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)

OPENING COMMENTS OF THE UTILITY REFORM NETWORK AND THE COALITION OF CALIFORNIA UTILITY EMPLOYEES ON THE ADMINISTRATIVE LAW JUDGE'S RULING REQUESTING COMMENTS ON NEW PROCUREMENT TARGETS AND CERTAIN COMPLIANCE REQUIREMENTS FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

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Pursuant to the July 15, 2011 ruling of ALJ Simon, The Utility Reform Network (TURN) and the Coalition of California Utility Employees (CUE) submit these opening comments on the creation of renewable procurement targets for retail sellers under SBx2. Rather than reprinting the entire question, a summary of the key issue presented by the question is provided. TURN/CUE do not offer responses to every question in these opening comments but reserve the right to respond to proposals made by other parties in reply comments.

Question 1 – Applicability of legacy flexible compliance rules to the 33% RPS program and compliance in 2011

The enactment of SBx2 requires the Commission to implement new procurement targets and flexible compliance rules commencing on January 1, 2011. The Legislature intended to replace the previous authority for the Commission to adopt flexible compliance rules (formerly in §399.14(a)(2)(C)) with more specific requirements regarding banking (new §399.13(a)(4)(B)), deficits (new §399.15(a) and §399.15(b)(7)) and compliance shortfalls (new §399.15(b)(5), (b)(6), (b)(7), (b)(8) and (b)(9)). The Commission should adhere to these new requirements for compliance obligations beginning on January 1, 2011 and apply the previous rules only to compliance requirements through December 31, 2010.

Question 2(A) -- Compliance targets for 2011-2013

The ruling proposes that the compliance target for 2011-2013 be set as the sum of 20% multiplied by actual retail sales in each of 2011, 2012 and 2013. This is the correct interpretation of §399.15(b)(2)(B). Consistent with the directive in §399.15(b)(2)(C),

there are no annual targets applicable during this compliance period. Retail sellers are required to demonstrate a total quantity of procurement covering the entire 2011-2013 compliance period rather than showing any particular amount of procurement in any individual year.

Question 2(B) -- Compliance targets for 2014-2016 and 2017-2020

The ruling proposes the use of a "linear trend" for setting procurement obligations for the 2014-2016 and 2017-2020 compliance periods. TURN/CUE support this approach and endorse the specific intervening year assumptions identified in the ruling. These targets are consistent with the assumptions incorporated into utility planning scenarios and satisfy the "reasonable progress" requirement. Consistent with the directive in §399.15(b)(2)(C), there are no annual targets applicable during this period.

We anticipate that the retails sellers (utilities and ESPs) will argue that "reasonable progress" requires them to procure even less than the ALJ's Solomonic linear trend. Of course, any entity with a compliance obligation would prefer that the obligation be less rather than more. However, given the enormous response to the IOUs' current solicitation for new renewable resources, there is no reason to require less than the split-the-difference outcome described by the ALJ. Procuring enough renewable generation to meet the linear trend requirement is not likely to be challenging for retail sellers making good faith efforts to comply.

Question 2(C) -- Consequences of failing to attain the final year target in a compliance period

The attainment of the final year procurement target is not relevant to determining compliance. The statutory scheme explicitly requires that compliance is established if a retail seller procures "no less than the quantities associated with all intervening years by the end of each compliance period." (§399.15(b)(1)(B)) This multi-year

approach recognizes that a retail seller may procure more, or less, than is specified for a particular intervening year. As a result, whether or not a retail seller meets the final year target is not relevant to a compliance determination. Conversely, meeting the final year target is not sufficient. A retail seller must procure the sum of the quantities for each of the years in the compliance period.

Question 3(A) -- Interpreting the 14% threshold for waiving deficits

The deficit waiver in §399.15(a) requires that a retail seller procure "at least 14% of retail sales from eligible renewable energy resources in 2010" to qualify. The Commission may not include deferrals, earmarking, or the application of banked excesses in determining whether the 14% threshold has been satisfied. The procurement must have occurred in 2010 and applied to compliance in that year. The Legislature did not envision that retail sellers could utilize accounting mechanisms to meet this threshold but rather that any waiver be based on a showing of actual procurement "in 2010".

