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)

SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E) OPENING COMMENTS ON JULY 15, 2011 RULING REQUESTING COMMENTS ON NEW PROCUREMENT TARGETS AND CERTAIN COMPLIANCE REQUIREMENTS FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

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August 30, 2011

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I.
INTRODUCTION AND BACKGROUND

In accordance with the Rules of Practice and Procedure of the California Public Utilities Commission (the "Commission" or "CPUC") and the *Administrative Law Judge's Ruling Requesting Comments on New Procurement Targets and Certain Compliance Requirements for the Renewables Portfolio Standard Program* dated July 15, 2011 (the "ALJ Ruling"), San Diego Gas & Electric Company ("SDG&E") hereby submits these comments in response to questions set forth in the ALJ Ruling regarding implementation of new procurement targets and certain compliance requirements for the Renewable Portfolio Standard ("RPS") program.

Senate Bill ("SB") 2 (1X) ("SB 2") was signed by the Governor in April, 2011, and will become effective 90 days after the conclusion of the Legislature's 2011-2012 First Extraordinary Session.[1/] SB 2 makes numerous modifications to the RPS Program, including, *inter alia*, replacing the current requirement that retail sellers serve 20% of retail load with renewable energy by the end of 2010 with a requirement to serve 33% of retail load with renewable energy by the end of 2020. The ALJ Ruling seeks comments relating to new procurement targets and

[1/] SB 2 (1X) (Stats. 2011, Ch. 1).

compliance requirements for the RPS program. It sets forth 19 specific questions that relate to the following general areas of inquiry:

1. Setting new RPS procurement requirements pursuant to new § 399.15(b), particularly the compliance obligations of RPS-obligated retail sellers for the period 2011-2013, the first compliance period in the new 33% RPS regime.

2. Changing the compliance obligations of RPS-obligated retail sellers through 2010.

3. Developing basic RPS compliance accounting for 2011 and later years, including "banking" rules and minimum quantity of long-term contracts.[2/]

The ALJ Ruling establishes four guiding principles for implementation of the RPS compliance obligations and accounting provisions of SB 2;[3/] SDG&E generally supports the guiding principles outlined in the ALJ Ruling and, in particular, agrees that it is critical to ensure that implementation is fair and that it protects RPS market certainty.

As discussed below, it is SDG&E's general view that the compliance framework adopted pursuant to SB 2 is intended to replace the existing RPS compliance framework in its entirety beginning in the 2011 compliance year. That is, the compliance obligations and accounting processes developed under the SB 2 program will apply as of January 1, 2011, without reference

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[2/] ALJ Ruling, p. 2.

[3/] The ALJ Ruling establishes the following four guiding principles:

1. Parties' proposals should further the fair, efficient, and transparent administration of the RPS program. In particular, proposals should facilitate efficient contract review by Energy Division staff; straightforward calculation of RPS compliance obligations; and ease of verifying retail sellers' reports on their RPS compliance.

2. Proposals should lead to RPS market certainty, to the extent possible.

3. Proposals should, to the extent possible, address and resolve issues raised by the transition from the current RPS program to the RPS program as it will be administered pursuant to SB 2 (1x).

4. Proposals should avoid creating new issues in the transition between the current RPS program and the RPS program as it will be administered pursuant to SB 2 (1x).

ALJ Ruling, pp. 3-4.

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to the prior program. SDG&E addresses this issue and provides specific responses to each of the questions set forth in the ALJ Ruling below.

II.
RESPONSES TO ALJ RULING QUESTIONS

The Supreme Court of California has made clear that in construing a statute to ascertain the intent of the Legislature, the Commission must first and foremost give effect to the plain meaning of the language in the statute.[4/] The Commission has explained that under the most fundamental rules of statutory interpretation, "[f]irst, one looks to the plain language of the statute. If the language is unambiguous, then the language controls and the inquiry is over. Otherwise, one proceeds to the legislative history. The final step -- and one which we believe should only be taken when the first two steps have failed to reveal clear meaning -- is to apply reason, practicality, and common sense to the language at hand."[5/] Accordingly, SDG&E's responses below rely upon an interpretation of the plain language of SB 2, taking into account the guiding principles set forth in the ALJ Ruling.

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)?) Please provide detailed support for your position.**

RESPONSE: Yes. The procurement and flexible compliance rules for the 20% RPS program should apply through December 31, 2010; the 33% RPS program rules should apply beginning January 1, 2011.

4/ *See Collection Bureau of San Jose v. Rumsey*, 24 Cal.4th 301, 310 (2000) ("Absent a compelling reason to do otherwise, we strive to construe each statute in accordance with its plain language.").

5/ D.04-04-020, *mimeo*, p. 4 (internal citations omitted).

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It is clear that the RPS program rules established under SB 2 are intended to apply as of January 1, 2011. New § 399.15(b)(1)(A), for example, expressly provides that the first compliance period begins on January 1, 2011. Similarly, new § 399.13(a)(4)(B) provides that the SB 2 procurement bank is calculated beginning January 1, 2011, upon commencement of the new RPS program.

