

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)

**ORDER DENYING APPLICATIONS FOR REHEARING
OF DECISION (D.) 11-12-052**

I. INTRODUCTION

In Decision (D.) 11-12-052 (or “Decision”), we implemented changes to the renewables portfolio standard (“RPS”) program made by Senate Bill 2 (1X) (Stats. 2011, 1st Ex. Sess. 2011-12, ch. 1) (“SB 2 (1X)”). The Decision focused on implementing Public Utilities Code section 399.16,¹ which established three new portfolio content categories for RPS procurement and set minimum and maximum quantities of procurement in each category.

Southern California Edison Company (“SCE”) and Public Utility District No. 1 of Cowlitz County (“Cowlitz”) timely filed applications for rehearing of D.11-12-052.

SCE alleges that the Decision violates California law by creating different and more burdensome RPS rules for the investor-owned utilities (“IOUs”) than for other retail sellers. According to SCE, California law requires that all retail sellers, including IOUs, electric service providers (“ESPs”), and community choice aggregators (“CCAs”)

¹ All subsequent section references are to the Public Utilities Code, unless otherwise specified.

be subject to the same requirements, terms, and conditions with respect to the RPS program.

Cowlitz alleges that the criteria for the portfolio content categories adopted in the Decision violate the Commerce Clause of the U.S. Constitution because they result in discrimination against out-of-state generation. Cowlitz also alleges that the Decision's requirements for Category 2 transactions are not supported by the record, are an abuse of discretion, and violate the Commerce Clause.

Responses to SCE's rehearing application were filed by the Western Power Trading Forum and the Marin Energy Authority (jointly) (collectively, "WPTF/MEA"); the Alliance for Retail Energy Markets and Retail Energy Supply Association (jointly) (collectively, "AReM/RESA"); the City and County of San Francisco ("CCSF"); The Utility Reform Network ("TURN"); and Pacific Gas and Electric Company. Responses to Cowlitz's rehearing application were filed by WPTF/MEA; AReM/RESA; TURN; and the Independent Energy Producers Association.

We have reviewed each of the allegations raised in the rehearing applications, and are of the opinion that the granting of a rehearing is not warranted. Thus, we deny the applications for rehearing of D.11-12-052.

II. DISCUSSION

A. SCE's Rehearing Application

SCE alleges that several rules in the Decision create more and burdensome RPS rules for the IOUs than for other retail sellers in violation of California law. SCE alleges that the following rules are applied differently to IOUs than to ESPs and CCAs: (1) the durational requirement for substitute energy contracts (SCE Rehr. App., pp. 5-7); (2) the definition of the "effective date" governing the resale of contracts (SCE Rehr. App., pp. 7-9); and (3) the \$50 per renewable energy credit ("REC") price cap for unbundled RECs (SCE Rehr. App., pp. 9-10). SCE alleges that applying these rules differently to IOUs than to ESPs and CCAs violates sections 365.1(c), 380(e), and 399.12(j)(2)-(j)(3). (SCE Rehr. App., pp. 4-5.)

Section 365.1(c) requires among other things that once the Commission has authorized the reopening of direct access transactions pursuant to section 365.1(b), the Commission must ensure that “other providers” are subject to the same requirements that are applicable to the three large IOUs under any programs or rules adopted by the Commission to implement the RPS program. As defined in the statute, “other providers” include ESPs but specifically excludes CCAs. (Pub. Util. Code, § 365.1, subd. (a).)

Section 380(e) requires that each “load-serving entity shall be subject to the same requirements for resource adequacy and the renewables portfolio standard program that are applicable to electrical corporations pursuant to this section, or otherwise required by law, or by order or decision of the commission.” Both ESPs and CCAs are included in the definition of a “load-serving entity.” (Pub. Util. Code, § 380, subd. (j).)

Section 399.12(j)(2)-(j)(3) provides that CCAs and ESPs shall be subject to the same terms and conditions applicable to the IOUs pursuant to the RPS Program.

For the reasons discussed below, SCE’s allegations that the Decision violates sections 365.1(c), 380(e), and 399.12(j)(2)-(j)(3) lack merit.

1. Minimum Duration Requirement for “Firmed and Shaped” Transactions

The Decision sets forth the elements of what qualifies as a “firmed and shaped” transaction that may be counted under the portfolio content category described in section 399.16(b)(2). (D.11-12-052, p. 72 [Conclusion of Law (“COL”) 16].) Firmed and shaped transactions provide “substitute energy in the same quantity as the contracted-for RPS-eligible generation, in order to fulfill the scheduling into a California balancing authority of the RPS-eligible generation...” (D.11-12-052, pp. 46; see also D.11-12-052, p. 72, [COL 16].) The Decision requires that when an IOU submits any contract for procurement in this category to the Commission, the IOU must include a contract for substitute energy that must either be at least five years in duration, or as long as the contract for RPS-eligible energy, whichever is shorter. (D.11-12-052, pp. 79-80 [Ordering Paragraph 7].) The IOUs are to provide all subsequent contracts for substitute energy via a Tier 2 advice letter. (*Ibid.*) SCE alleges that imposing a minimum duration

requirement only on the IOUs violates the principle that ESPs and CCAs must be subject to the same RPS terms and conditions as the IOUs. (SCE Rehrig. App., p. 6.)

