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)

COMMENTS OF THE UNION OF CONCERNED SCIENTISTS ON NEW PROCUREMENT TARGETS AND CERTAIN COMPLIANCE REQUIREMENTS FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

Laura Wisland
UNION OF CONCERNED SCIENTISTS
2397 Shattuck Avenue, Suite 203
Berkeley, CA 94704
(510) 843-1872
lwisland@ucsusa.org

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Pursuant to the July 15, 2011 *Ruling Requesting Comments on New Procurement Targets and Certain Compliance Requirements for the Renewables Portfolio Standard Program* ("Ruling"), the Union of Concerned Scientists ("UCS") respectfully submits these initial comments. To save space, UCS reproduces the questions posed in the Ruling, but not background material included to frame each question.

Question #1

Should the transition from the current RPS program (20% of retail sales) from RPS-eligible generation by the end of 2010)(20% program) to the RPS program as revised by SB 2 (1x) (33% of retail sales from RPS-eligible generation by the end of 2020) (33% program) start from the position that the procurement and flexible compliance rules for the 20% program apply through the 2010 compliance year and the procurement and compliance rules for the 33% program apply beginning with the 2011 compliance year (making allowance for the special provision in new § 399.15(a)?4) Please provide detailed support for your position.

The first RPS compliance period for the new 33% program established by SB 2 (1x) began on Jan.1, 2011 and ends on Dec. 31, 2013. The Legislature eliminated flexible compliance rules previously adopted by the Commission with new rules pertaining to banking, interim compliance obligations, and compliance shortfalls. Therefore, flexible rules associated with the 20% RPS program should only be applied to compliance requirements through December 31, 2010.

Question #2

- Should compliance targets for intervening years in the 2011-2013 compliance period be set as:
  - 20% of retail sales for the year ending December 31, 2011;
  - 20% of retail sales for the year ending December 31, 2012; ending with

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- 20% of retail sales for the year ending December 31, 2013, such that the RPS obligation (compliance period quantity) of a retail seller for the 2011-2013 compliance period would equal in megawatt-hours (MWh): (.20 x 2011 retail sales) + (.20 x 2012 retail sales) + (.20 x 2013 retail sales)?

- Should different compliance targets for intervening years be set for this period?
- Should no compliance targets for intervening years be set for this period?

The RPS statute, as revised by SB 2 (1x), requires that the cumulative quantity of eligible renewable energy resources procured in the 2011-2013 compliance period be equal to an average of 20% of retail sales for each of those three years. UCS agrees with the Commission that the most straightforward way to calculate the actual cumulative compliance requirement for this three year period is to calculate the sum of 20% retail sales for each year between 2011 and 2013. The new § 399.15(b)(2)(C) is explicit that the Commission cannot set procurement requirements for intervening years. Therefore, failure to procure a certain amount in any intervening year between compliance years (2013, 2016, 2020) should by itself cause a retail seller to be out of compliance. However, § 399.15(b)(2)(B) requires the compliance period to reflect "reasonable progress in each of the intervening years…" Therefore UCS believes it is reasonable for the Commission to make an assumption about "reasonable progress" benchmarks in order to calculate the cumulative compliance obligation for any compliance period. In addition, UCS believes that the Commission should not in any case define "reasonable progress" as remaining at a constant level of renewable energy as a percentage of retail sales throughout a compliance period, or going below the amount required for the most recent compliance period. For example, if a retail seller needed to reach 25% renewables in 2016, the Commission should estimate that the retail seller stays <u>at least</u> a level of 25% throughout the next compliance period.

- Should targets for intervening years in the 2014-2016 compliance period be set using a linear trend:
  - 21.5% of retail sales by December 31, 2014;
  - 23.5% of retail sales by December 31, 2015; ending with

- 25% of retail sales by December 31, 2016, such that the compliance period quantity for the 2014-2016 compliance period would equal in MWh: (.215 x 2014 retail sales) + (.235 x 2015 retail sales) + (.25 x 2016 retail sales)?