It is equally clear that SB 2 does not operate to modify the procurement and flexible compliance rules associated with the 20% RPS program, which remains in effect through December 31, 2010. The Commission has acknowledged that retroactive regulation is generally disfavored.[6/] Retroactive application of new regulations undermines regulatory certainty, has a destabilizing effect on markets and offends basic principles of fairness and due process. In the case of RPS compliance, retail sellers relied upon the regulatory framework in place in 2010 in determining their RPS compliance strategy for that compliance year. *Ex post facto* revision of the rules in effect for 2010 compliance would represent a flagrant violation of Commission policy and would directly contravene the Commission's guiding principles for implementation of SB 2 by undermining fairness, disturbing regulatory certainty and creating new issues in the transition between the current RPS program and the RPS program administered pursuant to SB 2. Accordingly, the Commission should make clear that for purposes of assessing compliance with the 20% RPS program goals, the procurement rules and full range of flexible compliance measures available under the 20% RPS program apply through December 31, 2010.

2. New § 399.15(b) establishes new RPS compliance targets and provides instructions to the Commission about implementing them.

a. New § 399.15(b)(2)(B) states that "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

6/ *See, e.g.,* D.02-01-001, *mimeo*, p. 8.

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sales. For the following compliance periods, the quantities shall reflect reasonable progress in each of the intervening years sufficient to ensure that the procurement of electricity products form eligible renewable energy resources achieves 25 percent of retail sales by December 31, 2016, and 33 percent of retail sales by December 31, 2020…"

- **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**
  - ➢ **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)?**

RESPONSE: Yes. The targets set forth above are consistent with the approach contemplated in new § 399.15(b)(2)(B). As is discussed in more detail below, it is important to note that intervening year targets are intended to operate as "soft targets" that are not enforceable by the Commission.

- **Should different compliance targets for intervening years be set for this period? Why or why not?**

RESPONSE: Please see above response

- **Should no compliance targets for intervening years be set for this period? Why or why not?**

RESPONSE: Please see above response

b. **For the compliance period 2014-2016 and 2017-2020, the Commission is required to set compliance period quantities that "reflect reasonable progress in each of the intervening years sufficient to ensure that the procurement of electricity products form eligible renewable energy resources achieves 25 percent of retail sales by December 31, 2015, and 33 percent of retail sales by December 31, 2020"**

- **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**

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

- **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?**

RESPONSE: SDG&E does not support adoption of linear trend targets for the 2014-2016 and 2017-2020 compliance periods. Imposition of linear trend targets ignores the practical realities of energy procurement, which is inherently "lumpy" with generation projects coming online in a staggered, non-linear fashion. Moreover, establishing aggressive annual targets creates a "sellers market" that places upward pressure on prices, to the detriment of utility ratepayers. Accordingly, SDG&E supports post-2013 intervening year targets that that increase by 1% per year and then "jump" to meet the RPS targets for years 2016 and 2020 as a more reasonable approach that balances the need for "reasonable progress" against the need to ensure necessary flexibility in RPS procurement. This approach is illustrated in Table 1 below.

Table 1

RPS Target	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**
	20%	20%	20%	21%	22%	25%	26%	27%	28%	33%
	20% average			22.7% average			28.5% average			

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c. **New section 399.15(b)(2)(C) provides that "[r]etail sellers shall be obligated to procure no less than the quantities associated with all intervening years by the end of each compliance period. Retail sellers shall not be required to demonstrate a specific quantity of procurement for any individual intervening year."**

- **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?**

RESPONSE: It is clear from the plain language of new § 399.15(b)(2)(C) that retail sellers are not required to demonstrate compliance with intervening year targets and therefore are not subject to penalties for failure to achieve individual compliance year targets. The non-enforceable nature of the intervening year targets is also evident from the analysis of SB 2 prepared for the Energy, Utilities and Communications Committee of the California State Senate:

> **This bill eliminates the annual goal and replaces it with the three compliance windows of an average of 20% between 2011 and 2013, 25% by 2016 and 33% by 2020**. The compliance periods were intended to reflect the realities of electricity procurement which does not come online in regular intervals, tends to be lumpy and to come online in chunks when new generation is interconnected. Given that the utilities must show progress toward 33% during each of the three compliance periods, **the need for the CPUC to set interim goals within each compliance period is not apparent and not reflective of the procurement process**.[7/]

Intervening year targets are intended to operate as "soft targets" that assist the Commission in monitoring progress toward the "hard target" compliance goals in 2013 and 2020.[8/] Thus, if an RPS-obligated LSE fails to achieve the soft target in an intervening year, the Commission may not take enforcement action, such as imposing penalties, but may take non-

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7/ Bill Analysis dated February 15, 2011 prepared for the Energy, Utilities and Communications Committee of the California State Senate, p. 8.

8/ New § 399.11(a) states that the RPS program is intended to "attain a target of generating 20 percent of total retail sales of electricity in California from eligible renewable energy resources *by December 31, 2013* and 33 percent *by December 31, 2010*."

punitive measures such as conferring with the LSE for the purpose of assessing and quantifying challenges to achieving the 33% RPS target.

