteristics of the three different PCCs. As the Commission is aware, these transactions typically involve sources of biomethane that cannot be physically delivered to California,⁷ provide no additionality (in terms of overall biomethane production or electricity generated within a California Balancing Authority)⁸ and do not offer any in-state environmental benefits. As a result, they are fundamentally different than biomethane transactions that satisfy the §399.12.6(b) standards.

⁶ Burbank Water and Power Staff Report on 2011 RPS Compliance Update, October 30, 2012 (“Earlier this year, the Legislature passed Assembly Bill 2196 (AB 2196) which was supposed to clear up the ambiguity surrounding the RPS eligibility of biomethane. Although existing contracts for biomethane were grandfathered, the legislation was not clear on which Compliance Category the energy produced would fall under. Staff will now be working with the California Energy Commission as it develops the regulations associated with AB 2196 to ensure that out-of-state biomethane burned in California is treated as Compliance Category 1.”); Vernon City Council minutes from September 4, 2012 meeting, page 9 (“Director of Light & Power, Carlos Fandino reported on AB 2196 advising that it had passed and grandfathered Vernon’s contracts. However, he advised that whether bio-methane gas is included as part of the Bucket 1 requirement is open to interpretation.”)

⁷ Most contracts executed prior to March 29, 2012 do not represent true physical transactions because they involve existing sources that inject gas into pipelines flowing Eastward and schedule biomethane against the pipeline flow, thereby ensuring there is no possibility that either the biomethane could actually be delivered into California or that such transactions will have any impact on the supply of natural gas to California.

⁸ Most pre-March 29, 2012 transactions do not even involve incremental pipeline injections of biomethane by the source facilities and instead rely on pre-existing levels of supply that are unchanged as a result of the contract.

The original Suspension Notice issued by the Commission explains that pipeline biomethane “may not displace in-state fossil fuel consumption” and “may not be physically delivered to the purchasing power plant, or even to the state, and may not even be used to produce electricity.”⁹ Indeed, industry proponents argue that one of the benefits of these transactions is that it does not alter the operation of existing CCGT units, does not require the installation of any new equipment, and does not require any additional generation.¹⁰ Retail sellers and Publicly Owned Utilities procuring biomethane intend to rely on existing output from units already under contract (or ownership) to produce this “new” renewable energy using conventional natural gas. This behavior demonstrates that the only real transaction is a purchase of tradable attributes along with the delivery of natural gas, not the generation of additional renewable electricity. It was for these reasons that the Commission initially undertook the suspension.

Given these characteristics, the Joint Parties believe it would be reasonable to conclude that many such transactions are appropriately classified as Category 3. The Commission should develop specific criteria applicable to contracts executed prior to March 29, 2012 with biomethane supplies that do not meet the §399.12.6(b) standards in order to determine the appropriate Portfolio Content Category.

II. OPTIONAL CONTRACT QUANTITIES

The Concept Paper correctly interprets §399.12.6(a)(2)(C) and concludes that, for contracts executed prior to March 29, 2012, any quantities of biomethane “specified as optional to the buyer in the original contract will be subject to the requirements of

⁹ Notice to Consider Suspension of the RPS Eligibility Guidelines Related to Biomethane, CEC Docket 11-RPS-01 and 02-REN-1038, March 16, 2012, page 3.

¹⁰ For example, see the April 19, 2011 memo by Burbank Water and Power General Manager Ron Davis to Burbank City Manager Michael Flad (http://burbank.granicus.com/MetaViewer.php?view_id=6&clip_id=2368&meta_id=104263)

Public Utilities Code Section 399.12.6 subdivision (b).”¹¹ An initial investigation reveals that at least three POUs have contracts with volumes that would be excluded from RPS eligibility under this provision.¹² It is not clear whether the affected POUs are aware of this restriction. The CEC should require all entities seeking RPS certification for pre-March 29, 2012 biomethane contracts to provide copies of the contracts to the Commission for review to determine whether there are any other quantities that are discretionary for the buyer. Any such quantities must be categorically excluded from RPS eligibility consistent with the provisions of AB 2196.