See comments above. UCS agrees with the Commission that assuming a linear trend for the 2014-2016 compliance period is reasonable.

- Should targets for intervening years in the 2017-2020 be set using a linear trend:
  - 27% of retail sales by December 31, 2017;
  - 29% of retail sales by December 31, 2018;
  - 31% of retail sales by December 31, 2019; ending with
  - 33% of retail sales by December 31, 2020, and thereafter, such that the compliance period quantity for the 2017-2020 compliance period would equal in MWh: (.27 x 2017 retail sales) + (.29 x 2018 retail sales) + (.31 x 2019 retail sales) + (.33 x 2020 retail sales)?
- Should different targets for intervening years be set for either of these compliance periods? Why or why not?

See comments above. UCS agrees with the Commission that assuming a linear trend for the 2017-2020 compliance period is reasonable.

- What are the consequences, if any, of a retail seller attaining the target in the final year of the compliance period (e.g., 25% of retail sales in 2016), but failing to procure "the quantities associated with all intervening years" by the end of that compliance period?

Since § 399.15(b)(1) establishes compliance periods that are “inclusive” of the intervening years, simply reaching the renewable requirement associated with the last year in the compliance period is not sufficient. Section 399.15(b)(2)(C) require retail sellers to procure “no less than the quantities associated will *all* intervening years by the end of each compliance period” (*emphasis added*) which means that the quantities associated with intervening years are a central component of the compliance requirement.

Question #3

- How should "at least 14 percent of retail sales from eligible renewable energy resources in 2010" be interpreted?

- At least 14 percent of retail sales must come from renewable energy credits (RECs), from bundled or REC-only contracts, associated with RPS-eligible energy that was generated and delivered in 2010. *Or*
- The 14 % figure may include the allowable deferral of up to 0.25% of a retail seller's annual procurement target (APT) for 2010 under the flexible compliance rules for the 20% RPS program set out in Decision (D.) 06-10-050. *Or*
- The 14% figure may include both the allowable deferral of up to 0.25% APT and deferral of further deficits for 2010 through any allowable reason for current noncompliance, e.g. "earmarking," as set out in D. 06-10-050. *Or*
- The 14% figure may include either the deferral of up to 0.25% of APT for 2010 or deferral of further deficits through any allowable reason for current noncompliance, e.g., earmarking, but not both. *Or*
- The 14% figure should be calculated in some other way.

The Commission should interpret "at least 14 percent of retail sales in 2010" as only the actual deliveries from eligible renewable energy resources that a retail seller retired in its WREGIS account to meet its RPS compliance requirement in 2010. Actual deliveries should not include future deliveries that have not yet occurred, but had been earmarked under existing flexible compliance rules. Since banked resources represent eligible renewable energy resources that have already generated electricity (and met the delivery rules under the previous RPS program) UCS believes it is also reasonable to account for these deliveries when calculating the 14% threshold.

- How should "the deficits associated with any previous renewables portfolio standard" be interpreted? Please provide detailed support for the proposal.
    - As applying only to deficits in meeting the 2010 target of 20% of retail sales, without the use of flexible compliance; *or*
    - As applying only to the 2010 target of 20% of retail sales, using allowable flexible compliance rules in the calculation of any deficit. *Or*
    - As applying to any year in which a retail seller has an APT obligation, using allowable flexible compliance rules in the calculation of any deficit. *or*
    - Another interpretation should be used.

The phrase "deficits associated with any previous renewables portfolio standard" means that if a retail seller can verify that it procured and delivered 14% of its retail sales in 2010 from eligible renewable energy resources that have already generated the electricity (excluding earmarking), then *any* deficit associated with the 20% program shall be eliminated. If a retail

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seller does not meet the 14% requirement, then flexible rules associated with the 20% RPS program should apply and deficits pertaining to each annual procurement target ("APT") should be calculated accordingly and trigger penalties.