3. **New section 399.15(a) provides that "[f]or any retail seller procuring at least 14 percent of retail sales from eligible renewable energy resources in 2010, the deficits associated with any previous renewables portfolio standard shall not be added to any procurement requirement pursuant to this article."**

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

      1) **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***
      2) **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***
      3) **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***
      4) **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***
      5) **The 14% figure should be calculated in some other way. Please provide detailed support for the proposed calculation.**

RESPONSE: As a starting point for the discussion of the 14% showing, it is important to note that the 14% showing contemplated in new § 399.15(a) is required *only* where an RPS-obligated LSE has a deficit associated with any previous renewables portfolio standard.[9/] The need for the 14% showing is premised on the existence of "deficits associated with any previous renewables portfolio standard." Thus, where no such deficits exist through 2010 – *i.e.*, where a retail seller has satisfied its RPS compliance obligations though application of the procurement

[9/] *See* § 399.15(a) ("For any retail seller procuring at least 14% of retail sales from eligible renewable energy resources in 2010, *the deficits associated with any previous renewables portfolio standard* shall not be added to any procurement requirement pursuant to this article.") (emphasis added).

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and flexible compliance rules in existence at the time that compliance was measured – there is no need to make the 14% showing.

The above question seeks to explore what, if any, flexible compliance mechanisms may be relied upon in making the 14% showing. A threshold inquiry is whether the 14% showing is governed by the 20% program procurement and flexible compliance rules, or instead by the 33% program procurement and flexible compliance rules. Since the 14% showing relates to the 2010 compliance year, it is reasonable to conclude that the rules (including flexible compliance measures) associated with the 20% program apply and should be used to calculate the 14% showing. It is equally reasonable to conclude, however, that the 14% showing is a construct of SB 2 and should therefore be considered in light of the program rules (and reduced flexible compliance options) existing under that legislation. Regardless of which RPS program rules – 20% or 33% – are applied in the context of the 14% showing, the Commission must permit a retail seller making the 14% showing to use the flexible compliance methods available under the relevant RPS program.

The first interpretation proposed above would require that the 14% showing "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." This interpretation, which would require a retail seller to rely entirely on energy delivered in 2010 and would entirely eliminate the ability to rely upon flexible compliance to meet the 14% target, is overly restrictive. Under new § 399.15(a), a retail seller making the 14% showing must demonstrate that it procured "at least 14 percent of retail sales *from eligible renewable energy resources* in 2010." (Emphasis added). Apart from the percentage value, this language mimics the prior § 399.11(a), which required retail sellers to "attain a target of generating 20 percent of total retail

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sales of electricity in California *from eligible renewable energy resources* by December 31, 2010." (Emphasis added). Similarly, the new § 399.11(a) requires retail sellers to "attain a target of generating 20 percent of total retail sales of electricity in California *from eligible renewable energy resources* by December 31, 2013." (Emphasis added).

Thus, under new § 399.15(a) a retail seller must demonstrate satisfaction of the 14% procurement requirement in exactly the same manner that it demonstrates compliance with either the 20% or 33% procurement requirements. In other words, under both the 20% and 33% RPS programs, a retail seller could satisfy the requirement to attain a specified percentage of total retail sales "from eligible renewable energy resources" through a combination of 2010 deliveries and flexible compliance. Therefore, it is logical to conclude that a retail seller can demonstrate that it attained 14% of total retail sales "from eligible renewable energy resources" through a combination of 2010 deliveries and flexible compliance. The specific flexible compliance measures available to a retail seller making the 14% showing would depend upon which RPS program rules are determined to apply to calculation of the 14% showing. If the 14% showing is made according to the 20% program rules, the flexible compliance rules applicable to the 20% program would apply; if, on the other hand, the 14% showing is made according to the 33% program rules, the flexible compliance rules applicable to the 33% program would apply.

Under both the 20% and 33% program rules, it is clear that 2010 deliveries and banked procurement may be used by a retail seller to demonstrate compliance with the RPS procurement targets.[10] Accordingly, for purposes of the 14% showing, retail sellers must be permitted to use both 2010 deliveries and banked procurement to demonstrate satisfaction of the 14% target. Since the 14% showing relates to the 2010 compliance year, the relevant procurement bank for

[10] Banking is permitted in the 33% program pursuant to new § 399.13(a)(4)(B); banking is permitted in the 20% program pursuant to § 399.14(a)(2)(C)(i).

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purposes of the 14% showing is the procurement bank available in 2010. This would be the case even if the Commission concludes the 14% showing is governed by the 33% program rules since, as a practical matter, the 14% showing must draw from the procurement bank actually available in 2010 rather than the procurement bank available in some other year.

With regard to the applicability of the other flexible compliance measures referenced above – *i.e.*, deferral of up to 0.25% of a retail seller's APT and deferral of further deficits for 2010 through "earmarking" – the availability of these tools for the 14% showing depends upon whether the 20% or 33% RPS program rules apply. If the Commission concludes that the 20% program rules apply, the 14% showing could incorporate deferral and earmarking. If the Commission instead concludes that the 33% program rules apply, deferral and earmarking could not be relied upon to demonstrate satisfaction of the 14% target.

c. 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;**

RESPONSE: This interpretation has no basis in law. SB 2 includes no provision altering the method of determining compliance under the existing 20% RPS program for 2010 or any prior year. Accordingly, the current rules remain unchanged and in effect through December 31, 2010. It is clear that under the statutory framework governing the 20% program, retail sellers may rely on flexible compliance measures (including banking, deferral and earmarking) to meet RPS procurement targets. Thus, the proposed interpretation, which would require compliance in 2010 without use of flexible compliance measures, must be rejected as flawed and unlawful.

