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 R.11-05-005

COMMENTS OF THE GREEN POWER INSTITUTE ON THE ALJ'S RULING REQUESTING COMMENTS ON TARGETS AND COMPLIANCE

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COMMENTS OF THE GREEN POWER INSTITUTE ON THE ALJ'S RULING REQUESTING COMMENTS ON TARGETS AND COMPLIANCE

Pursuant to the July 15, 2011, *Administrative Law Judge's Ruling Requesting Comments on New Procurement Targets and Certain Compliance Requirements for the Renewables Portfolio Standard Program*, in Proceeding R-11-05-005, the **Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program**, the Green Power Institute, a program of the Pacific Institute for Studies in Development, Environment, and Security (GPI), provides these *Comments on Targets and Compliance*, which address the questions posed in the *Ruling*.

This *Ruling* is focused on some of the most significant changes to the state's RPS program that are contained in SB 2 (1x), the 33-percent RPS legislation that was passed and signed earlier this year. The *Ruling* poses 19 questions, which we address by question number without restating the questions, per instructions in the *Ruling*. We address selected questions from the *Ruling*.

1. Yes. The current RPS program is designed to achieve a target (20 percent) in 2010, and maintain thereafter. The new RPS explicitly begins in 2011, and is designed to achieve a target (33 percent) in 2020 and maintain thereafter. It is logical to use Jan. 1, 2011, as the transition point to the new regime, since that is clearly how the new legislation is written. However, it is already the end of August, and the new law has still not taken effect, and won't before mid-October at the earliest. In fact, it is even possible that the special session of the legislature that passed the new law could remain in session throughout 2012. Our advice is to proceed on the assumption that the new law will be enacted in time to allow the official transition point to remain 1/1/11 as planned, but be prepared to move it back a year if necessary. The good news is that the procurement target for 2011 is the same, 20 percent, in both systems. Thus adjustments that may become necessary when the date of enactment finally becomes clear will be minimized.

Regardless of what date is used as the transition point from the old program to the new program, the special provision in new § 399.15 (a) will not be a factor because, according to their March, 2011, *RPS Compliance Reports*, none of the three IOUs will be encumbered by any residual procurement deficits from the original RPS program at the completion of compliance year 2010. The special provision deals with a possible carryover of deficits from the old RPS program to the new program.

2.A. Yes. The compliance targets for intervening years in the 2011-2013 compliance period should be set at 20% of retail sales for each year. Utilities are not relieved of compliance obligations in the intervening years. Specific compliance targets will provide utilities and regulators with the requisite indicators for determining compliance for the aggregate compliance period.

The language of the new § 399.15(b)(2)(B) states, "for the compliance period from January 1, 2011, to December 31, 2013, inclusive, the commission shall require procurement for each retail seller equal to an average of 20 percent of retail sales." the use of multi-year compliance periods allows retail sellers to balance good renewables years with poor years, and to adjust to some of the chunkiness in renewables production related to new generating-facility startups, and old facility shutdowns. The procurement obligation for the first compliance period should be based on twenty percent of aggregate sales over the entire three-year compliance period.

2.B. As stated above, utilities are not relieved of compliance obligations during intervening years. Thus, a linear escalating schedule showing that a utility is making "demonstrable progress" towards meetings its compliance period obligations would remove any potential ambiguity regarding compliance or non-compliance during intervening years.

In regards to the specific schedules offered for the 2014-2016 and 2017-2020 compliance periods, a regularly increasing linear schedule provides sound guidance to the utilities for maintaining compliance. The exact quantities of the regular increases are not as relevant as the fact that there are regular increases. For the 2014-2016 period, if the Commission

wanted to introduce more uniformity to the regular target increases, it could increase the RPS target by 1.66 percent per year, instead of the 1.5 percent increase from 2013 to 2014, the 2 percent increase from 2014 to 2015, and the 1.5 percent increase from 2015 to 2016. We are not recommending any change to the 2-percent increases that starting in 2017.

2.C. The new RPS program's compliance program is based on using three-year block-compliance periods. The consequences of non-compliance for any of the three multi-year block-compliance periods (2011 – 2013, 2014 – 2016, 2017 – 2020) specified in the new legislation should be whatever consequences are imposed by the Commission in this rulemaking (see answers to question nos. 16 & 17 below). Compliance is not based on just the last year of a compliance period alone. It is simply a matter that the legislation happens to specify the target for the final year of each period, leaving it to the Commission to set the targets for the intervening years.