- How should "shall not be added to any procurement requirement pursuant to this article" be interpreted with respect to RPS procurement obligations under the 20% program?
    - Does a retail seller need to satisfy its APT requirements for all compliance years through 2010, using the current flexible compliance rules, whether or not the retail seller attained 14% of retail sales from RPS-eligible resources in 2010?
    - Is a retail seller subject to penalties for failing to satisfy its APT requirements for any compliance year(s) through 2010, in accordance with D.03-06-071, D.03-12-065, and D.06-10-050, whether or not the retail seller attained 14% of retail sales from RPS-eligible resources (defined as you proposed in 3.A, above) in 2010?

The phrase "shall not be added to any procurement requirement pursuant to this article" means that if a retail seller can verify that it procured and delivered 14% of its retail sales in 2010 from eligible renewable energy resources that have already generated the electricity (so excluding earmarking), then any deficit associated with the 20% program shall be eliminated and not factor into calculations to define the compliance requirements beginning Jan. 1, 2011. If a retail seller does not meet the 14% retail sales requirement, the retail seller must satisfy its APT requirements under the 20% RPS program using the flexible compliance rules that existed under the 20% RPS program. Any deficits are subject to penalties in accordance with D.03-06-071, D.03-012-065, and D.06-10-050.

Question #4

Should new § 399.15(b)(9) be interpreted to mean: "[d]eficits associated with the compliance period in which the deficits occur shall not be added to a future compliance period?" Should this section apply only to compliance year 2011 and future years? Why or why not?

Section 399.15(b)(9) applies to deficits associated with the compliance periods that begin on Jan. 1, 2011. SB 2 (1x) specifically forgave deficits associated with past compliance periods within the 20% RPS *only* if the retail seller generated 14% of its retail sales from eligible

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renewable energy resources in 2010. If the Legislature had wanted to forgive all deficits associated with all past and future compliance periods, it would have contained specific language to do so. Since it does not, § 399.15(b)(9) only applies to deficits associated with the three compliance periods contained in § 399.15(b)(1).

Question #5

If a retail seller has deficits from any compliance year through 2010 that must be satisfied with procurement in 2011 and/or later years, how should the requirement to satisfy the prior deficits be implemented, in light of new § 399.15(b)(9)?

Section 399.15(b)(9) only refers to deficits associated with the three compliance periods established in § 399.15(b)(1). If a retail seller accrued deficits associated with the APTs in the 20% RPS program and is not able to meet the 14% requirement that would "wipe the slate clean," then flexible compliance mechanisms should be applied, and any remaining deficits should trigger penalty proceedings.

Question #6

- How should the Commission determine the minimum quantity under new §399.13(b)? Please provide a sample calculation using the proposed method.
- Should the minimum quantity include specific minimum quantities of procurement from long-term contracts in any or all of the portfolio content categories identified in new § 399.16(b)?
- Should the minimum quantity requirement under new § 399.13(b) carry forward the requirement in D.07-05-028 that the long-term contracts for the minimum quantity must be signed in the same year as the short term contracts sought to be counted for RPS compliance? If not, what basis for accounting for the minimum quantity of long-term contracts should be used?
- Should the minimum quantity requirement under new § 399.13(b) have a termination? If so, what should the termination be?

UCS has long supported the Commission placing a priority on long-term contracts for eligible renewable energy resources because they provide a stable and long-term revenue stream for renewable energy project developers, and are therefore more likely to result in new

