BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.	)))	Rulemaking 11-05-005 (Filed May 5, 2011)

JOINT COMMENTS OF THE BIOENERGY ASSOCIATION OF CALIFORNIA AND THE CALIFORNIA ASSOCIATION OF SANITATION AGENCIES ON THE PROPOSED DECISION IMPLEMENTATING SENATE BILL 1122

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The Bioenergy Association of California (BAC) and the California Association of Sanitation Agencies (CASA) submit these Joint Comments on the Proposed Decision Implementing Senate Bill 1122, filed November 18, 2014. BAC and CASA are very grateful for the Commission's thorough consideration of the issues in this proceeding and for providing many opportunities for participation, including informal and very helpful staff workshops and opportunities to comment on the *Final Consultant's Report on Small-Scale Bioenergy Development*[1] and the Staff Proposal on Implementation of SB 1122.

BAC and CASA strongly support the Proposed Decision, with two critical exceptions, described more fully in Section II below:

[1] *Final Consultant Report on Small-Scale Bioenergy,"* Prepared for the CPUC, October 31, 2013, at page 1-3, footnote 3 and submitted as Attachment A to the Final Staff Proposal on SB 1122 Implementation.

1. The Proposed Decision incorrectly excludes gasification of eligible waste from feedstock Category 1, ignoring the long-standing definition of "biogas" under the RPS (which SB 1122 is a part of) and increasing the costs of SB 1122 to ratepayers; and

2. The Proposed Decision confirms the appropriate definition of "affiliate" but does not require the utilities to revise their tariffs to conform to that definition, which will make it difficult or impossible to meet the minimum bidder requirements in feedstock Categories 2 and 3.

BAC is an association of more than 50 public agencies, local governments, private companies, environmental groups and others working to promote sustainable bioenergy development. BAC members represent every sector of bioenergy, including each of the categories in SB 1122. The California Association of Sanitation Agencies (CASA) is a statewide association of cities, counties, special districts, and joint powers agencies that provide wastewater collection, treatment, water recycling, and biosolids management services to more than 90% of the sewered population of California. BAC members and staff were involved in the development and passage of SB 1122, and both BAC and CASA members intend to participate in its implementation.

I. SUPPORT FOR MOST OF THE PROPOSED DECISION'S FINDINGS AND CONCLUSIONS.

BAC and CASA support most of the findings and conclusions in the Proposed Decision. In particular, we support:

A. The Starting Price

BAC and CASA strongly support the Proposed Decision on the appropriate starting price.[2] We agree with the Proposed Decision that "the post-TOD bid price presents the most realistic representation of the cost to the IOUs of small bioenergy projects of all types."[3] The starting

[2] Proposed Decision at page 55
[3] Id.

price adopted in the Proposed Decision, $127.72 per MWh, is currently lower than small bioenergy projects in California, so it has room to adjust upward while encouraging the lowest cost projects in each feedstock category.

BAC and CASA also agree with the Proposed Decision that the statewide starting price should adjust separately for each bioenergy feedstock type in order to stimulate projects in each of the feedstock categories, as the Legislature intended. [4]

B. The Price Screen Between Dairy and Agricultural Projects

BAC and CASA support the Proposed Decision's inclusion of a price screen between dairy and other agricultural projects to ensure that SB 1122 promotes the development of dairy digesters. As BAC noted in its Opening Comments on the Staff Proposal, the Legislature clearly intended SB 1122 to promote dairy digesters or it would not have listed dairy separately from and before "other agricultural projects" in Category two.[5] BAC and CASA agree with the Proposed Decision that allowing the price of each type of project, dairy and agriculture, to adjust separately will maximize the opportunities for both and contribute to the Legislature's goals.[6]

C. The Revised Definition of "Strategically Located" for SB 1122 Projects

BAC and CASA support the Proposed Decision's revision of the definition of "strategically located" and the Proposed Decision's recognition that the physical reality of small-scale bioenergy projects "makes it necessary to revise the Commission's implementation of the 'strategically located' criterion in order to implement SB 1122 effectively."[7] Many bioenergy projects are at fixed locations, such as wastewater treatment facilities and dairies, or must be in close proximity to their fuel source to maximize greenhouse gas reductions and other benefits. This revised definition gives small-scale bioenergy projects the flexibility to be located at or near the feedstock.

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[4] Id. at page 57.

[5] Bioenergy Association of California's Comments on Staff Proposal on Implementation of Senate Bill 1122, filed December 20, 2013, at page 3.

[6] Proposed Decision at page 58.

[7] Proposed Decision at page 48.