Question 3(B) -- Meaning of "deficits associated with any previous renewables portfolio standard" under §399.15(a)

This language refers to the cumulative procurement deficits incurred by any retail seller through December 31, 2010. It includes all deficits under the 20% RPS program and is designed to provide a "clean slate" for any retail seller exceeding the 14% threshold in 2010.

Question 3(C) -- Treatment of waived deficits

Any deficits waived under §399.15(a) may not be added to the compliance obligations for 2011 and beyond. Moreover, the retail seller shall not be subject to penalties for any waived deficits. As a result, a retail seller need not satisfy its APT requirements for any previous year so long as it meets the 14% threshold with actual renewable energy procured in 2010.

Question 4 -- Treatment of deficits incurred during the 2011-2013, 2014-2016 and 2017-2020 compliance periods

The ruling correctly infers that §399.15(b)(9) clarifies that no deficits may be carried from one compliance period to the next. This provision applies only to the three compliance periods specified in §399.15(b)(1). Under SBx2, there are no other "compliance periods." Any deficits associated with pre-2011 RPS obligations should either be waived (if the 14%threshold in 2010 has been met) or trigger noncompliance penalties.

Question 5 -- Satisfying deficits associated with pre-2011 RPS obligations

The ruling presumes that any pre-2011 deficits not waived may be satisfied through additional procurement during the 2011-2013 compliance period. There is no basis for this presumption since §399.15(b)(3) prohibits the Commission from requiring any retail seller to procure more than the quantities established pursuant to §399.15(b)(2). As a result, any cumulative deficits in 2010 that are not waived should trigger enforcement proceedings and noncompliance penalties. It is important to note that a retail seller may have procured less than 14% in 2010 but still have no cumulative deficit. In determining whether a deficit exists, the Commission must review procurement of a retail seller during all years in which they were obligated under the program. There may be several retail sellers with cumulative excesses prior to 2010 that can be applied to the 2010 shortfall and result in no net deficit over the entire period.

Question 7 -- Calculating excess procurement eligible for forward banking

The calculation of excess procurement is the same for every compliance period identified in SBx2. For each retail seller, the Commission should deduct from total period procurement any quantities associated with short-term contracts (less than 10 years in duration) and electricity products classified in the third product category

(§366.16(b)(3)). This results in a net procurement for the period. If the net procurement exceeds the total compliance obligation, then the difference can be banked and applied to a subsequent compliance period. The following example illustrates this approach:

Total procurement in period 1	100
Procurement associated with short-term contracts	20
Procurement associated third category products	5
Net procurement (for purposes of §399.13(a)(4)(B))	75
Compliance obligation for period 1	70
Excess procurement to be banked	5

It is critical that both short-term contracts and third product category procurement be deducted 'off the top' of total procurement occurring during the period. Absent this approach, a retail seller could circumvent the explicit statutory restrictions by claiming that procurement of short-term contracts or third product category quantities should be counted first, thereby ensuring that any 'excess' procurement consists of procurement not subject to the restrictions. The Commission must prevent any retail seller from engaging in this type of shell game. The Legislature intended for these restrictions to be meaningful and did not distinguish between the prohibition on banking of short-term contracts and unbundled RECs associated with the third product category. The following analyses demonstrate that the Legislature understood the restrictions to equally prohibit both categories of transactions:

> This bill allows IOUs and ESPs to apply excess generation from any compliance period to a subsequent compliance period if the generation source is from contracts of more than 10 year's duration, not including unbundled RECs. This is commonly referred to as banking.
> *Senate Floor Analysis of SBx2, page 8*

> Permits retail sellers to take credit for future compliance surpluses by requiring the PUC to adopt "banking" rules permitting retail sellers apply excess procurement to subsequent compliance periods. Prohibits banking of procurement associated with contracts of less than 10 years, as well as RECs

> and other undelivered products.
> *Assembly Committee on Natural Resources Analysis of SBx2, page 3*
>
> This bill allows IOUs and ESPs to apply excess generation from any compliance period to a subsequent compliance period if the generation source is from contracts of more than 10 years duration, not including unbundled RECs. This is commonly referred to as banking.
> *Senate Energy, Utilities and Communications Committee Analysis of SBx2, page 2*

Given the clear legislative history on this subject, it would be legal error to permit retail sellers to evade the restrictions by claiming that certain types of procurement are dedicated for compliance and other types are intended for banking.