We imposed the minimum duration requirement to implement ratepayer protection and cost containment requirements, not RPS requirements. We determined:

In order to protect the interests of ratepayers, IOUs must also meet additional requirements designed to allow evaluation of the price reasonableness of their firmed and shaped contracts, to provide a basis for the cost containment measures the Commission will develop, and to aid in resource planning.

(D.11-12-052, p. 49, footnote omitted.) The Decision explains that the minimum duration requirement “will help ensure that the firmed and shaped transaction is sufficiently well-defined that Energy Division staff can reasonably evaluate the viability and cost of the deal when it is presented to the Commission for approval via advice letter.” (D.11-12-052, p. 50; see also Union of Concerned Scientists (“UCS”) Opening Comments, dated August 8, 2011, pp. 7-8; TURN Opening Comments, dated August 8, 2011, pp. 7-8.)

We have previously explained that:

[T]his Commission has different responsibilities with respect to utilities, on the one hand, and ESPs and CCAs on the other. This Commission does not set the rates of ESPs or CCAs and has no responsibility to ensure that their charges to their customers are just and reasonable.

*(Decision Authorizing Use of Renewable Energy Credits for Compliance with the California Renewables Portfolio Standard [D.10-03-021] (2010), at p. 48 (slip op.).)*²

We have the responsibility to ensure just and reasonable rates and costs for IOU

² All citations to Commission decisions follow the form for non-published decisions and informally refer to the Commission’s decision number as found in the official pdf versions which are available on the Commission’s website at: <http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx>.

customers. (Pub. Util. Code, § 451.) We must ensure just and reasonable rates and costs with regard to all procurement by the utilities, whether conventional or RPS-eligible. In addition, we must ensure that REC contract prices are reasonable as we are required to allow electrical corporations to recover the reasonable costs of purchasing, selling, and administering REC contracts in rates. (Pub. Util. Code, § 399.21, subd. (b).) We are also required to establish a limitation for each electrical corporation on the procurement expenditures for all eligible renewable energy resources used to comply with the RPS Program. (Pub. Util. Code, § 399.15, subd. (c).)

On the other hand, we do not regulate the rates of ESPs. (Pub. Util. Code, § 394, subd. (f); see also *Decision Revising Rules for the Renewables Portfolio Standard Pursuant to Senate Bill 695* [D.11-01-026] (2011), at p. 22 (slip op.)) We also do not regulate the rates of CCAs. (*Decision Resolving Phase 2 Issues on Implementation of Community Choice Aggregation Program and Related Matters* [D.05-12-041] (2005), at pp. 9-10 (slip op.)) The fact that we have authority over ESPs' and CCAs' participation in the RPS program does not change the fact that we do not regulate the rates or costs of ESPs and CCAs. SCE does not identify anything in sections 365.1(c), 380(e), or 399.12(j)(2)-(j)(3) that authorizes us to regulate the rates and costs of ESPs and CCAs. Further, the cost containment measures that we are required to develop pursuant to section 399.15(c) only apply to electrical corporations. Unlike the IOUs, the ESPs and CCAs are also not assured the recovery of reasonable costs for their REC contracts. As noted by CCSF and AReM/RESA, we afford the IOUs certain cost recovery protections that we do not afford the CCAs and ESPs. (See CCSF Opp. to SCE Rehr. App., pp. 5-6; see also AReM/RESA Opp. to SCE Rehr. App., p. 6.)

As explained above, we imposed the minimum duration requirement to implement ratepayer protection and cost containment requirements, not RPS requirements. While RPS requirements apply to all retail sellers including ESPs and

CCAs,³ the ratepayer protection and cost containment requirements only apply to the IOUs. Thus, SCE fails to demonstrate that the Decision violates sections 365.1(c), 380(e), and 399.12(j)(2)-(j)(3) by imposing the minimum duration requirement.

SCE also disputes that the minimum durational requirement is necessary to promote reasonable costs for ratepayers. (SCE Rehr. App., p. 7.) The purpose of a rehearing application is to alert the Commission to legal error, not to relitigate an issue that has been ruled upon by the Commission. (Pub. Util. Code, § 1732, Cal. Code Regs., tit. 20, § 16.1, subd. (c).) Here, SCE merely attempts to relitigate its position during the proceeding, and essentially asks us to reconsider the issue and reach a different determination. Therefore, we find that there is no basis for granting rehearing on this issue.