D. The Reduced Number of Bidders Required

BAC and CASA support the Proposed Decision to reduce the minimum number of bidders from five to three in each of the feedstock categories. As *The Final Consultant's Report,* BAC and other parties noted, the small number of market participants, especially in Categories two and three, would make it difficult or impossible to launch the program without lowering the minimum number of bidders required. BAC and CASA are concerned about the reversion to five required bidders as soon as one bidder accepts the offer price, but that, too, may be workable as long as the utilities' revise their tariffs to reflect the Commission's definition of "Affiliate" (see section B, below).

E. Feedstock Flexibility Between SB 1122 Categories

BAC and CASA support the Proposed Decision on flexibility between feedstock categories as it will help projects to contain costs and improve operational performance, especially for feedstock types that may be seasonal, such as forestry and agricultural waste.[8]

II. TWO CRITICAL ERRORS IN THE PROPOSED DECISION

BAC and CASA urge the Commission to make two critical changes where the Proposed Decision made an error of law and a technical error, respectively.

A. The Proposed Decision Erred in Its Exclusion of Gasification from Feedstock Category 1.

The Proposed Decision erred legally in its exclusion of gasification from Category 1.[9] SB 1122 is a part of the Renewables Portfolio Standard (RPS) program and, except where the legislation explicitly revises requirements of the RPS, must comply with the RPS program. The Proposed Decision erred in substituting a definition of "biogas" adopted for pipeline injection purposes in

[8] Proposed Decision at page 22; BAC Comments at page 8.
[9] Proposed Decision at page 10 and Conclusion of Law # 1 at page 80.

an entirely different Code of California law,[10] rather than the definition under the RPS that was in place at the time SB 1122 was enacted.

1. SB 1122 Must Be Consistent with the RPS.

The Proposed Decision notes correctly that "SB 1122 is one of a number of legislative enactments setting up, defining, and refining the parameters of the feed-in tariff (FiT) for the renewables portfolio standard (RPS) program."[11] The Legislature placed SB 1122 within the larger RPS program and intended SB 1122 to refine that program. Except where the Legislature explicitly directed otherwise, SB 1122 must be consistent the RPS first and foremost.

The Proposed Decision notes the importance of being internally consistent, but chooses to be consistent with a biogas definition adopted for pipeline injection purposes rather than adopting the biogas definition under the RPS program.[12] The Proposed Decision states that varying "the definition from that of the CEC does not introduce any troublesome inconsistencies. The definition of 'biogas' that we adopt is not for the purpose of determining eligibility for the RPS program as a whole . . . " In other words, the Proposed Decision recognizes the importance of being consistent, but creates a significant inconsistency within the RPS program in order to be consistent with a statute (AB 1900) focused on pipeline biogas. As the author of AB 1900, Assemblyman Mike Gatto, stated in his November 24 letter to Commissioner Peterman, AB 1900 was not intended to affect the definition of biogas under SB 1122 or the RPS, which have very different legal, technical and regulatory requirements from pipeline biogas.[13]

2. The Determination of RPS Eligibility is the Responsibility of the California Energy Commission, which Defines "Biogas" to Include Gasification of Eligible Feedstock.

[10][10] The definition of "biogas" included in AB 1900 (Gatto) is codified in the Health and Safety Code, not the Public Utilities or Public Resources Codes, at Health and Safety Code §25420.
[11] Proposed Decision at page 4.
[12] Proposed Decision at page 10.
[13][13] Letter from Assemblyman Mike Gatto to Commissioner Carla Peterman, dated November 24, 2014 and shared with the Service List in this Rulemaking on December 3, 2014.

Under the RPS, the Legislature directed the California Energy Commission (CEC), not this Commission, to define eligible resources.[14] The CEC has defined eligible "biogas" under the RPS to include "digester gas, landfill gas, and any gas derived from an eligible biomass feedstock."[15] This was the definition of biogas in the *Renewables Portfolio Standard Eligibility Guidebook* in effect at the time that SB 1122 was enacted as well as in earlier and more recent editions of the *Eligibility Guidebook*.[16]

Either the definition of biogas in the Proposed Decision creates an inconsistency within the RPS or, worse, it sets a precedent across the RPS that excludes gasification from eligibility despite the CEC's determination that gasification of eligible resources is eligible under the RPS, which would require the CEC to rescind the RPS certification of two operating gasification plants in California that are currently providing RPS eligible power to PG&E.[17]

3. <u>The Legislature Divided the Three Categories in SB 1122 Based on Feedstock Types, not Technology Types.</u>

The three categories in SB 1122 are clearly divided by feedstock types, not technologies. There is no mention of eligible technologies in any of the three categories. The Legislature chose which feedstocks would be eligible for SB 1122 overall and then divided the megawatts between those different feedstock categories. The only indirect limitation on technology in Category one is the use of the term "biogas" but, as noted above, the RPS definition of biogas includes the gas produced from any eligible biomass resource regardless of technology. In other words, by using the term "biogas" instead of "bioenergy" in Category one, the Legislature was not excluding gasification or other technologies that produce an RPS eligible biogas. Instead, it was excluding combustion of organic waste, which would otherwise be RPS eligible but does not produce biogas.