Moreover, the Commission must prevent gaming through 'REC reshuffling' strategies. Such a strategy entails the retail seller procuring RECs in one compliance period but delaying their retirement (in the WREGIS system) until a future compliance period. For example, a retail seller could procure a quantity of third product category unbundled RECs on January 2, 2014 but subsequently realize that the RECs are not needed to satisfy the second period compliance obligation (2014-2016). Because the RECs have a 36 month shelf life pursuant to §399.21(a)(6), the retail seller could wait until January 1, 2017 to 'retire' the unbundled RECs. These RECs would then be used to satisfy a compliance obligation that does not take effect until December 31, 2020, nearly seven years after the REC was procured. This is not consistent with the statutory prohibition that "[i]n no event" shall bucket category 3 be used for banking.

The Commission should assume that any procurement occurring during a particular compliance period is credited towards compliance in that period. Absent such a requirement, retail sellers will almost certainly engage in 'REC reshuffling' to avoid the banking restrictions in §399.13(a)(4)(B). Allowing this strategy would completely defeat the restrictions on banking explicitly enacted by the Legislature. TURN/CUE

strongly urge the Commission to prevent this type of abuse. The prohibition on 'REC reshuffling' should be adopted to clarify that such strategies are not permitted.

Question 8 -- Treatment of excess procurement for RPS obligations through December 31, 2010

SBx2 deleted §399.14(a)(2)(C)(i) and replaced it with the new §399.13(a)(4)(B). As a result, the previous statutory authorization for flexible compliance rules and banking no longer exists. That authorization has been superseded by §399.13(a)(4)(B). This provision restricts forward banking to excess procurement "beginning January 1, 2011". The Commission may not allow any procurement occurring prior to this date to result in excess compliance that can be banked towards a future compliance period. In short, no pre-2011 procurement quantities are eligible for forward banking.

By deleting the previous flexible compliance provision, adding §399.13(a)(4)(B), and adding a deficit waiver in §399.15(a), the Legislature intended to create a "clean slate" in which deficits and bankable excesses would be set to zero at the outset of the new RPS program. The Commission should conclude that every retail seller begins the first compliance period (2011-2013) with nothing in the bank. This outcome is the only permissible interpretation of this provision.

A related question is whether contracts executed prior to June 1, 2010 but providing quantities after January 1, 2011 will be subject to the banking restrictions in §399.13(a)(4)(B). The Commission should conclude that the banking restrictions are independent and not related to the allowance that such contracts will "count in full" pursuant to §399.16(d). In particular, the restriction on banking short-term contracts is unrelated to any of the product categories outlined in §399.16. The legislative history clearly demonstrates that the Legislature intended to prevent short-term contracts (< 10 years in duration) and unbundled RECs from being eligible for

banking. Had there been an intention to exempt pre-June 1, 2010 contracts from the banking restrictions, there would have been an explicit provision to this effect in §399.13(a)(4)(B).

For purposes of banking, the Commission should therefore treat all contracts in the existing portfolio of a retail seller the same as any contracts executed after June 1, 2010. This treatment allows legacy contracts to "count in full" because it does not disallow any quantities based on the product category limitations in §399.16(c), thereby allowing a retail seller to effectively procure more second and third category products than would otherwise be allowed under this section. It does place all third product category products on equal footing for purposes of banking and ensures that the restriction on the banking of short-term contracts is honored.

