

To Bundle or Not to Bundle

by Tom Munteer

Tom Munteer is a partner in the Washington, D.C., office of Paul Hastings, where he co-chairs the law firm's environmental practice. Since 1997, he has been an adjunct professor in the Masters in Environmental Law program at the George Washington University Law School. He is also author of the Climate Change Deskbook (ELI 2009). He thanks San Francisco office Of Counsel Beth Deane for her assistance.

California has been struggling with how to implement its requirement that a certain percentage of energy consumed in the state come from renewable (e.g., solar, wind, biomass) sources. So-called renewable portfolio standards (RPSs) have become a popular way for states to try to wean themselves off energy derived from burning fossil fuels, thereby avoiding the resulting carbon dioxide emissions.¹

California ostensibly embraces a policy that increases the use of energy generated from renewable sources within the state. As implemented, however, California's RPS does not necessarily increase the amount of renewable energy that is actually delivered into the state. A recent proposal would further clarify that utilities need not deliver more renewable energy into California in order to meet their obligations under the state's RPS.

In general, state RPS programs encourage the development of renewable energy sources by requiring in-state utilities to purchase renewable energy credits (RECs) and submit them to the state for compliance purposes. RECs are certified and potentially tradable environmental commodities. Each REC is derived from a unit (typically one megawatt hour) of electricity generated by a renewable energy source. When a state RPS requires a REC to be "bundled" with the underlying energy, the underlying renewable energy must be "delivered" into the state to satisfy the state's RPS. Allowing the use of "unbundled" RECs so that an electricity retailer need only purchase the RECs derived from renewable energy generated elsewhere in order to meet the state RPS makes RPS compliance far easier. Among

the many states with RPS programs, only Arizona, Illinois, and Iowa are in the bundled camp. The public policies that drive states to adopt the bundled approach include a desire to promote in-state generation of renewable energy and to encourage long-term financeability of renewable power projects over short-term REC purchase contracts with out-of-state REC producers.

For large investor-owned utilities in California, compliance with the RPS requirements is a three-step process.² First, utilities must submit RPS procurement plans to the California Public Utilities Commission (PUC) for approval. Second, once the procurement plans are approved, the utilities must conduct solicitations to procure RPS-eligible resources consistent with the procurement plans. Finally, the procurement contracts resulting from such solicitations must be submitted to the PUC for approval. Currently, explicitly unbundled REC contracts cannot be used to satisfy approved procurement plans. Rather, California has purported to be a bundled REC state, requiring electricity to be bundled with a REC and delivered into the state.

The interpretation of California's bundling requirements by the state's implementing agencies, however, has opened the door for a hybrid approach. Only the PUC has statutory authority to prescribe how RECs can be used to satisfy the state's RPS.³ The PUC has, under the applicable statute, deferred to the California Energy Commission (CEC) to define what it means to "deliver" the electricity underlying RECs into the state.⁴ The CEC issued an *Eligibility Guidebook* that describes what it means to "deliver" a bundled



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REC into the state, in part requiring the RPS-eligible electricity either to be generated within the state or, if generated outside the state, scheduled for consumption by the state's retail customers.⁵ The CEC has created considerable flexibility in this scheduling requirement, as discussed below.

To facilitate a move away from rigid adherence to a bundled approach, the CEC relied on a statutory directive allowing eligible renewable energy to be considered "delivered" regardless of whether it is generated at a different time from when California end-use customers consume it.⁶ In its *Eligibility Guidebook*, the CEC seized on this directive to allow so-called firming and shaping transactions that, essentially, allow RECs to be unbundled from their underlying electricity after their initial purchase and "matched" with an equivalent amount of electricity from another (likely nonrenewable) source.⁷ Illustrations included in the *Guidebook* stop short of pure REC-only purchases, and all the illustrations involve only purchases by retail sellers subject to the RPS (not brokers or middlemen). So, while there clearly is a "work around" from the titular bundled REC policy, the "work around" is not without its own limitations.

California appears headed toward affirming this hybrid approach for RECs. The state has an ambitious goal of having 20% of its energy consumption come from renewable sources in

2010. Gov. Arnold Schwarzenegger has also proclaimed a 2020 goal of having one-third of California's energy come from renewables. Explicitly allowing retail sellers to meet some portion of their RPS obligations by way of "firming and shaping" transactions would, at least, provide for the development of an equivalent amount of renewable energy generation, even though the renewable energy itself might not be used in California.