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- **As applying only to the 2010 target of 20% of retail sales, using allowable flexible compliance rules in the calculation of any deficit.**

RESPONSE: The above interpretation is reasonable. In referring to “deficits” associated with previous RPS programs, the provision should be interpreted as referring to 2010 deficits associated with the prior renewable procurement standard, which required retail sellers to achieve 20% by 2010. The notion of SB 2 as a “clean slate” mechanism that recognizes the challenges faced by retail sellers in achieving RPS compliance supports this interpretation. In other words, SB 2 operates to re-set retail sellers’ RPS compliance obligation; SB 2 does not contemplate stringent enforcement of prior RPS requirements.

- **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.**

RESPONSE: This interpretation is flawed in that the provision clearly refers to prior “renewable portfolio standards” and not “annual procurement targets set forth under prior renewable portfolio standards”. The intent of the provision is plainly to determine whether a retail seller reached the compliance target set forth in the prior renewable procurement standard, which was 20% by 2010.

d. 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 (defined as you proposed in 3.A, above) in 2010?**

RESPONSE: New § 399.15(a) plainly states that the 14% showing is intended to cure “deficits associated with any previous renewables portfolio standard.” Requiring a retail seller to satisfy procurement targets through 2010 would eliminate the possibility that deficits associated

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with a previous RPS program would exist, which would make the 14% showing provision superfluous. The rules of statutory construction make clear that "every word, phrase or provision is presumed to have been intended to have a meaning and perform a useful function."[11/] If a particular construction would render a statutory provision ineffective and meaningless, that construction must be rejected.[12/] Accordingly, the Commission cannot enforce an interpretation of § 399.15(a) that would require retail sellers to comply with RPS procurement targets through 2010 *and* make the 14% showing under § 399.15(a).

- **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?**

RESPONSE: It is clear under § 399.15(a) that a showing that a retail seller has attained 14% of retail sales from RPS-eligible resources cures any deficits existing under the previous RPS program. Thus, if a retail seller has made the 14% showing, it should not be subject to penalties for failure to satisfy APT requirements under the 20% program.

If a retail seller failed to achieve its RPS target in 2010, but cannot make the 14% showing, new § 399.15(a) would add the deficits associated with the prior RPS program to the procurement requirement established under SB 2. New § 399.15(a) omits any discussion of imposition of penalties for deficits associated with prior RPS programs. Under the governing principles of statutory construction, "the expression of one thing in a statute ordinarily implies the exclusion of other things."[13/] Moreover, as noted above, SB 2 is intended to address the compliance challenges faced by retail sellers under the 20% RPS program; it essentially re-sets

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[11/] *Rosenfield v. Superior Court,* 143 Cal. App. 3d 198, 202 (1983).
[12/] *Id.*
[13/] *In re J.W.*, 29 Cal. 4th 200, 209 (2002).

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the RPS goals for retail sellers. Imposition of penalties for failure to meet past RPS goals would ignore and contravene the intent of the statute.

Finally, in order to assess penalties for pre-2011 deficits, the Commission, which tracks compliance with annual RPS targets, and the California Energy Commission ("CEC"), which verifies compliance with annual RPS targets, would be required to engage in accounting and verification efforts related to pre-2011 RPS compliance at the same time that both agencies are working to implement the comprehensive new RPS legislation set forth in SB 2. In addition, since, as the Commission has previously acknowledged, imposition of penalties for RPS procurement deficits is not automatic,[14/] it would be necessary for the Commission to initiate enforcement proceedings against each retail seller with a deficit, which would involve evaluation of the circumstances related to the deficit and would likely be a complex and time-consuming process. Given the "clean slate" approach adopted in SB 2, and the significant administrative burden associated with imposition of penalties for pre-2011 deficits, the Commission should not seek to impose penalties for failure to satisfy RPS procurement targets for any compliance year(s) through 2010.

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?**

RESPONSE: Yes, the plain language of new § 399.15(b)(9) supports interpretation of the provision to mean "[d]eficits associated with the compliance period in which the deficits occur shall not be added to a future compliance period." In order to avoid rendering the 14% showing provision of new § 399.15(a) meaningless, new § 399.15(b)(9) must be interpreted as applying to compliance year 2011 and future years.

[14/] *See* D.03-12-065, *mimeo*, p. 8.

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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)?

RESPONSE: SDG&E understands this question to be referring to "earmarking" under the 20% program flexible compliance rules. New § 399.15(b)(9) is not relevant to earmarking under the 20% RPS program; the provision refers to deficits associated with a "compliance period" and is, thus, relevant only to the 33% RPS program.

Earmarking is a flexible compliance mechanism approved under the 20% RPS program that permits a retail seller to demonstrate compliance with an RPS target by designating future deliveries to satisfy a deficit in a particular compliance year.[15/] While, under the 20% RPS program, earmarking was intended to have a future effect (*i.e.*, deduction from deliveries counted in future years), SB 2 makes no provision for carrying the earmarking accounting into the new RPS program. This is similar to the elimination under new § 399.13(a)(4)(B) of the pre-2011 procurement bank for purposes of the 2011-2013 compliance period and beyond.[16/] This approach reflects the impracticability of incorporating legacy elements of the 20% program, with the attendant accounting requirements, into the comprehensive reengineering of the RPS program accomplished through SB 2. Implementation of the new 33% RPS program is intended to "close the book" on the prior program, with the result being that earmarking of future deliveries, as well as the pre-2011 procurement bank, cease to be relevant in the new framework.[17/] Accordingly, future deliveries earmarked under the 20% program should be

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15/ *See* D.05-07-039, *mimeo*, Ordering Paragraph 14.