III. CHANGES IN THE DESIGNATED ELECTRIC GENERATION FACILITY

The Concept Paper proposes to allow the POUs to designate a new generating facility to be associated with a biomethane contract executed prior to March 29, 2012 “even if the new facility has not been previously RPS-certified or pre-certified.”¹³ In late July of 2012, the California Municipal Utilities Association sought an amendment to AB 2196 that would allow the substitution of a new generating facility for those originally identified in biomethane transactions executed prior to March 29, 2012.¹⁴ This proposal was considered, and rejected, by the authors of AB 2196. The staff recommendation therefore conflicts with the Legislative history and ignores the fact that such a proposal was made and not accepted.

¹¹ Concept Paper, page 6.

¹² The contracts include: (1) Pasadena Water and Power (EDF Trading/Dos Rios) – includes 899 mmBTU/day of “non contract quantity” that can be exercised if proposed by buyer and accepted by seller, (2) Burbank Water and Power (EDF Trading/Dos Rios) – includes 751 mmBTU/day of “non contract quantity” that can be exercised if proposed by buyer and accepted by seller, (3) City of Vernon (Element Markets Renewable Energy) -- includes 2,500 mmBTU/day of “non contract quantity” that can be exercised if proposed by buyer and accepted by seller.

¹³ Concept paper, page 7.

¹⁴ The specific amendment sought by CMUA read as follows:

“On page 8, after line 3 insert: (f) The Energy Commission shall develop rules or guidelines for the precertification and certification of facilities that allow local publicly-owned electric utilities to take biomethane procured for use in a facility certified as an eligible renewable energy resource and use it in re-powered, or more efficient, or other generation facilities without changing the precertification or

The staff recommendation does not explain why allowing a substitution of uncertified generation facilities would be reasonable. The primary motivation behind such substitution is to allow a retail seller or POU to identify a generating unit with a lower heat rate in order to generate more “renewable” energy without any change to the overall supply of biomethane. The result would be an illusory increase in the amount of renewable generation and a decrease in the procurement of other renewable sources by any retail seller or POU engaging in such substitution. This outcome does not further the goals of the RPS program because it offers no environmental improvements, no additional displacement of fossil fuels, and no new generation being developed. In fact, the changes proposed by the Concept Paper would actually result in greater environmental impacts and fossil fuel consumption by relieving the retail seller or POU of some portion of its RPS obligations and allowing greater reliance on non-renewable electric sources.

The Commission should not rewrite AB 2196 to allow, or encourage, retail sellers or POUs to substitute more efficient generation units for contracts executed before March 29, 2012. The Concept paper fails to identify any valid purpose served by this proposal.

IV. DEMONSTRATION OF LOCAL ENVIRONMENTAL BENEFITS

The Concept Paper proposes to implement the local environmental benefits tests in §399.12.6(b)(3)(C) through “pathway approaches” and “per se” findings. These terms are neither clear nor obvious. The plain language of AB 2196 requires that the production and injection of biomethane in any post-March 29, 2012 transaction directly achieve of at least one of these local benefits. The Commission should clarify how the demonstration of the direct benefit requirement would occur and take proactive measures to prevent certain gaming strategies from being employed. For example, it should not be permissible to procure offsetting (and unrelated) environmental benefits

certification criteria, and portfolio content category pursuant to Section 399.16(b)(1) as applied to the previously certified facility.”

in order to satisfy these tests.¹⁵

The Commission should more explicitly explain any reliance on “per se” or “pathway” approaches under this section. Given the history of lax oversight by the Commission over pipeline biomethane eligibility, there is little confidence that any ambiguities in the proposed guidelines will not be gamed and exploited by industry participants at some point in the future.

¹⁵ An example would be a transaction in which the producer of biomethane purchases and retires some quantity of California emission reduction credits for the sole purpose of satisfying one of these tests.

Respectfully submitted,

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