4. <u>The Legislature did not link SB 1122 and AB 1900 even though they were adopted at the same time.</u>

[14] Public Utilities Code § 399.13.
[15] *Renewables Portfolio Standard Eligibility Guidebook (6th ed. August 2012)* at page 16.
[16] Id. Other editions of the *Eligibility Guidebook* are available at http://www.energy.ca.gov/renewables/documents/.
[17] Phoenix Energy facilities in Merced and Modesto.

The Legislature was well aware of AB 1900 when it adopted SB 1122 as both bills were passed near the end of the Legislative session in 2012. The Legislature explicitly linked (double-joined) AB 1900 with AB 2196 since those two bills related to pipeline gas,[18] but it did not in any way link AB 1900 with SB 1122. It is not appropriate, therefore, to substitute long-standing definitions of eligibility under the RPS with the definition of biogas from AB 1900, which is focused on pipeline biogas.

5. Excluding Gasification from Category 1 Would Increase Ratepayer Costs.

The exclusion of gasification in Category 1 will increase ratepayer costs by removing one of the lowest cost technologies and reducing the number of market participants that would otherwise be eligible to compete in Category 1. As the *Final Consultant Report* noted, it focused on anaerobic digestion and gasification as "the most commercially available, lowest cost technologies that could feasibly be permitted in California."[19] Excluding gasification from SB 1122 will also hurt public agencies, such as wastewater treatment and solid waste agencies, which are pursuing projects to convert cellulosic waste and biosolids to energy.
Using the definition of biogas from AB 1900 instead of the definition in the *Eligibility Guidebook* would also exclude the gasification of biosolids that remain after anaerobic digestion, even though biosolids are currently RPS eligible. Not allowing gasification or other technologies to capture the additional energy value of those biosolids is inconsistent with the idea that Category 1 specifically includes biogas from wastewater treatment, and wastewater treatment naturally includes the production of biosolids. Failure to include this important technology will increase the costs of implementing SB 1122, and is particularly troubling for California's wastewater treatment agencies, some of which are seeking to produce additional energy from the biosolids that remain after wastewater treatment.

[18] AB 1900 (Gatto, Statutes of 2012), section 7 states that: " This act shall become operative only if this act and Assembly Bill 2196 of the 2011-12 Regular Session are both enacted and become effective on or before January 1, 2013."
[19] *Final Consultant Report on Small-Scale Bioenergy,"* Prepared for the CPUC, October 31, 2013, at page 1-3, footnote 3 and submitted as Attachment A to the Final Staff Proposal on SB 1122 Implementation.

6. Excluding Gasification Would Make Compliance with AB 1826 and AB 1594 Much More Difficult.

This year, California enacted AB 1826 and AB 1594 to phase out the landfilling of organic waste, part of California's longer term waste diversion and greenhouse gas reduction policies.[20] Diverted municipal organic waste, one of the eligible feedstocks in Category one of SB 1122, is an important means to comply with these bills and to help California meet the requirements of AB 32.[21] Yet, according to CalRecycle, half of the diverted municipal organic waste stream is not suitable for anaerobic digestion.[22] Excluding gasification and other conversion technologies from Category one, as the Proposed Decision does, would make it much harder for California to meet its organic waste diversion, greenhouse gas reduction and other goals.

Organic waste currently comprises about half of California's landfill waste stream.[23] CalRecycle has found that just over half of that organic waste is not suitable for anaerobic digestion, meaning that in order to convert it to energy, it requires gasification or other conversion technologies.[24] Therefore, excluding gasification from Category 1, which includes "diverted municipal organic waste" would contradict the intent of AB 1826 and AB 1594. It would also hurt local governments such as the Cities of San Jose, Sacramento, Los Angeles and others that are developing gasification projects to meet the state's organic waste diversion requirements.