2. Effective Date for Resale Contracts

The Decision states that a retail seller may buy all or a portion of a contract entered into by another entity. A retail seller may apply the contract and the procurement acquired through it to the retail seller's RPS compliance in the same portfolio category as the original contract would have been classified under sections 399.16(b)(1)(A) or 399.16(b)(2) if certain conditions are met. (D.11-12-052, pp. 36-37, 52.) Among the conditions is that the resale contract transfer only electricity and RECs that have not yet been generated prior to the effective date of the resale contract. The Decision explains that the effective date for the IOUs would be the date that the Commission's approval of the resale contract is final. (D.11-12-052, p. 37, fn. 69 & p. 52, fn. 90.) For ESPs and

³ For instance, all retail sellers seeking to count RPS procurement under section 399.16(b)(2) must provide information to Energy Division Staff so that Staff can determine that the procurement at issue meets the definition of a "firmed and shaped" transaction as set forth in the Decision. (D.11-12-052, p. 53; see also D.11-12-052, p. 13, fn. 20.) The Decision authorizes the Director of Energy Division to require retail sellers to submit any information relevant to making this compliance determination. (D.11-12-052, p. 53.)

CCAs, the effective date would be the date chosen by the parties and stated in the resale contract. (*Ibid.*)

SCE argues that because the effective date is different for IOUs than for ESPs and CCAs, the Decision adopts different resale conditions for IOUs than for ESPs and CCAs, thus violating the legal requirement that the Commission apply the same RPS requirements, terms and conditions to all retail sellers. (SCE Rehr. App., p. 8.) SCE argues that we should redefine the effective date of a resale contract to the date of contract execution for all retail sellers, or should eliminate this condition on resale contracts. (SCE Rehr. App., p. 9.)

The Decision adopts the same resale conditions for all retail sellers. For all retail sellers, the resale contract may only transfer electricity and RECs that have not yet been generated prior to the effective date of the contract. The fact that the effective date differs for IOUs than for ESPs and CCAs reflects the fact that as regulated public utilities, the IOUs are subject to different procedural requirements. As we previously explained: “For ESPs, ‘signing’ is equivalent to ‘Commission approval’ for IOUs. The IOUs’ contracts become effective upon Commission approval. The ESPs’ contracts, like most private contracts, become effective when signed.” (D.11-01-026, *supra*, at p. 17, fn. 19 (slip op.)) The CCAs’ contracts also do not require Commission approval, and thus, are effective on the date chosen by the parties to the contract.

As explained above in section II.A.1., unlike with ESPs and CCAs, we are responsible for ensuring that the IOU customers pay reasonable rates and costs. (See Pub. Util. Code, §§ 451 & 454.) Unlike the ESPs and CCAs, the IOUs are allowed to recover the reasonable costs associated with REC contracts from ratepayers. (Pub. Util. Code, § 399.21, subd. (b).) Section 399.13(d) also requires that “[u]nless preapproved by the commission, an electrical corporation shall submit a contract for the generation of an eligible renewable energy resource to the commission for review and approval consistent with an approved renewable energy resource procurement plan.” (Pub. Util. Code, § 399.13, subd. (d); see also Pub. Util. Code, § 399.16, subd. (d)(2); *Interim Opinion Compiling Standard Terms and Conditions* [D.08-04-009] (2008) at Attachment A,

Standard Term and Condition 1.) In contrast, there is no such statutory requirement with respect to ESPs and CCAs.

We are not responsible for the rates and cost recovery for ESPs and CCAs, and do not approve their RPS contracts.⁴ (D.11-12-052, pp. 10.) SCE had previously argued that the current advice letter process be extended to the RPS procurement contracts of all RPS-obligated retail sellers. We noted that the Commission's long-standing position, consistent with section 394(f), was that we do not approve the procurement contracts of ESPs, whether for conventional generation or RPS-eligible resources. (D.11-01-026, *supra*, at p. 23 (slip op.)) Similarly, we also do not regulate the rates or costs or approve the procurement contracts of CCAs. (See D.05-12-041, *supra*, at pp. 9-10 (slip op.))

We cannot abdicate our responsibilities with regard to the IOUs. On the other hand, SCE does not identify why it is necessary for us to deviate from our long-standing position, consistent with statute, that we do not approve the procurement contracts of ESPs and CCAs. Based on the foregoing, we find that SCE has failed to demonstrate that rehearing is warranted on this issue.

3. Temporary Price Cap on Unbundled REC Purchases

The Decision leaves unchanged the temporary price cap of \$50 per REC for unbundled REC purchases by the IOUs, which will expire on December 31, 2013.⁵ (D.11-12-052, p. 55.) The Commission adopted this temporary price cap in D.10-03-021 in order to provide protections for ratepayers from the potential for volatility and spikes

⁴ We do, however, review RPS procurement transactions for all retail sellers, including ESPs and CCAs, to ensure compliance with RPS procurement requirements. (See D.11-12-052, pp. 11-13.)