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renewable energy projects than short-term or REC-only contracts where the electricity is not delivered into California, and provide significant risk hedging benefits to ratepayers because they lock in stable, fixed prices over periods that exceed the shorter lengths of time for which financial hedging instruments are available. The Legislature clearly placed a higher value on long-term contracts in § 399.13(a)(4)(B), which restricts banking across compliance periods to only contracts of 10 or more years and under no circumstances allows banking of out-of-state REC-only products. UCS proposes that given the importance of long-term contracting to the development of new renewable energy projects and providing a long-term RPS compliance strategy for California ratepayers, the Commission should require that at least 75% of all the electricity products that meet the requirements of § 399.16(b)(1) or § 399.16(b)(2) should be consist of contracts that are 10 years or longer for each compliance period. The long-term contracting requirement should not have a termination date. Since REC-only products are much less likely to result in new renewable energy construction, regardless of whether they are long-term or short-term contracts, UCS does not believe a retail seller should be able to use long-term purchases that meet the requirements of § 399.16(b)(3) to meet long-term contracting requirements. As utilities begin to procure eligible renewable energy resources to meet the 2016 and 2020 compliance requirements, it is not productive to simply load up on short-term contracts that will technically achieve a requirement that will quickly taper off as the contracts expire. The intent of the RPS program is not for the utilities to reach a certain number by a certain date, but to make long-term investments in renewable electricity generation that will serve the needs of California customers and help the state transition away from dirtier fuel sources for good. This cannot be achieved if the bulk of a retail seller's RPS compliance in 2020 is met with short-term contracts that expire by 20205.

- How should deliveries in 2011 and later years from short-term contracts entered into in 2010 and earlier years, and in compliance with D.07-05-028, be treated?
- Should such deliveries be deducted from actual procurement quantities as part of the calculation of excess procurement that may be applied to a subsequent compliance period pursuant to new § 399.13(a)(4)(B)?
- Should short-term contracts entered into in 2011 but prior to the effective date of SB 2 (1x) be treated differently? Why or why not?

Nothing that UCS is proposing for long-term contracting requirements should independently render actual deliveries from eligible renewable energy resources as invalid. If short-term contracts were signed prior to June 1, 2010, the product content categories established in § 399.16b) should not apply; if the contracts were signed on or after June 1, 2010, the product content categories should apply. Banking rules associated with § 399.13(a)(4)(B) should also apply, but if the deliveries are associated with contracts were signed prior to June 1, 2010, the deliveries should "count in full" notwithstanding the banking rules. The Legislature did not include special provisions that would make short-term contracts executed prior to the effective date of SB 2 (1x) immune from minimum long-term contracting requirements, so UCS sees no reason to treat short-term contracts entered into beginning Jan. 1, 2011 differently and exclude them from the Commission's calculation of the percentage of a retail seller's portfolio that is comprised of long-term contracts. If a utility fails to meet long-term contracting requirements, it cannot be penalized on that failure alone, but take these failures into consideration as it analyzes whether to grant a compliance waiver for any deficit accrued at the end of a compliance period.

Question #7

- Please propose a method of calculating any excess procurement that may be carried over from the 2011-2013 compliance period to the 2014-2016 compliance period.
- Should the method you propose also be used for calculating any excess procurement that may be carried over from the 2014-2016 compliance period to the 2017-2020 compliance period? If not, please propose another method.

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Section § 399.13(a)(4)(B) lays out specific rules for what types of procurement can and cannot be banked across compliance periods. Retail sellers may carry over excess procurement that meets the product content categories associated with § 399.16(b)(1) or § 399.16(b)(2) as long as the contracts are for 10 or more years. For example, if a retail seller procures 200 MWh during the first compliance period, but only needs 100 to satisfy its procurement requirement, it has 100 MWh of "excess." Some or all of it may be eligible for banking based on the requirements of § 399.13(a)(4)(B):

- **45 MWh of long-term [10+ years] procurement conforming to § 399.16(b)(1)or (2)**
- 45 MWh of short-term (< 10 years) procurement confirming to § 399.16(b)(1)or (2)
- 10 MWh of procurement conforming to § 399.16(b)(3)

In this case, the retail seller would only be eligible to carry over its 45 MWh of long-term procurement meeting the requirements of § 399.16(b)(1)or (2) from one compliance period to the next. This method should be used to calculate eligible bank for all compliance periods. Under no circumstances should products meeting the requirements of § 399.16(b)(3) that are purchased in one compliance period be able to carry over into the next compliance period. The statute is very clear on this issue: "*in no event* shall electricity products meeting the portfolio content of paragraph (3) of subdivision (b) of Section 399.16 be counted as excess procurement." (*emphasis added*). Although § 399.21(a)(6) maintains that a REC can be eligible for up to 36 months from its initial date of generation, this language does not gurantee a 3-year shelf life, and certainly should not be interpreted to trump the "in no event" language in § 399.13(a)(4)(B).