3.A. According to the 2011 RPS Procurement Performance Report, SCE and PG&E are over 14 percent for 2010 (19.4% and 17.7%, respectively), and SDG&E is under (11.9%). Thus, this section effectively targets SDG&E, regardless of exactly how the calculation is performed. Thus, how the CPUC calculates the 14% is not as relevant as ensuring the efficacy of the previous RPS program, i.e., making sure that any earmarked energy for the previous program not be double-counted under the new 33% RPS. To do away with any residual deficits, and to allow previously allocated energy to be counted towards the new 33% RPS program would effectively negate the initial phase (2003 – 2010) of the California RPS program.

3.B. Although the state's two largest IOUs have run large operating-year RPS-procurement deficits for the past five straight years, no enforcement action has ever been pursued. The reason is that the flexible-compliance rules, which became increasingly flexible over the course of the first decade of the RPS program, have allowed all of the utilities to achieve program-compliance targets for every year that the program has been in effect (2003 – 2010). In other words, once all of the scheduled flexible-compliance transfers, as described in the March, 2011, *RPS Compliance Reports*, have been executed,

including banking and earmarking transfers, there will be no residual compliance deficits to worry about. These transfers involve renewable energy that will be generated during the 2011, 2012, and 2013 calendar years.

3.C. Retail sellers do have to satisfy their obligations for the program that ran through 2010, as they have proposed to do in their March, 2011, *RPS Compliance Reports*. Although probably not relevant, since there should not be any residual procurement deficits from the pre-2011 program (see answer to 3.B above), the last part of the phrase, "pursuant to this article," means that it should apply to the new RPS program, which begins in 2011, and thus is not relevant to the earlier program that is being replaced by SB 2 (1x).

4. Deficits should not be excused simply because the state enters a new compliance period. Instead, the deficits should be addressed as they arise, either via penalties or via earmark and banking transfers if it is for the pre-2011 program. New § 399.15 (b)(9) pertains to the new RPS program (beginning 2011), and substitutes multi-year compliance periods for the flexible-compliance regime that was used in the earlier version of the RPS program. Procurement deficits, if any, do not carry over in the new program. They are subject to appropriate enforcement action.

5. The original 20-percent RPS program and the new RPS program are two distinct programs running consecutively. They should not be conflated. Therefore, obligations from the initial phase of the program (2003 – 2010) should not be excused; rather the prior operating-year deficits must be met with earmarks and banked energy or penalties. Likewise, the 33 percent RPS should not negate the initial program, nor the utilities' pre-existing deferred compliance obligations. Double-counting of renewable energy must be avoided. New § 399.15 (b)(9) pertains to the new RPS program (beginning 2011), and specifies that there will be no carryover of deficits between the three defined block-compliance years of the new program (2011 – 2020). In any case, satisfying earmarking obligations from the initial version of the RPS program does not represent a carryover of a deficit.

7. As a matter of principle, the GPI is a long-time supporter of forward banking of RPS over-procurement. We have never seen any reason not to incentivize any and all efforts to procure renewable energy, including procurement in excess of minimum obligations, and forward-banking rights is an obvious way to do that. Determining the amount of over-procurement is relatively straightforward as long as the Commission uses multi-year, block-compliance periods, as specified in the SB 2 (1x) (see our answer to question no. 16 below). Compliance is based on procurement during each defined block period, and if there is excess procurement from the aggregate block, it should be bankable into the next block, subject to the contract-type restrictions in the legislation.

8. We believe that question no. 8 refers to the possibility of banking excess procurement accumulated prior to 2011, for use in meeting compliance obligation in one of the three defined block-compliance periods for 2011 – 2020. In fact, it is now August of 2011, and it is well known that there simply is no excess procurement from the initial phase of the RPS program (2003 – 2010) to account for.

9. By statute, all retail sellers had an APT for 2010 of 20 percent. For any retail seller that failed to achieve twenty percent in 2010, even after all applicable flexible compliance mechanisms are applied, the deficit is calculated based on the 20-percent target level, as specified by statute. The 14-percent clause only pertains to the transfer of residual deficits from the original RPS program, running through 2010, to the new RPS program, which begins in 2011.

10. Yes. The new legislation creates a new program that begins in 2011. It does not in any way alter or negate the program that ran from 2003 – 2010.

12. There is no point in having a rule allowing certain amounts of deferrals in a system that does not allow deferrals.

13. The Commission should eliminate or modify all rules regarding deferrals of deficits for the new RPS program's compliance program, as by statute deficits may not be deferred.

One of the most basic principles underlying the RPS program is that RECs can be used only once for one purpose, and can never be double counted. RECs that are generated during the compliance period 2011 – 2013 that have been earmarked to count towards a compliance obligation for a pre-2011 compliance period are **not** available for counting during the compliance period 2011 – 2013. Thus, there is no need to worry about the issue of procurement categories for these RECs in the context of the new statute. These RECs are not applicable towards the new RPS program and its first, 2011 – 2013 compliance period.