⁵ An "unbundled REC" is a REC that is procured separately from the RPS-eligible generation originally associated with the REC. (D.11-12-052, p. 30.) The fact that a utility may purchase an unbundled REC at the amount of the price cap does not necessarily mean that the purchase price will be deemed reasonable. We evaluate the reasonableness of all utility REC purchases in the contract approval process. (See D.10-03-021, *supra*, at p. 59, fn. 90 (slip op.))

in unbundled REC prices. (D.10-03-021, *supra*, at pp. 89-90 [Finding of Fact (“FOF”) 11] (slip op.)) SCE alleges that the Decision violates California law by applying the temporary price cap of \$50 per REC to the IOUs but not ESPs and CCAs. (SCE Rehrgr. App., p. 9.)

In D.11-01-026, we implemented section 365.1’s requirement that ESPs be subject to the same requirements of the RPS program as the three large IOUs. We determined that the temporary price cap on unbundled RECs should not be imposed on ESPs. We explained that the temporary price cap was not an RPS program requirement but rather a method to protect IOU ratepayers from paying for unbundled RECs at excessive prices in the early stages of the unbundled REC market.⁶ (D.11-01-026, *supra*, at p. 18 (slip op.))

As explained above in section II.A.1., we have different responsibilities with respect to utilities, on the one hand, and ESPs and CCAs on the other, especially when it comes to ratepayer protections. Because we do not regulate the rates and costs of ESPs or CCAs and are not responsible for ensuring that their costs are contained, it does not make sense to apply the temporary price cap, which is intended to ensure reasonable costs for ratepayers, to the ESPs and CCAs. This requirement is a ratepayer protection requirement, rather than an RPS Program requirement, and thus, we find that applying this rule only to the IOUs does not violate sections 365.1(c), 380(e), and 399.12(j)(2)-(j)(3).

⁶ We made the determination that the temporary price cap should not be applied to ESPs in D.11-01-026, not in the Decision. Therefore, SCE’s allegations with respect to ESPs constitute an impermissible collateral attack of D.11-01-026. (Pub. Util. Code, §§ 1709 & 1731.) SCE did not file a rehearing application of D.11-01-026, and SCE accordingly is now foreclosed from challenging any of that decision’s determinations. (Pub. Util. Code, § 1731.)

B. Cowlitz’s Rehearing Application

1. Dormant Commerce Clause

The Commerce Clause states in pertinent part that “the Congress shall have power ... to regulate Commerce ... among the several States.” (U.S. Const. Art I, § 8, cl. 3.) The U.S. Supreme Court has for many decades interpreted the Commerce Clause as having a “negative” aspect, also known as the “dormant Commerce Clause,” that limits the power of states to unjustifiably discriminate against or burden interstate commerce. (See e.g. *Oregon Waste Sys. v. Dept. of Environmental Quality* (1994) 511 U.S. 93, 98.)

The first step in analyzing whether a state law violates the dormant Commerce Clause is to determine whether it regulates evenhandedly, with only incidental effects on interstate commerce, or whether it discriminates against interstate commerce. (*Id.* at p. 99.) Discrimination against interstate commerce means favoring in-state over out-of-state economic interests that benefits the former and burdens the latter. (*Ibid.*) Where a state law is found to be discriminatory, the law is subject to strict scrutiny. Courts will invalidate the law unless the state can demonstrate that the law “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” (*Id.* at pp. at 100-101; see also *Maine v. Taylor* (1986) 477 U.S. 131, 138.) In contrast, where a state law “regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental,” courts will not invalidate the state law under the Commerce Clause unless “the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.” (*Pike v. Bruce Church* (1970) 397 U.S. 137, 142.) The burden is on those challenging the state law to demonstrate discrimination. (*Hughes v. Oklahoma* (1979) 441 U.S. 322, 336; *Black Star Farms LLC v. Oliver* (9th Cir. 2010) 600 F.3d 1225, 1230; see generally *Interim Opinion on Phase I Issues: Greenhouse Gas Emissions Performance Standard* [D.07-01-039] (2007), at pp. 205-220 (slip op.) [Commerce Clause analysis].)

