California Energy Commission
DOCKETED
02-REN-1038
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MAR. 25 2013

California Energy Commission
Dockets Office, MS-4
Re: Docket No. 11-RPS-01, and
Docket No. 02-REN-1038
RPS Proceeding
1516 Ninth Street
Sacramento, CA 95814-5512

Via Email: docket@energy.ca.gov **and** RPS33@energy.ca.gov

Subject: Docket numbers **11-RPS-01** and **02-REN-1038 – Renewables Portfolio Standard – Comments from Element Markets Renewable Energy, LLC**

Ladies and Gentlemen:

Element Markets Renewable Energy LLC (Element Markets) offers the following comments concerning the March 14, 2013 workshop on proposed revisions to the *Renewables Portfolio Standard Guidebook, 7th Ed.* (the "Guidebook").

Element Markets generally supports the proposed revisions and language and is appreciative of the Energy Commission (CEC) staff's efforts to expedite approval of the Guidebook. In connection with the March 14, 2013 workshop, Element Markets would like to raise several issues of concern about the proposed revisions to the Guidebook:

1. **Guidebook language should be revised to clarify that applicants may satisfy biomethane source reporting requirements by either reporting the procurement contract or by identifying sources in application documents filed with CEC.** Proposed Section C.1.b (p.14) requires that "the source(s) and the amount of biomethane under the biomethane procurement contract" be reported to the CEC before March 29, 2012 "in connection with the application for RPS certification or precertification of the designated electrical generation facility" in order for the contract to be RPS eligible. However, AB 2196 requires only that a procurement contract for biomethane be reported to the Energy Commission by March 29, 2012 and requires that these contracts be certified pursuant to the rules in place at the time of execution. Cal. Pub. Util. Code § 399.12.6(a)(1). We respectfully request that the staff revise §C(1)(b) to clarify that the generation facility is RPS eligible if the sources of biomethane are either contained in a procurement contract that was executed and reported to the Commission prior to March 29, 2012 *or* reported directly to the commission prior to March 29, 2012.

Element Markets executed a biomethane procurement contract with the City of Burbank. The City of Burbank did not include all of the biomethane sources identified in the contract in the S-5 application documents submitted to the Commission prior to March 29, 2012. However, the sources are all expressly stated in the procurement contract (or associated amendments) that were executed and reported to the Commission before March 29, 2012. We are concerned that Section C1b as proposed would penalize applicants who timely executed and reported a biomethane procurement contract to the CEC but did not include all sources on their application forms. Given the truncated time period for amending or updating application documents due to

the pending CEC Biomethane Suspension Order, it would be unfair to penalize applicants for not submitting all sources before March 29, 2012 and would be inconsistent with the wording and intent of AB 2196. Thus, we urge you to revise Section C.1.b to state that a facility may be RPS eligible under Pub. Util. Code §399.12.6(a)(1) if the applicant utilizes sources of biomethane reported to CEC either as part of a procurement contract or on S-5 application forms prior to March 29, 2012.

2. **The Guidebook should be revised to clarify that buyer controlled options for any quantities of biomethane under a procurement executed before March 29, 2012 are *not* subject to rules governing new biomethane contracts unless optional amounts *exceed* the total amount of gas to be delivered under the contract.**

The proposed Guidebook states that additional eligibility requirements under Public Utilities Code § 399.12.6(a)(2)(b) will apply to any quantities of biomethane "identified in the existing biomethane procurement contract, as originally executed and reported to the Energy Commission before March 29, 2012, that are specified as optional to the buyer in the contract, as determined by the Energy Commission. Quantities will be deemed optional if the buyer, through his or her initiation or election, can decide whether to accept the additional quantities of biomethane." "Adjustments to Existing Biomethane Procurement Contracts" §C.1.b.1 (p. 26). Element Markets is concerned that the proposed language does not reflect the intent of AB 2196.