14. Yes. Retail sellers should fulfill all steps necessary to complete their obligations under the original RPS program, regardless of whether they achieved 14 percent renewables in operating-year 2010. Their use of flexible compliance instruments allowed them to avoid fines and penalties that would have been imposed in the absence of the flexible-compliance tools over the course of the program. Indeed, if the 14-percent provision is used to excuse the retail providers from fulfilling their obligations under the original RPS program, that would, in effect, negate the entire program. We do not believe that that is the intent of the new law.

If the RECs necessary for fulfilling pre-2011 compliance obligations were used for satisfying compliance obligations for the 2011 – 2013 compliance period, that would represent double counting. The 14-percent rule pertains to unfulfilled, pre-2011 obligations after flexible compliance. The way that the compliance system works for the pre-2011 program is that in March of the year following a compliance year the retail sellers file a procurement report that includes a demonstration of how they will fulfill their compliance obligations for the just-completed year. Three years later the CEC can perform its compliance-verification function, after all necessary flexible-compliance transfers are completed.

16. Our understanding of the compliance system that is envisioned for the new RPS program is that compliance is determined based on each retail seller's procurement performance during defined, multi-year block periods. Compliance is based on the

aggregate performance during the block, not on the individual years within the block. For example, for the 2011 – 2013 compliance period, for which the procurement target is 20 percent during each of the three years, the retail seller will determine its aggregate RPS procurement during the period, and divide it by its aggregate sales, to determine whether it achieved 20 percent over the course of the compliance period. If the annual procurement targets for individual years within future procurement blocks vary, the calculation becomes slightly more complicated, but it is still standard math.[1] There are no flexible compliance mechanisms available in the new system to allow transfers between compliance periods. In our opinion that is an improvement. In the old system compliance was so flexible that retail sellers were able to wrack up a series of spiraling operating-year deficits and never face consequences. We hope that the new program will be sufficiently robust to achieve the intended programmatic results.

We do not have a strong opinion about the correct penalty amount ($/kWh) to impose for under-procurement. Penalties should be imposed for total under-procurement during a given multi-year, block-compliance period. We do have a concern about the imposition of a cap on the penalty amount, particularly given the fact that the penalties will be imposed on a multi-year, compliance-period basis. In the old program, if there had not been flexible compliance mechanisms available and penalties had been assessed on the basis of operating-year performance, nearly all of the time the cap would have kept the actual penalty amounts assessed far below $0.05/kWh, in some years as low as $0.01/kWh.

17. The GPI's proposed compliance and penalty determination can be verified using the same basic approach as is currently used for the pre-2011 program, simply expanding the determination to a multi-year calculation. On the positive side, there would no longer be a need to wait three years beyond the completion of the compliance period in order to allow for carry-backs associated with banking and earmarking.

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[1] Compliance-period target amount = sum over the years of the compliance period [sales * target]
Compliance-period procurement = sum over the years of the compliance period [annual procurement]
For compliance, the compliance period procurement must be greater than or equal to the compliance-period target amount.

18. WREGIS Certificates (RECs) that are certified compliant in California will be used as the counting instruments for verifying compliance with RPS requirements.

19. It is logical to use Jan. 1, 2011, as the transition point to the new regime, since that is clearly how the new legislation is written. However, it is already the end of August, and the new law has still not taken effect, and won't before mid-October at the earliest. In fact, it is even possible that the special session of the legislature that passed the new law could remain in session through 2012. Our advice is to proceed on the assumption that the new law will be enacted in time to allow the official transition point to remain 1/1/11 as planned, but be prepared to move it back a year if necessary. The good news is that the procurement target for 2011 is the same, 20 percent, in both systems, meaning that adjusting the transition point, if necessary, will not be as difficult as it otherwise might be.

Dated August 30, 2011

Respectfully Submitted,

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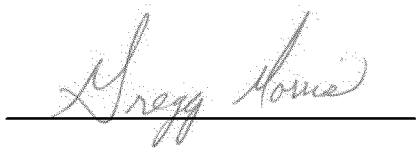
VERIFICATION

I, Gregory Morris, am Director of the Green Power Institute, and a Research Affiliate of the Pacific Institute for Studies in Development, Environment, and Security. I am authorized to make this Verification on its behalf. I declare under penalty of perjury that the statements in the foregoing copy of *Comments of the Green Power Institute on the ALJ's Ruling Requesting Comments on Targets and Compliance*, filed in R.11-05-005, 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.

Executed on August 30, 2011, at Berkeley, California.



Gregory Morris