Cowlitz alleges that the practical effect of SB 2 (1X) and the Decision is to discriminate against out-of-state generation. (Cowlitz Rehrig. App., pp. 10 & 11.) Cowlitz alleges that few out-of-state transactions are likely to qualify for Category 1 while most in-state facilities will easily qualify for Category 1. (Cowlitz Rehrig. App., p. 10.) Cowlitz alleges that this problem is aggravated because the Commission left unclear the requirements for out-of-state transactions to qualify for Category 1 and imposed additional requirements for Category 2 transactions that are not required by the RPS statute. (Cowlitz Rehrig. App., p. 11.)⁷

Cowlitz fails to meet its burden of demonstrating that the Decision discriminates against interstate commerce. The Decision implemented SB 2 (1X), which established three new portfolio content categories for RPS procurement and set minimum and maximum use of procurement in each category. (Pub. Util. Code, § 399.16.) Eligible renewable energy resource electricity products that meet any of the following criteria qualify under the first portfolio content category: (1) have a first point of interconnection with a California balancing authority; (2) have a first point of interconnection with distribution facilities used to serve end users within a California balancing authority area; (3) are scheduled from the eligible renewable energy resource into a California balancing authority without substituting electricity from another source; or (4) have an agreement to dynamically transfer electricity to a California balancing authority. (Pub. Util. Code, § 399.16, subd. (b)(1).) All of these criteria ensure that California end users actually receive the eligible renewable energy associated with the REC.

The criteria for the first portfolio content category do not facially discriminate against out-of-state generators. Out-of-state generators are not precluded from participating in transactions that would qualify under the first category. The boundaries of California balancing authority areas extend beyond the political boundaries of the State of California. (See Pub. Util. Code, § 399.12, subd. (d); D.11-12-052,

⁷ Cowlitz's allegations regarding Category 2 transactions are addressed in section II.B.2, below.

pp. 19-20; D.10-03-021, *supra*, at p. 86 (slip op.)) Thus, out-of-state generators that have a first point of interconnection with a California balancing authority or with distribution facilities used to serve end users within a California balancing authority area will be able to participate in Category 1 transactions. The last two criteria allow for even broader participation by out-of-state generators in Category 1 transactions because they do not require out-of-state generators to be directly interconnected with a California balancing authority.⁸

Relying on *New Energy Company of Indiana v. Limbach* (1988) 486 U.S. 269 (“*New Energy*”), Cowlitz asserts that the fact that some out-of-state entities can qualify under the first portfolio content category is insufficient to overcome the strict scrutiny standard under the Commerce Clause. (Cowlitz Rehg. App., p. 11.) *New Energy* involved an Ohio statute under which a sales tax credit for fuel dealers was made unavailable to ethanol coming from a state which did not grant reciprocal tax advantages to Ohio-produced ethanol, and was limited for ethanol coming from a state that did grant reciprocal tax advantages. The U.S. Supreme Court found that the Ohio statute was facially discriminatory because it “explicitly deprives certain products of generally available beneficial tax treatment because they are made in certain other States.” (*Id.* at p. 274.) The Court observed that “where discrimination is patent, ... neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown.” (*Id.* at p. 276.) The statute at issue in *New Energy* was facially discriminatory. Cowlitz fails to demonstrate any such facial discrimination in this case that would trigger the strict scrutiny standard in the first place.

⁸ Only RPS-eligible generation located outside of a California balancing authority area may qualify under the last two criteria. (D.11-12-052, pp. 23 & 45.) However, these criteria are not discriminatory as they do not result in the favoring of in-state over out-of-state economic interests that benefits the former and burdens the latter. (See *Oregon Waste Sys.*, *supra*, 511 U.S. at p. 99.) These criteria actually provide additional avenues for out-of-state generators to qualify for Category 1 treatment that are unavailable to in-state generators.

Unlike the statute at issue in *New Energy*, the Decision regulates evenhandedly. The Decision does not draw a distinction or apply different rules merely because a generator is located out-of-state as opposed to in-state. No preference or benefit is given to California generators. In fact, SB 2 (1X) requires “generating resources located outside of California that are able to supply that electricity to California end-use customers to be treated identically to generating resources located within the state, without discrimination.” (Pub. Util. Code, § 399.11, subd. (e)(2).) Nothing in SB 2 (1X) or the Decision imposes any requirements that the first portfolio content category be comprised of a certain percentage of in-state generation. Therefore, depending on its RPS procurement decisions, a load serving entity is free to procure any combination of in-state and out-of-state resources that it desires to fulfill its requirements under the first portfolio content category.

The fact that some out-of-state entities may be unable to meet the criteria for the first portfolio content category does not demonstrate discrimination under the Commerce Clause. “The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.” (*Exxon Corp. v. Governor of Maryland* (1978) 437 U.S. 117, 126; see also *Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 474.) The Commerce Clause “protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.” (*Exxon Corp. v. Governor of Maryland, supra*, 437 U.S. at pp. 127-128.)