Recently, in accordance with its statutory authority to do so, California's PUC proposed putting an end to any pretense of allowing only those RECs bundled with their underlying renewable energy to be used to satisfy the state RPS. On December 23, 2009, the PUC proposed to authorize the use of so-called tradable RECs (i.e., those RECs matched with energy from a separate source) to satisfy the California RPS, so long as the matched energy is generated within three years of such use, the use by the big three California utilities is limited to 40% of their annual RPS obligations, and the price is capped at \$50/REC.⁸

The PUC has gone down this path twice before, with the most recent effort occurring earlier in the same year. On March 26, 2009, the PUC issued a proposed decision that would have allowed retail sellers to use tradable RECs to meet no more than 5% of their annual RPS target.⁹ That proposed decision

drew the ire of the California Legislature, which passed a bill to prohibit matching RECs with energy from entirely different sources.¹⁰ Governor Schwarzenegger vetoed that bill but did not settle the controversy over "firming and shaping" transactions in his accompanying Executive Order.¹¹

In addition to such political turmoil, pending resolution of whether tradable RECs will count toward RPS compliance, the PUC will continue to be subject to the administrative burden of piecemeal petitions from large, powerful constituents, such as Pacific Gas and Electric Company, requesting authorization of the use of tradable RECs on a case-by-case basis.¹²

If the Waxman-Markey federal climate change legislation were to be enacted, the bundled and unbundled divide would evaporate. The RPS would be nationalized, and RECs would have national scope.¹³ This is as it should be, proponents of pure unbundled RECs would argue. Carbon dioxide is not a problem in localized airsheds. It causes global warming in the upper atmosphere, so limiting its production—from whatever state—is equally desirable. But prospects for passage of comprehensive federal climate legislation appeared dim as 2009 drew to a close. So, how California resolves the dilemma of whether to bundle or not to bundle is likely to remain the question.

ENDNOTES

1. See generally TOM MOUNTEER, CLIMATE CHANGE DESKBOOK §5.1 (Env'l. L. Inst. 2009).
2. Publicly owned utilities are not subject to the RPS requirements but have been encouraged to develop their own RPSs. See CAL. ENERGY COMM'N, PUBLICLY OWNED ELECTRIC UTILITIES AND THE CALIFORNIA RENEWABLES PORTFOLIO STANDARD: A SUMMARY OF DATA COLLECTION ACTIVITIES 1-2 (Nov. 2005).
3. CAL. PUB. UTIL. CODE §399.16(a) (2009).
4. Decision on Definition and Attributes of Renewable Energy Credits for Compliance With the California Renewable Portfolio Standards, Decision 08-08-028, §4.1.2.2 (Cal. PUC Aug. 21, 2008), available at http://docs.cpuc.ca.gov/word_pdf/FINAL_DECISION/86954.pdf.
5. CAL. ENERGY COMM'N, RENEWABLES PORTFOLIO STANDARD ELIGIBILITY GUIDEBOOK 21-3 (3d ed. Dec. 19, 2007) [hereinafter ELIGIBILITY HANDBOOK].
6. CAL. PUB. RES. CODE §25741(a) (2009).
7. ELIGIBILITY HANDBOOK, *supra* note 5, at 23-24 n.21.
8. Decision Authorizing Use of Renewable Energy Credits for Compliance With the California Renewable Portfolio Standards, Rulemaking 06-02-012 (Cal. PUC Dec. 23, 2009), available at <http://docs.cpuc.ca.gov/efile/PD/111679.pdf>.
9. Cal. PUC, Decision Authorizing Use of Renewable Energy Credits for Compliance With the California Renewable Portfolio Standard, Rulemaking 06-02-012 (Proposed), 46-52 (Mar. 26, 2009), available at <http://docs.cpuc.ca.gov/efile/PD/99016.pdf>.
10. S.B. 14, §5 (Cal. Sept. 12, 2009), available at http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sb_14_bill_20090915_enrolled.pdf.
11. Exec. Order No. S-21-09 (Cal. Sept. 15, 2009), available at <http://gov.ca.gov/executive-order/13269>.
12. Application of Pacific Gas and Electric Company (U 39 E) for Approval of Renewable Energy Credit Purchase Agreements and for Authority to Recover Costs in Rates, Application No. 09-10-035 (Cal. PUC Oct. 29, 2009), available at <http://docs.cpuc.ca.gov/efile/A/109503.pdf>.
13. Tom Munteer, *Comprehensive Federal Legislation to Regulate Greenhouse Gas Emissions*, 39 ELR 11068, 11090-91 (Nov. 2009).