For all these reasons, we urge the Commission to rely on the CEC's definition of biogas under the RPS for purposes of SB 1122 implementation since SB 1122 is a part of the RPS program. That definition does not exclude gasification or other technologies so long as they produce biogas from an SB 1122 eligible feedstock. The limitation in Category one should be the underlying feedstock, not the technology used to convert otherwise eligible feedstock to biogas.

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[20] AB 1826 (Chesbro, Statutes of 2014) and AB 1594 (Williams, Statutes of 2014).

[21] Both the AB 32 Scoping Plan and the First Update to the Climate Change Scoping Plan assume greenhouse gas reductions from diverted organic waste. See, eg, the First Update at page 75. Available at http://www.arb.ca.gov/cc/scopingplan/document/updatedscopingplan2013.htm.

[22] Presentation by Jacques Franco, CalRecycle, at Decarbonizing California conference in Los Angeles on November 17, 2014, slide 3.

[23] Id and Technical Paper by CalRecycle on *Composting and Anaerobic Digestion*, released September 2013. http://www.calrecycle.ca.gov/actions/Documents%5C77%5C20132013%5C935%5CComposting%20and%20Anaerobic%20Digestion%20FINAL.pdf.

B. The Proposed Decision Adopted the Correct Definition of "Affiliate" but failed to require the Utilities to Conform their Tariffs to that Definition.

The definition of "Affiliate" is important to the determination of minimum number of bidders, since affiliated parties do not count as separate entities for purposes of reaching the minimum number of bidders. BAC and CASA support the definition of "Affiliate" in the Proposed Decision which states that:

> "Affiliate" means, with respect to a Party, any entity that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with that Party.[25]

This definition makes sense to ensure that enough separately controlled bidders are participating in the SB 1122 program to prevent market manipulation.

The utilities' ReMAT tariff, however, goes much farther than the definition of "affiliate" adopted in the ReMAT and confirmed in the Proposed Decision. The current ReMAT tarriff does not just require non-affiliated bidders to meet the minimum bidder requirement; it requires that the minimum number of bidders have no common ownership interests at all, meaning they cannot even have common investors who have no control over the different projects. The ReMAT tariff states that:

> If an Applicant or its Affiliates <u>have any ownership interest</u> (based on the information provided by and attested to by the Applicant in PPR Section E.1(c)(3)), in a Project, the Project will be attributed to the Applicant(s) for purposes of this provision. [emphasis added][26]

As an emerging industry, SB 1122 qualifying projects have limited sources of financing. Requiring that project Applicants and their Affiliates have <u>no</u> overlap at all, even minor, non-controlling, ownership stakes or financing is likely to prevent successful implementation of SB

[25] Proposed Decision at page 60 and footnote 83, quoting Appendix A to PG&E's contract.
[26] Section H.a. of PG&E's ReMAT Tariff. http://www.pge.com/includes/docs/pdfs/b2b/energysupply/wholesaleelectricsuppliersolicitation/standardcontractsforpurchase/ReMAT_Tariff.pdf.

1122 in Categories two and three, where there are very few market participants.[27] For example, if a company such as Caterpillar has a controlling interest in one project (is an affiliate) and offers vendor financing to three completely independent projects, those other projects would be considered a single entity simply because of their common investor (equipment vendor). While Caterpillar has no ability to dictate management decisions or otherwise exercise control, these three projects will be considered a single entity for the purposes of reaching the minimum number of bidders and triggering price adjustments. For early stage projects, the current ReMAT and SB 1122 language put significant restrictions on the ability for creative project finance and the ability for investment firms, private investors, progressive banks, and equipment vendors to participate in promoting the growth of this sector.

BAC and CASA support the definition of "Affiliate" in the ReMAT Decision and confirmed in the Proposed Decision, but urges the Commission to require the utilities to strike the phrase cited above that refers to having "any ownership interest" as overly broad and not consistent with the Commission's definition of Affiliate.

III. CONCLUSION

BAC and CASA look forward to working with the Commission, utilities and other stakeholders to implement SB 1122. The Proposed Decision, with the exception of the two issues described above, furthers the goal of the Legislature to promote small-scale bioenergy development while providing ratepayer and market protections. The two changes above, however, are critical to comply with the larger RPS program and to ensure that there will be adequate participation in all three categories of SB 1122, as the Legislature intended.

[27] *Final Consultant's Report* at pages 1-1, 4-3 and 4-4; BAC's Comments at page 12; Placer County Air Pollution Control District Comments.

DATED: December 8, 2014

Respectfully Submitted,

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VERIFICATION

I am a representative of the non-profit organization herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information or belief, and, as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 8th day of December, 2014, at Kensington, California.

/s/ Julia A. Levin

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