Furthermore, to the extent that an out-of-state entity is unable to meet the criteria for the first portfolio content category, it would not constitute discrimination under the Commerce Clause to treat that entity differently from an in-state entity that is able to meet the criteria. The purpose of the criteria is to ensure that California end users actually receive the eligible renewable energy associated with the REC in order to realize the benefits of the RPS statute. (See Pub. Util. Code, §§ 399.11, subd. (b) & 399.16,

subds. (b) & (c); see also D.10-03-021, *supra*, at pp. 27-28 (slip op.) [describing benefits of bundled transactions].⁹ If a generator, whether in-state or out-of-state, is unable to qualify under the criteria for the first portfolio content category, there would be no assurance that the generator is actually supplying California end users with the eligible renewable energy associated with the REC.

In order to determine whether there is discrimination under the Commerce Clause, there must be a comparison of substantially similar entities. (*General Motors Corp. v. Tracy* (1997) 519 U.S. 278, 298-299; *Nat'l Assn. of Optometrists and Opticians Lenscrafters, Inc. v. Brown* (9th Cir. 2009) 567 F.3d 521, 525.) An out-of-state entity must be compared to a similarly situated in-state entity. If the out-of-state entity is providing a different product (e.g. energy that is not the eligible renewable energy associated with the REC), it would not constitute discrimination under the Commerce Clause to treat that entity differently. As explained above, SB 2 (1X) and the Decision treat similarly situated in-state and out-of-state generators equally. (See also Pub. Util. Code, § 399.11, subd. (e)(2).)

Cowlitz does not present any record evidence that the criteria for Category 1 will result in discrimination in practical effect. Cowlitz alleges that the Decision is discriminatory because “few out-of-state transactions are likely to be able to qualify for Category 1” whereas “[m]ost in-state facilities ... will easily qualify for Category 1.” (Cowlitz Rehr. App., p. 10.) In order to trigger strict scrutiny under the dormant Commerce Clause, the burden is on Cowlitz to demonstrate that the Decision

⁹ Thus, contrary to Cowlitz’s assertion, the adoption of the criteria for the portfolio content categories is based on legitimate state interests, not based on economic protectionism. (See Cowlitz Rehr. App., p. 11.) The Legislature found that “[s]upplying electricity to California end-use customers that is generated by eligible renewable energy resources is necessary to improve California’s air quality and public health ...” (Pub. Util. Code, § 399.11, subd. (e)(1); see also Pub. Util. Code, § 399.11, subd. (b).) The protection of the health and welfare of a state’s citizens, and the guarding against environmental risks, are legitimate state interests. (*Huron Portland Cement Co. v. City of Detroit* (1960) 362 U.S. 440, 442; *Minnesota v. Clover Leaf Creamery Co.*, *supra*, 449 U.S. at p. 473; *Maine v. Taylor*, *supra*, 477 U.S. at p. 148.)

discriminates against out-of-state entities. (*Hughes v. Oklahoma, supra*, 441 U.S. at p. 336; *Black Star Farms LLC v. Oliver, supra*, 600 F.3d at p. 1230.) Cowlitz does not meet this burden by merely asserting that a statutory regime has a discriminatory potential. (*Id.* at p. 1235.)

Citing the comments of parties during the proceeding, Cowlitz alleges that the Decision is discriminatory because there is no clear understanding among parties how out-of-state transactions must be structured in order to satisfy the criteria for Category 1. (Cowlitz Rehr. App., pp. 12-14.) Cowlitz fails to explain how parties' uncertainty expressed in comments filed before we issued the Decision demonstrates legal error in the Decision. The Decision parses the statutory requirements of section 399.16(b)(1) and explains what is required for a transaction to qualify under the first portfolio content category.¹⁰ (See D.11-12-052, pp. 18-28.) As explained above, the Decision applies these requirements in an evenhanded manner.

Cowlitz alleges that its previous experiences regarding several commercial agreements for the sale of wind power to Pacific Gas and Electric Company demonstrate discrimination against out-of-state developers. (Cowlitz Rehr. App., pp. 4-6.) But Cowlitz fails to explain how events that occurred prior to the issuance of the Decision and the Commission's implementation of SB 2 (1X) demonstrate legal error in the Decision.

Cowlitz also cites to a Commission press release, which stated that the Commission had approved 1,000 MW of new in-state generation for RPS compliance purposes. Cowlitz alleges that these transactions demonstrate discrimination against out-

¹⁰ Cowlitz asserts that we should have made clear what transactions constitute a "dynamic transfer" under Category 1. (Cowlitz Rehr. App., pp. 14-15.) As noted in the Decision, the actual dynamic transfer arrangement is made between the balancing authorities. (D.11-12-052, p. 27.) We determined that all arrangements for dynamic transfer accepted by a California balancing authority qualify as a "dynamic transfer" under Category 1. (D.11-12-052, p. 28.) The Commission's interpretation actually allows maximum flexibility to the balancing authority area operators and contracting parties, rather than placing constraints on the transactions that could qualify under this criterion.

of-state generators because they reduce the remaining market in California available to out-of-state generators. (Cowlitz Rehrig. App., p. 15.) These transactions took place after the issuance of the Decision, and thus, Cowlitz's allegation regarding these transactions are not based on evidence in the record.¹¹ (See Cal. Code of Regs., tit. 20, § 16.1, subd. (c) [rehearing application must make specific references to the record or law].) Also, the mere fact that the Commission approved 1,000 MW of in-state generation does not demonstrate that there was discrimination against out-of-state entities.

