

CPUC Issues Proposed Decision Answering Many Questions Regarding the New “Three Bucket” Procurement Structure of SB 2X

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On Oct. 7, Administrative Law Judge (ALJ) Simon of the California Public Utilities Commission (CPUC) issued a highly technical and complex Proposed Decision (PD) implementing portfolio content categories for the Renewables Portfolio Standard (RPS) program. Parties may file opening comments on the PD by Oct. 27; reply comments on the PD are due by Nov. 1.

As previously reported in an [earlier Davis Wright Tremaine advisory](#), the CPUC opened up a new proceeding (Rulemaking 11-05-005) to continue implementation and administration of the California RPS program in light of the enactment of Senate Bill 2 of the 1st Extraordinary Session (SB 2X). Although signed by Governor Brown on April 12, the legislation will become effective on Dec. 10, 2011. SB 2X requires California retail electric providers to procure 33 percent of their retail energy sales from eligible renewable sources by 2020, among other matters. An [earlier DWT advisory](#) summarized SB 2X.

SB 2X establishes a structure under which a certain percentage of renewable energy will be procured from three different “buckets” of RPS eligible resources, including (1) in-state or in-state equivalent products, (2) “firmed and shaped products that provide incremental power;” and (3) unbundled renewable energy credits (RECs) and other RPS products.

The PD actually eschews the “bucket” terminology because the broad portfolio content categories have a complex structure and may result in transactions that include products that fall into more than one bucket. However, for ease of reference, this advisory will continue to use the term “bucket.”

The PD offers further clarification describing the particular transactions that fall into each of these three buckets, as well as the applicability of the bucket structure.

Bucket 1 – In-State or In-State Equivalent Products

SB 2X mandates that beginning in 2013, the majority (increasing to a minimum of 75 percent by 2017), of RECs that may be used for RPS compliance purposes must come from in-state or in-state equivalent products (i.e., Bucket 1). RPS transactions that qualify for such Bucket 1 status will have a competitive advantage over Bucket 2 and Bucket 3 transactions, of which the combined market share will ultimately be limited to no more than 25 percent. Thus, the definition of the transactions qualifying as an in-state or in-state equivalent product has significant commercial and policy consequences.

Along with a transaction involving RECs “bundled” with renewable energy generated within a California balancing authority, the PD, consistent with SB 2X, confirms that a transaction involving RECs bundled with renewable energy generated outside a California balancing authority, but scheduled into a California balancing authority utilizing some form of transmission arrangement, qualifies as a Bucket 1 transaction.

Previously the Commission had suggested that it would only consider out-of-state RPS generation which would be delivered with firm transmission to qualify as Bucket 1; however, numerous comments argued that SB 2X does not condition eligibility for this section based on firm transmission rights and the PD agrees.

The PD does stress, however, that the utility purchasing out-of-state RPS power through the use of transmission capacity will be obligated to make an upfront showing “that substitution of electricity from another source is unlikely to occur, whether because the transmission arrangements are sufficiently reliable or for some other documented reason,” and thus, the use of firm transmission arrangements may simplify the retail seller’s task in making its upfront showing. The CPUC’s Energy Division has been tasked with developing a methodology for this upfront showing.

Bucket 2 – Firmed and Shaped Products

SB 2X sets forth that Bucket 2 transactions should include “firmed and shaped” products “providing incremental electricity.” However, SB 2X did not define the terms “firmed,” “shaped,” or “incremental.”

The PD defines a “firmed and shaped” transaction as having three commercial elements:

1. the utility purchaser does not sell the electricity back to the generator after making a simultaneous purchase of electricity and associated RECs;
2. “the purchased energy must not in practice be already committed to consumption by another party;” and
3. the substitute energy must be acquired at the same time as the RPS-eligible energy, or at least prior to submission of the contract for the firmed and shaped transaction for Commission approval

In addition, in order for the transaction to provide “incremental electricity” the substitute energy must be “newly procured” by the retail seller for the firming and shaping transaction. The PD reasons that this requirement eliminates the possibility of “tagging” unbundled RECs to previously purchased electricity by a retail seller in order to have the unbundled RECs be counted as a Bucket 2 product instead of a Bucket 3 product.

Bucket 3 – Unbundled RECs and Other Products

Bucket 3 captures all other RPS products which fail to qualify for the other two buckets. Bucket 3 thus includes not only so-called unbundled RECs, but also “other” products that were intended to qualify for a more advantageous RPS status but for whatever

reason failed to do so. For example, a situation where a firm and shaped transaction ended up with some substitute electricity that was not scheduled in the same calendar year as the RPS generation would result in a Bucket 3 product.

Importantly, the PD clarifies that Bucket 3 includes all unbundled RECs, even those that were initially associated with, but subsequently separated from, generation that was produced and consumed inside a California balancing authority. The PD focuses on the transaction of the buyer that actually retires the RECs for RPS compliance. If that buyer ultimately purchased unbundled RECs only, the buyer will be participating in a Bucket 3 transaction regardless of the provenance of those RECs.

Applicability of the Bucket Structure

The PD limits the usage of the three bucket structure to those contracts that were executed after June 1, 2010. For contracts executed prior to that date, the three bucket structure does not apply to any procurement from those contracts as long as the RECs associated with that procurement are retired by the purchaser under that contract. If those RECs are not retired by the purchaser associated with the pre-June 1, 2010 contract but re-sold as unbundled RECs to a new purchaser, the re-sale transaction will be considered a Bucket 3 transaction and the new purchaser will not be able to claim that the transaction qualifies under Bucket 1.

The PD also confirms an earlier ruling that determined that the three bucket structure does not apply to those small and multijurisdictional utilities that fall under the provisions of Section 399.17 or 399.18, currently California Pacific Electric Company, LLC; PacifiCorp; and Bear Valley Electric Service.

For more information regarding the RPS Rulemaking and for those stakeholders who wish to participate in the proceeding or provide comments on the PD, please contact a Davis Wright Tremaine energy professional.

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