16/ New § 399.13(a)(4)(B) provides that the procurement bank under the 33% program accumulates "beginning January 1, 2011."

17/ As discussed herein, the pre-2011 bank may be used to satisfy the 14% in 2010 showing.

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counted for RPS compliance in the year of delivery without reference to prior compliance year earmark designations.

6. **New § 399.13(b) amends current § 399.14(b) as indicated below (underlines show additions; strikeouts show deletions):**

(b) A retail seller may enter into a combination of long- and- short-term contracts for electricity and associated renewable energy credits. The commission may authorize a retail seller to enter into a contract of less than 10 years' duration with an eligible renewable energy resource, if the commission has established, for each retail seller, minimum quantities of eligible renewable energy resources to be procured either through contracts of at least 10 years' duration ~~or from new facilities commencing commercial operations on or after January 1, 2005~~.

- **How should the Commission determine the minimum quantity under new § 399.13(b)? Please provide a sample calculation using the proposed method.**

RESPONSE: The Commission should maintain the formula adopted by D.07-05-028. Specifically, the Commission should determine that retail sellers may count energy deliveries from contracts of less than 10 years' duration (*i.e.*, short-term contracts) for RPS compliance provided that during the same compliance period, the retail seller signs long-term contract(s) for energy deliveries equivalent to at least 0.25% of its prior compliance period's retail sales.

- **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)?**

RESPONSE: No. SB 2 does not include this limitation, which does not serve the public interest. Placing additional limitations on short-term contracting options would increase the cost of RPS compliance borne by ratepayers. Retail sellers should be permitted to use long-term contracts from *any* of the portfolio content categories to satisfy the minimum quantity requirement.

- **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?

RESPONSE: No. Since SB 2 adopts multi-year compliance periods rather than annual compliance periods, a retail seller should be permitted to demonstrate at the conclusion of each compliance period (*e.g.*, in 2013, 2016 and 2020) that it met the minimum quantity requirement for that compliance period. This will reduce administrative burden and promote the goal of efficient administration of the RPS program.

- **Should the minimum quantity requirement under new § 399.13(b) have a termination? If so, what should the termination be?**

RESPONSE: The Commission should reevaluate at the end of each compliance period whether it is in the public interest to maintain the minimum quantity requirement.

- **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?**

RESPONSE: Grandfathered contracts – *i.e.*, contracts entered into prior to June 1, 2010 that satisfy the conditions of § 399.16(d) – have been approved by the Commission in accordance with the 20% program rules and are not subject to minimum quantity rules adopted as part of the 33% program. Deliveries from grandfathered short-term contracts should be counted towards compliance under the 33% program rules without reference to 33% program minimum quantity requirements.

Short-term deliveries received pursuant to a contract signed after June 1, 2010 should be subject to the 33% program minimum quantity requirements. Accordingly, such deliveries should count for RPS compliance only if the retail seller demonstrates: (i) for compliance year 2010, that it satisfied the minimum quantity requirement set forth in D.07-05-028 in calendar year 2010; or (ii) for compliance years 2011 and later, that it signed long-term contract(s) for energy deliveries equivalent to at least 0.25% of retail sales during the prior compliance period.

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- **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)?**

RESPONSE: No. While new § 399.13(a)(4)(B) requires retail sellers to deduct short-term deliveries from actual procurement quantities used to determine the amount of procurement eligible to be banked, the provision applies only to generation delivered beginning January 1, 2011. Contracts executed prior to June 1, 2010 that satisfy the criteria of § 399.16(d) are grandfathered and are not subject to the banking restrictions under SB 2. Accordingly, generation received pursuant to grandfathered contracts should be counted in the actual procurement quantities used to determine the amount of procurement eligible to be banked. Generation received on or after January 1, 2011 pursuant to a contract signed after June 1, 2010 is subject to the banking restrictions under SB 2.

- **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?**

RESPONSE: Please see above response.

7. **New § 399.13(a)(4)(B) requires the Commission to adopt new rules for the calculation and management of RPS procurement that is in excess of the requirements for a given compliance period ("banking"). This new section provides that the Commission must adopt:**

> **[r]ules permitting retail sellers to accumulate, beginning January 1, 2011, excess procurement in one compliance period to be applied to any subsequent compliance period. The rules shall apply equally to all retail sellers. In determining the quantity of excess procurement for the applicable compliance period, the commission shall deduct from actual procurement quantities, the total amount of procurement associated with contracts of less than 10 years in duration. 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.**

New § 399.15(b) sets out three metrics for procurement requirements in a compliance period:

1) For the 2011-2013 compliance period, attaining an average of 20% of retail sales in that period.

2) For the 2014-2016 and 2017-2020 compliance periods, attaining a target of a percentage of retail sales by the end of the compliance period (25% by December 31, 2016 and 33% by December 31, 2020).

3) For all compliance periods, procuring no less than the quantities associated with all intervening years by the end of the compliance period.