Question 9 -- Calculating pre-2011 deficits for a retail seller not procuring at least 14% of retail sales from RPS-eligible resources in 2010

If a retail seller falls below the 14% threshold for 2010, the Commission must calculate the 2010 deficit based on the 20% Annual Procurement Target for that year. There is nothing in the legislation to suggest that the 2010 RPS procurement target should be reset. Therefore, the Commission should only rely on this provision as a trigger that will determine whether a retail seller is eligible to have all cumulative deficits waived. Failing to reach the trigger means that a retail seller is responsible for the entire shortfall associated with the delta between actual 2010 procurement and the 20% target.

Question 10 -- Relevance of flexible compliance rules to 2010 and prior compliance years

The ruling implies that any deficits incurred through 2010 could be satisfied pursuant to the previous flexible compliance rules allowing earmarking, deferrals and a 3-year makeup period. There is no basis for this presumption since the authorization for flexible compliance rules in §399.14(a)(2)(C)(i) has been deleted.

Moreover, §399.15(b)(3) prohibits the Commission from requiring any retail seller to procure more than the quantities established pursuant to §399.15(b)(2). As a result, the Commission is constrained from ordering any retail seller to make up deficits through additional procurement obligations. Instead of requiring incremental procurement, any cumulative deficits in 2010 that are not waived should trigger enforcement proceedings and noncompliance penalties.

Question 11 -- Relevance of legacy flexible compliance rules to RPS procurement in 2011

SBx2 establishes compliance obligations that commence on January 1, 2011. It would be legal error (and bad policy) for the Commission to apply the previous flexible compliance rules to 2011. The Legislature intended for the new RPS program structure to take effect at the beginning of 2011. It is not clear how to even apply the old flexible compliance rules to the new program (even to a single year). Such an effort would overly complicate any compliance determinations, significantly erode the quantities of renewable procurement occurring in the first period, and undermine public confidence in the Commission.

Question 12 -- Ability to defer shortfalls of up to 0.25% of APT without explanation

The Commission may not continue this policy. It is expressly prohibited by SBx2 which contains explicit direction with respect to deficits, banking and other compliance metrics. Moreover, SBx2 eliminates annual compliance showings in favor of multi-year compliance periods. It would be illogical to apply this particular rule under the new program since there are no longer any annual procurement targets.

Question 15 -- Procurement of RECs from Publicly Owned Utilities

The Commission should allow the Energy Commission to make a determination as to whether a particular Publicly Owned Utility (POU) satisfies the conditions in §399.31.

The CEC has statutory authority to oversee RPS program design and enforcement for the POUs. TURN/CUE recommend that, as a threshold matter, no POU should be eligible to sell RPS credit unless it has attained a 20% renewable portfolio and has submitted a CEC-approved plan to achieve the SBx2 targets. Moreover, the CEC should de-certify a POU from being able to sell any RECs if the POU failed to meet or exceed the most recent compliance period procurement obligations.

Question 16 -- RPS penalty structure

The Commission should retain the basic penalty structure adopted in D.03-06-071 and D.03-12-065. There is no reason to fundamentally revisit the establishment of $0.05/kwh and this level is consistent with the price cap recently adopted for TREC transactions by the IOUs. However, the Commission must adjust the total cap since the previous penalty structure established an annual penalty cap of $25 million. The Commission should multiply this annual cap by the number of years in a given compliance period. For the first compliance period (2011-2013), the penalty cap should be set at $75 million for any retail seller.

Respectfully submitted,

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Dated: August 30, 2011

VERIFICATION

I, Matthew Freedman, am an attorney of record for THE UTILITY REFORM NETWORK in this proceeding and am authorized to make this verification on the organization's behalf. The statements in the foregoing document are true of my own knowledge, except for those matters which are stated on information and belief, and as to those matters, I believe them to be true.

I am making this verification on TURN's behalf because, as the lead attorney in the proceeding, I have unique personal knowledge of certain facts stated in the foregoing document.

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

Executed on August 30, 2011, at San Francisco, California.

_____/s/_____

Matthew Freedman
Staff Attorney

VERIFICATION

I, Marc D. Joseph, am an attorney of record for the Coalition of California Utility Employees in this proceeding. No officer of CUE is located in this County where I have my office. I am authorized to make this verification on the organization's behalf. I have read this document. The statements in this document are true of my own 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, at South San Francisco, California.

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