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Question #9

If a retail seller did not procure at least 14% of retail sales from RPS-eligible resources in 2010, should its deficit for 2010 be calculated as a shortfall from 20% of retail sales in 2010 or from 14% of retail sales in 2010?

Any deficits associated with the 20% RPS program should be calculated against the retail seller's original annual procurement requirements associated with reaching 20% renewables by 2010.

Question #10

Should the Commission continue to apply the current flexible compliance rules to RPS procurement for 2010 and prior compliance years?

UCS believes that flexible compliance rules pertain to RPS procurement intended to satisfy compliance requirements for the 20% RPS program. Flexible compliance rules should not be applied to any procurement used to comply with the 33% RPS requirements beginning on Jan. 1, 2011.

Question #11

Since SB 2 (1x) will not become effective until, at the earliest, the last quarter of 2011, should the current flexible compliance rules apply to RPS procurement for 2011?

Since SB 2 (1x) eliminates the section of code that authorized flexible compliance rules, and compliance requirements in SB 2 (1x) and the new 33% RPS program began Jan. 1, 2011, the Commission does not have any authority to authorize the use of flexible compliance towards compliance requirements that began in 2011.

Question #12

For years after 2010, should the Commission eliminate its current rule allowing deferral of 0.25% of APT without explanation, so long as the deficit is made up within three years?

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Since SB 2 (1x) eliminated both authority to apply flexible compliance rules and annual procurement requirements, the Commission should eliminate any application of flexible compliance rules, including the ability to defer requirements without explanation.

Question #13

- For years after 2010, should the Commission eliminate its current rule allowing deferral of deficits in excess of 0.25% of APT through earmarking?

Since SB 2 (1x) eliminated both authority to apply flexible compliance rules and annual procurement requirements, the Commission should eliminate any application of flexible compliance rules, including the ability to earmark.

- How should the Commission treat RECs from contracts earmarked prior to January 1, 2011 that are received by the retail seller during the compliance period 2011-2013?
  - Should the RECs be allocated to the portfolio content categories (and their respective limits) of new § 399.16?
  - Should the RECs be allocated to the procurement categories that applied in the year in which the contract was signed? How would these categories connect to the portfolio content categories of new § 399.16?

Please address the application of new § 399.16(d) to your proposals.

Any RECs earmarked prior to Jan. 1, 2011 that come online in the 2011-2013 timeframe should either be eligible for meeting 2010 requirements (using flexible compliance rules for the 20% program) OR be eligible to meet requirements for the first compliance period of the 33% program. If these RECs are used for the 33% program, product content categories established in § 399.16(b) should apply, as should the grandfather clause that allows contracts that were signed prior to June 1, 2011 to "count in full."

Question #14

Should retail sellers be required to apply the RECs from contracts earmarked prior to January 1, 2011 that are received by the retail seller during the compliance period 2011-2013 to any deficits in meeting APT in years prior to 2011, regardless of whether the retail seller attained at least 14 percent of retail sales from eligible renewable energy resources in 2010 (new § 399.15(a))? Why or why not?

If a retail seller delivered at least 14% of retail sales from eligible renewable energy resources in 2010, all cumulative deficits associated with the 20% program are eliminated and future eligible renewable energy deliveries should be applied towards future compliance obligations. If a retail seller did not meet the 14% renewables in 2010 requirement, UCS does not believe the retail seller should be allowed to use earmarked contracts to meet the 14% requirement and have the compliance slate wiped clean for the 2010 program. In other words, the 14% requirement should be based on actual generation, not future generation. This is because the 14% requirement was intended to create a snapshot in time of a retail seller's actual deliveries for the 20% RPS program.