- **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. Please provide a sample calculation.**

- **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. Please provide a sample calculation for your method.**

- **Please discuss the relationship of the method(s) you propose to your response to #2, above, relating to the calculation of RPS procurement obligations for compliance year 2011 and future years pursuant to new § 399.15(b).**

RESPONSE: New § 399.13(a)(4)(B) requires the Commission to adopt rules related to banking of generation beginning January 1, 2011. The provision requires the Commission to "deduct from actual procurement quantities, the total procurement associated of contracts of less than 10 years in duration." This deduction requirement is expressly limited to short-term contracts; the sentence referenced above could have included additional types of procurement, but deliberately excludes them. Rules of statutory construction make clear that "the expression of one thing in a statute ordinarily implies the exclusion of other things."[18] Accordingly, taking into account the plain language of the statute, the first step in determining a retail seller's post-2010 bank is to identify on an annual basis the number of MWh eligible to be banked – *i.e.*, the number of MWh from contracts with a term of 10 years or longer.

[18] *See In re J.W.*, *supra*, note 13.

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The second step in the process is to determine whether the total of the MWh eligible for the bank exceeds the total MWh needed for RPS compliance in a given year. This involves calculating all of the generation received in a given compliance year from the three product content categories established in § 399.16(b), subtracting the MWH associated with short-term contracts and comparing the resulting MWh value against the MWh needed to achieve RPS compliance in that compliance year.

It is important to note that new § 399.13(a)(4)(B) states that electricity products meeting the portfolio content of paragraph (3) of subdivision (b) of § 399.16 ("Category 3 Products") may not be counted as excess procurement. This does not signify that Category 3 Products must be deducted from actual procurement quantities. As noted above, new § 399.13(a)(4)(B) excludes Category 3 Products from the requirement to "deduct from actual procurement quantities." Thus, MWh from Category 3 Products may be included in the actual procurement quantity figure that is compared against the RPS compliance target.

Since Category 3 Products may not be counted as "excess" procurement, these products should be applied first against the RPS compliance target for purposes of determining excess generation to be included in the bank. Once the MWh from Category 3 Products have been applied against the compliance year RPS target, the MWh from remaining electricity products should be applied. The MWh amount from Category 1 and 2 Products that exceeds the compliance year RPS target (once Category 3 Products have been applied to the RPS target) is the MWh amount that may be banked.

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8. Current RPS rules set out a system of procurement banking different from that in new § 399.13(a)(4)(B). Current § 399.14((a)(2)(C)(i) directs the Commission to adopt: Flexible rules for compliance, including rules permitting retail sellers to apply excess procurement in one year to subsequent years or inadequate procurement in one year to no more than the following three years. The flexible rules for compliance shall apply to all years, including years before and after a retail seller procures at least 20 percent of total retail sales of electricity from eligible renewable energy resources.

With respect to forward banking under the provisions of SB 2 (1x), please comment on the following possibilities. Please provide detailed support and examples. Please specifically address the application of new §§ 399.15(a) and 399.16(d) to your proposal.

- **Should the Commission allow unlimited forward banking of excess procurement prior to January 1, 2011 from bundled and/or REC-only contracts for all compliance periods?**

RESPONSE: No. New § 399.13(a)(4)(B) expressly provides that retail sellers may bank excess procurement "beginning January 1, 2011." As discussed above, the regulatory framework adopted in SB 2 is intended to entirely replace the 20% RPS program; SB 2 did not provide for carry-forward of legacy accounting from the 20% program. The procurement bank developed under the 20% program existed solely in reference to the annual procurement goals adopted as part of the 20% program. Elimination of those annual goals should result in elimination of the pre-2011 bank beginning in the 2011-2013 compliance period. As discussed above in the response to Question 3, however, the pre-2011 bank must remain available for use by retail sellers to demonstrate compliance with the 20% in 2010 RPS target and/or satisfaction of the 14% in 2010 showing contemplated in new § 399.15(a).

- **Should the Commission allow no banking of excess procurement prior to January 1, 2011 from bundled and/or REC-only contracts for any compliance period later than 2010?**

RESPONSE: Please see above response.

- **Should the Commission allow forward banking of excess procurement prior to January 1, 2011 from bundled and/or REC-only contracts through the 2011-2013 compliance period but not beyond 2013?**

RESPONSE: Please see above response; however, SDG&E notes that this approach could offer a reasonable means of transitioning from the 20% program to the 33% program.

- **Should the Commission make some other provision for banking of excess procurement prior to January 1, 2011 from bundled and/or REC-only contracts?**

- **Should any banked procurement be counted in years after 2010 only in accordance with the limits on the use of specific portfolio content categories set out in new § 399.16(c)?**

RESPONSE: As explained above, SB 2 does not contemplate carry-forward of legacy accounting from the 20% RPS program, such as the pre-2011 procurement bank. If the Commission concludes otherwise, however, and allows for carry-forward of the pre-2011 bank, it should not apply the specific portfolio content categories set out in new § 399.16(c). This would run afoul of new § 399.16(d), which makes clear that contracts entered into prior to June 1, 2010 "count in full" for RPS compliance purposes and are not subject to the usage restrictions set forth in § 399.16(c). Accordingly, to the extent the Commission permits carry-forward of the pre-2011 procurement bank, the full bank should be available to the retail seller, regardless of how the contracts making up the bank would be classified under § 399.16(c).

