Resolution posted pursuant to Conference Rules Art. II, Sec. 6(c). The CCBA Board of Directors will consider whether to accept the filing of this resolution at its meeting on Sept. 15, 2011. Counterarguments may be submitted to the board at admin@calconference.org until 12:00pm on Sept. 15, 2011.

RESOLUTION ELF- 1-2011

DIGEST
Renewable Energy Incentives and Rates – No Federal Pre-emption

Amends the federal Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 824a-3 ("PURPA"), with effect on the Federal Power Act, 16 U.S.C. 791 et seq. ("FPA"), to clarify the authority of States to adopt renewable energy incentives and to require that an electric utility purchase renewable energy at a specified rate, without federal pre-emption by PURPA or the FPA of the rates set.

RESOLUTIONS COMMITTEE RECOMMENDATION
NONE

History:
No similar resolutions found.

Reasons:
Res Com has not considered or acted on this emergency late-filed resolution that was not presented to Res Com.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend the federal Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 824a-3, to read as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE

This Act may be cited as the "Let the States Innovate on Sustainable Energy Act of *2011".*

SEC. 2. CLARIFICATION OF STATE AUTHORITY TO ADOPT RENEWABLE ENERGY INCENTIVES.

Section 210 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 824a-3) is amended by adding at the end the following:

"(o) CLARIFICATION OF STATE AUTHORITY TO ADOPT RENEWABLE ENERGY INCENTIVES.

"(1) DEFINITION OF STATE-APPROVED PRODUCTION INCENTIVE PROGRAM. In this subsection, the term 'State-approved production incentive program' means a requirement imposed pursuant to State law, or by a State regulatory authority under State law, that an electric utility purchase renewable energy (as defined in section 609(a)) at a specified rate.

"(2) RATES. Notwithstanding any other provision of this Act or the Federal Power Act (16 U.S.C. 791a et seq.), a State legislature or regulatory authority may set the

rates for a sale of electric energy by a facility generating electric energy from renewable energy sources pursuant to a State-approved production incentive program under which the facility voluntarily sells electric energy.".

(Proposed new language underlined.)

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS:

Existing Law: Currently investor-owned utilities argue that PURPA and the FPA pre-empt the rights of States and State regulatory authorities to set the rates at which the utilities are required to purchase renewable energy.

In California in 2009, AB 920, Public Utilities Code Section 2827(h)(4)(A), was enacted, requiring California utilities to compensate Net Energy Metering ("NEM") customers for electricity generated in excess of electricity used. On June 9, 2011 the California Public Utilities Commission ("CPUC") issued a decision, http://docs.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/137431.htm , Decision 11-06-016, that set a compensation rate to be paid to renewable energy generators of 4 cents per kilowatt hour. The CPUC stated that it believed it was required to follow PURPA, setting the rate at the lowest avoidable cost.

In 2009 SB 32, Public Utility Code Section 387.6 et seq., was enacted to require the CPUC to set a feed-in tariff rate, for generators of renewable energy, to sell the electricity they generate to utility companies. Rule-making to set feed-in tariff rates under SB 32 is pending at the CPUC.

This Resolution: This resolution would make clear that the States may set rates for the sale of renewable energy to utility companies without federal pre-emption of the rates set or of the requirement that the utilities purchase the renewable energy. This resolution would prevent federal lawsuits alleging that renewable energy rates set by States are invalid because only the federal government may determine the pricing mechanism for setting rates under PURPA or the FPA.

The Problem: Investor-owned utility companies seek rates to compensate generators of renewable energy that are too low to allow recovery of costs and a return on investment. Relying on PURPA and the FPA, utilities argue that the federal pricing mechanism of "avoided cost" for rates must be followed by State public utility commissions.

"Avoided cost" is very low, with hydroelectric or gas as a reference source, undercutting the cost of building solar panels. Avoided cost may be as low as 4 cents per kilowatt hour, while the cost of energy generated from solar panels is 15 cents.

"Avoided cost" rates, based on PURPA or the FPA, strongly discourage renewable energy investment. There must be no federal pre-emption of utility rate setting for renewable energy if the States are going to implement effective renewable energy incentives.

PG&E charges as much as 40 cents per kilowatt hour. A rate of 4 cents paid by PG&E is totally unreasonable.

Countries such as Germany have offered feed-in tariffs to people who invest in renewable energy to allow the investors to recover costs plus a return on investment. No federal pre-emption would enable California to offer feed-in tariffs and more effectively establish a solar energy manufacturing sector.

This resolution was presented in Congress last year as Senate Bill 3923. It was not enacted.

Cost-recovery renewable energy rates are not a subsidy. They allow the renewable energy investor to recover costs and earn a return on investment. There is no expense to the taxpayers.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule, other than those stated above.

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RESPONSIBLE FLOOR DELEGATE: Robin E. Foor

COUNTER-ARGUMENT TO RESOLUTION ELF –

The proposed resolution endorses a policy that would force California utility customers to pay nearly four times the market price for energy and to guarantee both the investments and profits of venture capitalists who have put their money into alternative energy companies.