Question #16

- To what obligation should a penalty apply?
- Should the penalty amount of $0.05/kWh be changed? If so, what method should be used to set a new penalty amount?
- For compliance periods beginning in 2011, should a penalty cap be in place?
- If a penalty cap is imposed, should it cover an entire compliance period?
- What method should be used to set a new penalty cap under SB 2 (1x)?

Penalties should apply to the entire cumulative requirements established in § 399.15(b). Given the new "waiver process" established in § 399.15(b)(5), the Commission is required to conduct an analysis, based on evidence presented by the retail seller, regarding whether a deficit has accrued for reasons "beyond the control of the retail seller…" Regardless of whether the Commission determines the deficit is the retail seller's fault or not, the retail seller will not be required to make up the electricity generation in a subsequent compliance period. Presumably, if the Commission determines that the retail seller is clearly at fault for a deficit, those deficits

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would trigger the penalty authority the Commission has under § 2113. Although UCS sees no reason at this time to revisit the specific penalty amounts associated with each kWh of non-compliance, the annual penalty cap should be revised to reflect the fact that compliance requirements are no longer annual. In addition, UCS suggests that since the Commission is now required analyze whether the deficit was beyond the control of the retail seller, and deficits will no longer carry over into future compliance periods, any deficits deemed within the control of a retail seller should result in automatic penalties. Upfront analysis to understand the circumstances that have led to a deficit will have already occurred at this point, and without an automatic penalty, combined with no requirement to make up shortfalls in the future, UCS believes retail sellers will more motivated to hire lawyers to fight penalty proceedings rather than take the extra steps to ensure timely compliance.

Question #17

Please identify how the Commission would verify compliance with any proposal you have made, above. Please provide specific mechanisms and examples.

RPS compliance is measured in generated electricity to meet cumulative generation requirements and product content category limitations established for the three compliance periods: 2011-2013, 2014-2016, 2017-2020. Specific verification procedures for each product content category established in § 399.16(b) were the subject of recent comments and are still an evolving issue and UCS believes that ultimately, RPS verification should be done by the Energy Commission. Please see UCS's initial and reply comments on the RPS product content categories for details.

Question #19

The First Extraordinary Session of the Legislature is still in session. Because SB 2 (1x) becomes effective 90 days after the end of this special session, the provisions of SB 2 (1x) will not be in effect

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until mid-October 2011, at the earliest. In light of this, please review your proposals and identify any issues of timing that should be addressed. Should the Commission simply carry forward the existing RPS rules through calendar year 2011? Why or why not?

SB 2 (1x) establishes a 33% RPS program with a three-year compliance period that began on Jan. 1, 2011. All obligated utilities should be procuring to meet these requirements and the Commission should not apply existing RPS rules that were explicitly eliminated in the 33% RPS program (like flexible compliance rules) towards procurement that is meant to satisfy compliance requirements for the 33% program.

Respectfully submitted,

Laura Wisland
UNION OF CONCERNED SCIENTISTS
2397 Shattuck Avenue, Suite 203
Berkeley, CA 94704
Phone: (510) 843-1872
Facsimile: (510) 843-3785
E-Mail: lwisland@ucsusa.org

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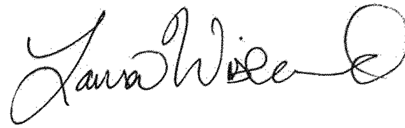
VERIFICATION

I, Laura Wisland, am a representative of the Union of Concerned Scientists and am authorized to make this verification on the organization's behalf. The statements in the foregoing document are true to the best of my knowledge, except for those matters which are stated on information and belief, and as to those matters, I believe them to be true.

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

Executed on August 30, 2011 in Berkeley, California.



Laura Wisland