Based on the foregoing, Cowlitz fails to meet its burden of demonstrating that the criteria for the first portfolio content category are discriminatory. As explained above, the Decision does not draw any distinction between similarly situated in-state and out-of-state generators that are able to supply the electricity from eligible renewable energy resources to California end-use customers. Therefore, Cowlitz fails to demonstrate that the Decision violates the dormant Commerce Clause.¹²

2. Requirements for Category 2 Transactions

Pursuant to section 399.16(b)(2), the second portfolio content category consists of: “[f]irmed and shaped eligible renewable energy resource electricity products providing incremental electricity and scheduled into a California balancing authority.” (Pub. Util. Code, § 399.16, subd. (b)(2).) Firmed and shaped transactions provide

¹¹ The Decision is dated December 15, 2011. Although the press release is dated January 12, 2011, the Commission approved the agreements referenced in the press release on January 12, 2012. (See Resolution E-4456, dated January 12, 2012; Resolution E-4458, dated January 12, 2012; Resolution E-4459, dated January 12, 2012.)

¹² Cowlitz's rehearing application alleges that the Decision is discriminatory and subject to strict scrutiny under the Commerce Clause; Cowlitz does not assert that the Decision would be invalid under the *Pike* balancing test. However, we note that any burdens on interstate commerce imposed by the Decision would be incidental. As explained above, out-of-state generators may still participate in the RPS program, including in Category 1 transactions, and no advantages are given to a generator merely because it is located in-state. Furthermore, as explained in footnote 9, above, the RPS program and the implementation of the portfolio content categories are based on legitimate state interests. Thus, the burdens on interstate commerce would not clearly outweigh the state's legitimate purposes in this case.

“substitute energy in the same quantity as the contracted-for RPS-eligible generation, in order to fulfill the scheduling into a California balancing authority of the RPS-eligible generation....” (D.11-12-052, pp. 46; see also D.11-12-052, p. 72, [COL 16].) The Decision explains that a transaction must meet the following requirements to count as a Category 2 transaction:

1. the buyer's simultaneous purchase of energy and associated RECs from the RPS-eligible generation facility without selling the energy back to the generator;
2. the availability of the purchased energy to the buyer (i.e., the purchased energy must not in practice be already committed to another party); and
3. the initial contract for substitute energy is acquired no earlier than the time the RPS-eligible energy is purchased and no later than prior to the initial date of generation of the RPS-eligible energy under the terms of the contract between the buyer and the RPS-eligible generator.

(D.11-12-052, p. 47 (footnotes omitted).)

Cowlitz alleges that these requirements are not found in the actual statutory language of SB 2 (1X). According to Cowlitz, the record contains evidence that these requirements will unnecessarily restrict the ability of out-of-state generators to compete in the California market, reduce competition for RPS products, and increase costs to the utilities and ratepayers. (Cowlitz Rehr. App., pp. 16-17.) Cowlitz alleges that, as a result, these additional requirements are an abuse of discretion and not supported record evidence. (Cowlitz. Rehr. App., p. 17.)¹³

¹³ Cowlitz asserts that section 1757 applies to the Decision. (Cowlitz Rehr. App., p. 17, fn. 39.) Section 1757 sets forth the standard of review that applies to a court’s review of a Commission decision issued “[i]n a complaint or enforcement proceeding, or in a ratemaking or licensing decision of specific application that is addressed to particular parties....” (Pub. Util. Code, § 1757.) The instant proceeding involves a rulemaking proceeding, and thus, section 1757 would not apply. Rather, any judicial review of the Decision would be under section 1757.1, which applies “[i]n any proceeding other than a proceeding subject to the standard of review

(footnote continued on next page)

As explained below, the requirements for Category 2 transactions are adequately supported by the record, and Cowlitz fails to demonstrate that the Commission abused its discretion.

We adopted the three requirements in order to implement the statutory requirements for the second portfolio content category. In adopting these requirements, we explained that:

[T]he general characteristics of a firm and shaped transaction must be translated into specific and practical elements. The following elements maintain the flexibility inherent in the firm and shaped category, while providing sufficient particularity to allow transactions in this category to make a meaningful contribution to RPS compliance.

(D.11-12-052, p. 46.)