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?**

RESPONSE: If a retail seller has a deficit in a compliance year prior to January 1, 2011, new § 399.15(a) operates to re-set the compliance target to 14%. This acknowledges the challenges faced by retail sellers in achieving RPS compliance. Thus, the deficit calculated for 2010 should be the shortfall from the 14% target.

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

RESPONSE: Yes. Please see the response to Question 1 above.

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?**

RESPONSE: No. Please see the response to Question 1 above.

12. **In the current RPS flexible compliance regime, a retail seller is allowed to defer a shortfall of up to 0.25% of APT without explanation, so long as the deficit is made up within three years. Under new § 399.15(b)(9), deficits will not be carried forward from one compliance period to the next.**

- **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?**

RESPONSE: Yes. SB 2 eliminates deferral as a flexible compliance mechanism.

13. **In the current RPS flexible compliance regime, a retail seller is allowed to defer a deficit in excess of 0.25% of APT by the use of any allowable reason for noncompliance (e.g., "earmarking.") Under new § 399.15(b)(9), deficits will not be carried forward from one compliance period to the next.**

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

RESPONSE: Yes. As noted above, SB 2 eliminates deferral as a flexible compliance mechanism. Accordingly, earmarking is not available as a flexible compliance tool under SB 2.

- **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.

RESPONSE: Please see the response to Question 5 above. Beginning January 1, 2011, future deliveries earmarked under the 20% program should be counted for RPS compliance in the year of delivery without reference to prior compliance year earmark designations.

With regard to portfolio content category allocation, an earmarked contract should be treated in a manner identical to non-earmarked contracts. Specifically, contracts grandfathered under new § 399.16(d) (whether or not earmarked) would not be subject to the portfolio content designations of new § 399.16(b). New § 399.16(d) creates a bright line distinction between grandfathered and non-grandfathered contracts based upon express criteria; these criteria do not include whether the contract was earmarked. Accordingly, earmarking of a contract does not make such contract ineligible for grandfathering under new § 399.16(d); if an earmarked contract is grandfathered, the portfolio content categories do not apply.

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?**

RESPONSE: As discussed above, the 33% program adopted under SB 2 completely replaces the 20% program; SB 2 does not contemplate carry-forward of legacy accounting from the 20% RPS program. Accordingly, retail sellers should apply deliveries occurring in the 2011-2013 compliance period toward RPS compliance for that period, regardless of whether they were earmarked under the 20% program to apply to deficits existing in any compliance year prior to 2011.

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15. New section 399.31 provides for the procurement of RECs for RPS compliance from local publicly owned utilities (POUs) by retail sellers, under certain conditions. It provides: A retail seller may procure renewable energy credits associated with deliveries of electricity by an eligible renewable energy resource to a local publicly owned electric utility, for purposes of compliance with the renewables portfolio standard requirements, if both of the following conditions are met:

a) The local publicly owned electric utility has adopted and implemented a renewable energy resources procurement plan that complies with the renewables portfolio standard adopted pursuant to Section 399.30.

b) The local publicly owned electric utility is procuring sufficient eligible renewable energy resources to satisfy the target standard, and will not fail to satisfy the target standard in the event that the renewable energy credit is sold to the retail seller.

- **What documentation should the Commission require from IOUs to demonstrate that the selling POU is in compliance with new § 399.31(a)?**
- **What documentation should the Commission require from ESPs? From CCAs?**
- **What documentation should the Commission require from IOUs to demonstrate that the selling POU is in compliance with new § 399.31(b)?**
- **What documentation should the Commission require from ESPs? From CCAs?**
- **In view of the CEC's oversight of POUs' compliance with RPS requirements under SB 2 (1x), how should this Commission coordinate with the CEC to administer and verify your proposed system of documentation?**

RESPONSE: As a practical matter, the IOUs have no independent ability to confirm satisfaction by POUs of the conditions set forth in new § 399.31. Accordingly, SDG&E proposes that the Commission adopt a process similar to that which currently exists for verification of RPS-eligibility of renewable resources. Specifically, power purchase agreements ("PPAs") between IOUs and POUs would include a representation and warranty by the POU regarding satisfaction by the POU of the conditions set forth in new § 399.31. As is currently the case with renewable developers, who must obtain a letter verifying RPS eligibility of their renewable facilities from the CEC, POUs would be required to obtain a verification letter from

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the CEC confirming satisfaction of the § 399.31 criteria. This CEC verification letter would be submitted with the IOU's advice letter filing requesting Commission approval of the PPA with the POU.

16. In D.03-06-071 and D.03-12-065, the Commission set the basic parameters for enforcement of RPS obligations. Among other things, the Commission set a penalty amount for retail sellers failing to meet their annual RPS obligations at $0.05/kilowatt-hour (kWh) for each kWh below the annual procurement target, with an annual cap of $25,000,000. New § 399.15(b)(2) institutes two three-year compliance periods and one four-year compliance period. New § 399.15(b)(1)(C) specifies that retail sellers "shall not be required to demonstrate a specific quantity of procurement for any individual intervening year."