PURPA requires public utilities to purchase energy at a price equal to its marginal cost-effectively, at the market price.

The proposed amendment to PURPA would allow utility companies to ignore the pricing scheme of PURPA and set rates as they wish. That amendment would, in turn, clear the way for the CPUC to go forward with pending rule making, enacting a rule that would require investor owned utilities to purchase energy from customers who generate electricity from renewable sources at a rate that would compensate for "the full cost of the renewable energy generation equipment plus a return on investment."

Thus, this is not a proposal merely to amend Federal law to allow states to "experiment" with renewable energy policy. It is a condition precedent to the enactment in California of a specific rule that would mandate the payment of higher energy costs and the underwriting of investment in technologies that may, or may not, be economically viable.

The proposal clearly is a subsidy in every sense of the word. Like any subsidy, it would have the public-utility rate payers assume - at the cost of higher utility bills - the risk of investing in technologies that, by definition, are not yet competitive with other sources of energy while private investors would reap the rewards if these technologies should become competitive. And, as is true with any such program, a government guaranteed price would effectively eliminate any incentive to become more competitive through cost-reducing innovations.

While it may be true that countries such as Germany and China subsidize the costs of developing a renewable energy industry, that merely highlights the difference between these countries' economic systems and our own. Germany and China have opted for a planned economy that attempts to "pick winners" among developing industries, and subsidizes the chosen winners. We believe that competition in the marketplace fosters innovation and that it is the market, and, ultimately, consumers, who pick the winners.

While the proposal may not affect the public as taxpayers, it does greatly impact the public and utility rate payer. The utility bill is one of the largest items in the budget of many California families. People on fixed incomes are frequently forced to choose in colder months between heat and food. The current rate at which utilities in California purchase energy from renewable sources $ .04 per kilowatt-hour. The current cost of solar generated energy is about $.15 per kilowatt-hour. Under the proposal, this latter figure would a benchmark for the price that utilities would pay for electricity from renewable sources. The utility consumer would pay the difference.

If renewable energy technologies are, indeed, viable competitors, they do not need such a subsidy. If they are not viable, utility customers should not underwrite their inefficiency.

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August 26, 2011

August 21, 2011

John Patton, Chairman,
Conference of California Bar Associations
Pasternak, Pasternak & Patton
1875 Century Park East, Suite 2200
Los Angeles, CA 90067

Re: Emergency Late-Filed Resolution – Renewable Energy Incentives and Rates- No Federal Pre-emption

Dear Mr. Patton:

Our delegation proposes the attached Emergency Late-Filed Resolution, which pertains to a June 9, 2011 decision of the California Public Utilities' Commission ("CPUC"). I would like to address the factors considered for Emergency Late-Filed Resolutions under Article II (6)(c) of the Conference Rules as follows:

(1) The resolution deals with a matter of substantial importance to the bar and the public, as it pertains to the rates paid to renewable energy generators, and whether those rates will encourage the development of renewable energy manufacturing in California and jobs in the renewable energy industry. Currently the rate of 4 cents per kilowatt hour set for net excess generation by Net Energy Metering ("NEM") customers will discourage investment in renewable energy capacity. Making clear that there is no federal pre-emption of renewable energy rates will allow the States to set cost-recovery rates that will allow owners to recover their costs and earn a return on investment. Renewable energy is a high priority for the public as California has set the public policy goal of 33% of energy from renewable sources by 2020. Allowing the States to set feed-in tariffs that allow cost recovery and return on investment is of great importance to strengthen the renewable energy industry. Renewable energy is of great importance because greenhouse gases from non-renewable energy present a clear and present danger to the public.

(2) The events giving rise to the resolution, to the extent the resolution is directed at the CPUC decision of June 9, 2011, occurred at a time close to the July 15, 2011 deadline

for late-filed resolutions. The resolution is also directed at the CPUC's pending feed-in tariff rulemaking. It would have been difficult to address the issues fully prior to the June 9, 2011 CPUC decision which set a compensation rate of 4 cents per kilowatt hour for renewable energy.

(3) The resolution is presented as soon as practicable after the occurrence of the June 9, 2011 events. Our delegation did not have meetings to consider resolutions until August 5, 2011, after the two-month deadline for late-filed resolutions.

(4) The subject matter of the resolution will not be before the Conference unless this resolution is filed.

(5) The business of the Conference allows time for consideration of the resolution without unduly restricting time for consideration of other matters of equal or greater importance to the Conference, the Bar and the public.

The resolution is attached to this letter, together with counter-arguments from members of our delegation. We would like to post the resolution to the web site to allow others to submit counter-arguments. Thank you.

SAN MATEO COUNTY BAR ASSOCIATION

Christopher C. Cooke
Co-Chair, Conference of Delegates Committee

Cc: Leticia Toledo
Robin Foor