Element Markets executed a contract with the City of Vernon, Light and Power Department ("Vernon") that expressly contemplates a Contract Quantity of up to 3,500 MMBtu per day and a minimum flow of 1,000 MMBtu per day, allowing Element Markets to offer up to 2,500 MMBtu per day to Vernon under the Contract Quantity. This provision was negotiated because Vernon required flexibility to accommodate variability associated with the deployment of a wind powered generation facility, which Vernon intends to bring online during the term of the Biomethane Agreement. Element Markets is concerned that under the CEC's proposed guidebook language, Element Markets could not provide Vernon the adjustable support contemplated in the contract even though acceptance of the 2,500 MMBtu would not exceed the Contract Quantity stated in the procurement contract to come from identified sources expressly contemplated by the contract. The contract itself provides that '[f]or the avoidance of doubt, the Contract Quantity shall not exceed 3,500 MMBtu at any time during the Term except as Buyer and Seller may otherwise agree in writing". Element Markets and Vernon have no intent to exceed the contemplated 3,500 MMBtu/day maximum contract quantity and believe that the entire contemplated quantity of the initial procurement contract should be eligible without application of the additional requirements.

When AB 2196 failed passage on the Senate floor in August 2012, Legislators made it clear on the record that they wanted a to create a path for certification that protected the sanctity of the contracts executed and reported to the CEC prior to the Biomethane Suspension Order and then limit the ability of utilities to use biomethane from out-of-state sources for RPS compliance going forward. That intent is contained in Cal. Pub. Util. Code § 399.12.6(a)(1) which allows for certification of biomethane contracts executed and reported to the CEC before March 29, 2012 under the rules in place at the time. AB 2196 also provides that additional eligibility requirements will apply to any quantities of biomethane arising from any extensions of the contract or adjustments contemplating any quantities of biomethane that exceed the quantities

initially stated in the contract, including any "optional" quantities of biomethane that can be exercised by the buyer, or changes to the sources of biomethane identified in the contract. Cal. Pub. Util. Code § 399.12.6(a)(2)(A)-(F).

In that context, Cal. Pub. Util. Code § 399.12.6(a)(2) must be understood to subject to the additional requirements of Section 399.12.6(b) to any quantities of biomethane that *exceed* the total flow expressly contemplated by the contract. It cannot be applied to bar the buyer from accepting the right to receive the full negotiated requirements of the procurement contract. Such an interpretation would retroactively interfere with the parties' rights under contract without advancing the Legislature's narrow policy goal of prohibiting utilities from extending or amending pre March 29, 2012 contracts to effectuate the delivery of quantities of out-of-state biogas that exceed the original contract terms. We respectfully request that the CEC staff review this section, as we believe that interpretation of AB 2196 in a way that interferes with the ability of the parties' rights to execute the contract not only disregards the intent of the Legislature in enacting § 399.16.12(a)(1) but may also constitute an impermissible interference with contract under the U.S. Constitution and California law.

3. **Requiring new applications for pre-March 29, 2012 contract certification will cause further delays and create additional financial hardships.** Element Markets remains concerned about the timing for certification of biomethane sources identified in pre-March 12, 2012 procurement contracts, particularly the proposal to require new applications from parties who filed application documents prior to the Biomethane Suspension Order. We believe this new requirement will further delay certification of the facilities and procurement contracts and each day of delay results in additional financial hardship to Element Markets. As you are aware, Element Markets and its partners have invested millions of dollars in renewable energy projects to meet our obligations under contracts entered into with California public utilities. Without certainty as to certification, development of these projects cannot progress. As the deadline for eligible projects nears, almost a year has passed since the Suspension Order. In the interest of time, we urge the CEC to consider allowing applicants to supplement existing applications by filing forms to specifically respond to the additional requirements of AB 2196 pertaining to Environmental Attributes and Verification.

4. **The Guidebook should be revised to reflect that all quantities of biomethane that have already been delivered pursuant to a procurement contract executed and reported to the CEC prior to March 29, 2012 are RPS eligible pending certification.** Flows of biomethane to Southern California publicly owned utilities under procurement contracts with Element Markets commenced in December 2011. However, due to the delay in RPS certification of the generation facilities utilizing the biomethane, Element Markets has not received the full contract price for the deliveries made under the contracts to date. At the workshop, CEC staff stated that deliveries of biomethane under procurement contracts that pre-date certification would also be RPS eligible once certification of the generating facility using the source of biomethane occurs. We respectfully request that CEC include language in the Guidebook to clarify eligibility of flows delivered from an eligible source prior to the date certification is received.

Element Markets wishes to thank the CEC staff for hosting the workshop and for allowing interested parties additional time to comment on proposed revisions following the workshop discussion. We greatly appreciate the diligence of the CEC staff in resolving issues associated with AB 2196 implementation and look forward to working collaboratively with you to complete the process.

Very truly yours,

Randall N. Lack, Senior Vice President