- **To what obligation should a penalty apply?**
  - ➢ **the goal at the end of each compliance period (i.e., average of 20% for 2011-2013; 25% by the end of 2016; 33% by the end of 2020);**
  - ➢ **the compliance period quantity for a particular compliance period;**
  - ➢ **both of the above;**
  - ➢ **another metric or quantity. Please set out the proposal in detail and explain its basis.**

RESPONSE: As a threshold matter, SDG&E notes that imposition of penalties is only one method of enforcement available to the Commission under SB 2, and that imposition of penalties is not an automatic outcome in the event of an RPS procurement deficit. New § 399.15(b)(8) provides that the Commission may undertake enforcement action pursuant to § 2113 only *after* a retail seller has been given the opportunity under § 399.15(b)(5) to seek waiver of enforcement. Moreover, § 2113 does not limit the Commission's enforcement option solely to imposition of penalties. Finally, in previously considering the enforcement provision included in the 20% RPS program (currently set forth in § 399.14(e)), which contains language substantially

similar to that contained in new § 399.15(b)(8),[19] the Commission observed that "this procedure does not automatically impose penalties for failure to comply with the RPS program, but rather establishes a rebuttable presumption that a pre-determined penalty should be imposed *in certain circumstances*."[20] The Commission pointed out that "[t]he utility may reduce or eliminate the pre-determined penalty upon a showing of good cause."[21] Accordingly, while the Commission may elect to set a pre-determined penalty amount in the 33% RPS program, it should expressly note that imposition of the penalty is not automatic in the case of a procurement deficit.

With regard to the question of the obligation(s) to which penalties (if appropriate) should apply under SB 2, it is clear that penalties or other enforcement action would apply at the end of the 2011-2013 and 2017-2020 compliance periods. New § 399.11(a) expressly states that the RPS program is intended to "attain a target of generating 20 percent of total retail sales of electricity in California from eligible renewable energy resources *by December 31, 2013* and 33 percent *by December 31, 2010*." The provision makes no mention of the 25% by 2016 target. Rules of statutory construction, which provide that "the expression of one thing in a statute ordinarily implies the exclusion of other things," support this interpretation.[22] While new § 399.15(b) establishes a January 1, 2014 to December 31, 2016 compliance period and discusses a procurement target of 25% by December 31, 2016,[23] it is in the context of the need to establish "reasonable progress" toward the ultimate 33% goal. Thus, the 2016 target is best understood as

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[19] Public Utilities Code § 399.14(e) provides, in pertinent part, as follows:

> If an electrical corporation fails to comply with a commission order adopting a renewable energy procurement plan, **the commission shall exercise its authority pursuant to Section 2113 to require compliance**. (Emphasis added).

[20] D.03-12-065, *mimeo*, p. 8 (emphasis added).
[21] *Id.*
[22] *See In re J.W.*, *supra*, note 13.
[23] § 399.15(b)(1)(B) and (b)(2)(B).

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an unenforceable "soft target" rather than an enforceable "hard target" such as the 2013 and 2020 targets established by new § 399.11(a).

- **Should the penalty amount of $0.05/kWh be changed? If so, what method should be used to set a new penalty amount?**

RESPONSE: SDG&E proposes that the current penalty amount of $0.05/kWh, which has been in place since the beginning of the RPS program, be retained for the 33% RPS program. This will promote the goal of RPS market certainty.

- **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)?**

RESPONSE: SDG&E proposes that the current penalty cap of $25 million be retained, but that the penalty cap be applied to each compliance period rather than on an annual basis.[24/] In D.03-06-071, the Commission observed that the purpose of the penalty structure, including the penalty cap, was to "create clear consequences for utility inaction and to provide further incentive to each utility to meet its APT."[25/] In the several years since D.03-06-071 was issued, it has become clear that the concerns regarding utility inaction are unfounded. Accordingly, the rationale supporting the $25 million annual cap is not compelling and a $25 million compliance period cap should be adopted in its place.

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

RESPONSE: The Commission's current reporting processes, with verification by the CEC, are sufficient to verify compliance.

24/ *See* D.03-06-071, 2001 Cal. PUC LEXIS 1215, p. *78.
25/ *Id.*

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18. **Please discuss any issues related to the verification by the CEC of any elements of any proposal you have made, above. Please include discussion of the use of the Western Renewable Energy Generation Information System (WREGIS). Please provide specific mechanisms and examples.**

RESPONSE: Please see response to Question 17.

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 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?**

RESPONSE: Pleases see response to Question 1.

III.
CONCLUSION

SDG&E appreciates the opportunity to provide these comments and supports the Commission's efforts to expeditiously implement the 33% RPS program.

Respectfully submitted this 30th day of August, 2011.

/s/ *Aimee M. Smith*
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AFFIDAVIT

I am an employee of the respondent corporation herein, and am authorized to make this verification on its behalf. The matters stated in the foregoing **SAN DIEGO GAS & ELECTRIC COMPANY OPENING COMMENTS ON JULY 15, 2011 RULING REQUESTING COMMENTS ON NEW PROCUREMENT TARGETS AND CERTAIN COMPLIANCE REQUIREMENTS FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM** are true of my own knowledge, except as to matters which are therein stated on information and belief, and as to those matters I believe them to be true.

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

Executed this 30th day of August, 2011, at San Diego, California

/s/ Hillary Hebert
Hillary Hebert
Partnerships and Programs Manager
Origination and Portfolio Design Department