Contrary to Cowlitz's allegations, evidence in the record supports that it was reasonable for us to impose these requirements in order to ensure that transactions actually meet the statutory requirements for the second portfolio content category. In fact, we adopted these requirements based on parties' comments. (See D.11-12-052, p. 46, fn. 79.) The requirements are to ensure that the transaction is in fact a "firm and shaped" transaction that provides "incremental electricity," rather than an unbundled transaction that belongs in Category 3.¹⁴ (See e.g. UCS Opening Comments, dated August 8, 2011, pp. 6-7; TURN Opening Comments, dated August 8, 2011, pp. 7-8; NextEra Energy Resources, LLC Opening Comments, dated August 8, 2011, pp. 6-7; see also D.11-12-052, pp. 48 & 49.) As explained in the Decision, the Legislature clearly

(footnote continued from previous page)

under Section 1757...."

¹⁴ Pursuant to section 399.16(b)(3), the third portfolio content category consists of: "Eligible renewable energy resource electricity products, or any fraction of the electricity generated, including unbundled renewable energy credits, that do not qualify under the criteria of paragraph (1) or (2)." (Pub. Util. Code, § 399.16, subd. (b)(3).)

intended that the three portfolio content categories set forth in SB 2 (1X) be separate and distinct. (D.11-12-052, pp. 31-32.)

Cowlitz alleges that the Commission abused its discretion by failing to consider evidence in the record. (Cowlitz Rehr. App., p. 17, fn. 38.) Cowlitz's allegation that we did not consider evidence in the record is without merit. The mere fact that we did not agree with the position taken by certain parties during the proceeding does not indicate that we failed to consider the evidence.¹⁵ Likewise, the fact that Cowlitz may be able to cite to evidence in the record that takes a contrary position does not demonstrate legal error. It is for the Commission to weigh conflicting evidence in the record and reach a determination. (See *Eden Hospital Dist. v. Belshe* (1998) 65 Cal.App.4th 908, 915.) In this instance, we weighed the evidence in the record and determined that these requirements were necessary in order to implement the statutory requirements for the second portfolio content category. (See D.11-12-052, pp.46-47 & 72 [COL 16].) Based on the foregoing, Cowlitz fails to demonstrate that the Commission's findings are unsupported on the basis of the entire record, or that the Commission abused its discretion.

Cowlitz also alleges that these requirements adopted for Category 2 transactions discriminate against out-of-state generators, and thus violate the Commerce Clause. (Cowlitz Rehr. App., p. 17.) This allegation lacks merit. Here again, Cowlitz has failed to meet its burden of demonstrating that these requirements discriminate against out-of-state generators. (See *Hughes v. Oklahoma*, *supra*, 441 U.S. at p. 336; *Black Star Farms LLC v. Oliver*, *supra*, 600 F.3d at p. 1230.) Cowlitz asserts that few

¹⁵ Cowlitz asserts that we should have adopted the California Energy Commission ("CEC")'s definition of firmed and shaped transactions as described in the Fourth Edition of the CEC's *Renewables Portfolio Standard Eligibility Guidebook*. (Cowlitz Rehr. App., p. 17.) Cowlitz fails to explain how this definition would be consistent with the requirements of SB 2 (1X). We considered and did not adopt this definition because we found that the CEC's description of firmed and shaped transactions was based on the now-repealed "delivery" element of RPS eligibility under the law prior to SB 2 (1X). (D.11-12-052, p. 44-45; see also D.11-12-052, pp. 14-15.)

transactions for out-of-state power are likely to qualify as Category 2. (Cowlitz Rehrgr. App., p. 16.) Cowlitz offers no support for this assertion. As a matter of fact, only generation facilities located outside of California balancing authority areas will qualify for Category 2 transactions. (D.11-12-052, p. 43.) Thus, section 399.16(b)(2) actually provides another avenue for out-of-state generation facilities to participate in the RPS Program. (D.11-12-052, p. 67 [FOF 5].) Furthermore, even if some out-of-state transactions are unable to qualify under Category 2, Cowlitz fails to explain how this would constitute discrimination under the Commerce Clause. (See *Oregon Waste Sys., supra*, 511 U.S. at p. 99; *Exxon Corp. v. Governor of Maryland, supra*, 437 U.S. at p. 126.) As explained above, we adopted these requirements to ensure that the statutory requirements of section 399.16(b)(2) are met. Cowlitz fails to explain why a transaction should receive Category 2 treatment if it does not meet the requirements of section 399.16(b)(2).

III. CONCLUSION

For the reasons stated above, the applications for rehearing of D.11-12-052 fail to demonstrate that rehearing of D.11-12-052 is warranted.

THEREFORE, IT IS ORDERED that:

1. The applications for rehearing of D.11-12-052 are denied.

This order is effective today.

Dated October 31, 2013, at San Francisco, California.

MICHAEL R. PEEVEY
President
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK J. FERRON
CARLA J. PETERMAN
Commissioners