**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) |
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# COMMENTS OF CALPINE POWERAMERICA-CA, LLC ON NEW PROCUREMENT TARGETS AND CERTAIN COMPLIANCE REQUIREMENTS FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

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# COMMENTS OF CALPINE POWERAMERICA-CA, LLC ON NEW PROCUREMENT TARGETS AND CERTAIN COMPLIANCE REQUIREMENTS FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

Calpine PowerAmerica-CA, LLC ("CPA")[1] submits the following comments in response 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 ("RPS") Program ("ALJ Ruling").[2]

**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)[3]) Please provide detailed support for your position.**

Senate Bill ("SB") 2 (1x) is not yet effective and will not take effect until late 2011. As a result, existing (*i.e.*, pre-SB 2 (1x)) RPS laws and rules remain in effect and are applicable to

[1] CPA is an Energy Service Provider subject to the Commission's RPS compliance obligations and is a subsidiary of Calpine Corporation ("Calpine"). Calpine is a party in this proceeding and CPA is a named respondent.

[2] CPA is not addressing every issue raised in the ALJ Ruling but reserves the right to respond to other parties' comments on all issues. Although CPA is not responding to every question, the questions are numbered to match the numbering in the ALJ Ruling.

[3] Unless otherwise noted, all references are to the California Public Utilities Code. The last sentence of new § 399.15(a) provides:

> For any retail seller procuring at least 14 percent of retail sales from eligible renewable energy resources in 2010, the deficits associated with any previous renewable portfolio standard shall not be added to any procurement requirement pursuant to this article.

This provision is also addressed in #3, below.

procurement and other RPS compliance-related decisions that have been made to date by retail sellers. To account for this timing "disconnect," transitional rules should be adopted that recognize, and preserve the value of, actions taken by retail sellers in 2011 in reliance on existing laws and rules. For example, as discussed in response to specific questions below, transitional rules should ensure that flexible compliance rules currently in effect, including banking rules, can be used by retail sellers to satisfy RPS compliance obligations going forward. Absent such transitional rules, the retroactive application of SB 2 (1x) beginning January 1, 2011 could penalize retail sellers for decisions that were, in all respects, consistent with the law and RPS rules in effect at the time the decisions were made.

**2. New § 399.15(b) establishes new RPS compliance targets and provides instructions to the Commission about implementing them. (A copy of new § 399.15(b) is attached as Attachment A.)[4]**

**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 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 from 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)?**

[4] New § 399.15(b)(5) will be addressed later in this proceeding.

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

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

SB 2 (1x) explicitly recognizes that retail sellers need only demonstrate procurement "equal to an *average* of 20 percent of retail sales" over the 2011-2013 compliance period[5] and that retail sellers "shall not be required to demonstrate a specific quantity of procurement for any individual intervening year."[6] Thus, no compliance targets may be set for the intervening years in the 2011-2013 compliance period.

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

[5] § 399.15(b)(2)(B) (emphasis added).
[6] *See* § 399.15(b)(2)(C).

- **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?**

Section 399.15(b)(2)(C) specifically provides that retail sellers "shall not be required to demonstrate a specific quantity of procurement for any individual intervening year."[7] Given this specific statutory direction, any interim targets for the intervening years in the 2014-2016 and 2017-2020 compliance periods should serve only as *guidelines* and not annual compliance requirements.

**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?**

There should be no consequences for a retail seller that satisfies the compliance target in the final year of a compliance period but fails to procure a specific quantity of eligible renewable resources in an intervening year. As discussed above, SB 2 (1x) is clear that a retail seller's compliance obligation only arises at the end of each compliance period.[8]

**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."**

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

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[7] § 399.15(b)(2)(C).
[8] *See* § 399.15(b)(1)(A)-(C), § 399.15(b)(2)(C).

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.**

Given that SB 2 (1x) is not yet effective, all procurement and flexible compliance rules applicable under the RPS rules currently in effect should be considered in calculating the 14 percent figure.

**C. 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?**

No. SB 2 (1x) provides that "[f]or any retail seller procuring at least 14 percent of retail sales from eligible renewable resources *in 2010*, the deficits associated with any previous renewables portfolio standard shall not be added to any procurement requirement . . . ."[9] Accordingly, a retail seller is only required to demonstrate it has satisfied the 14 percent target in

[9] § 399.15(a) (emphasis added).

2010. Once a retail seller satisfies this 14 percent threshold for the 2010 compliance year, no pre-2010 compliance year deficits may be carried forward.

- **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?**

No. If a retail seller procures at least 14 percent of retail sales from eligible renewable energy resources in 2010, the retail seller should not be subject to penalties for failing to satisfy its APT requirements 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?**

Section 399.15(b)(9) prohibits adding "deficits" to future compliance periods without limitation or reference to the compliance year or period. Thus, section 399.15(b)(9) applies to all compliance years and periods.

**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)?**

If a retail seller has attained 14 percent of retail sales from RPS-eligible resources in 2010, then the retail seller is not required to make-up any prior deficits. If the 14 percent threshold is not satisfied, transitional rules should allow retail sellers to use existing flexible compliance rules to satisfy compliance obligations through 2010.

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

> **(b) <u>A retail seller may enter into a combination of long- and short-term contracts for electricity and associated renewable energy credits</u>. 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~~.**

**In D.07-05-028, the Commission implemented current § 399.14(b) by requiring that retail sellers enter into contracts for a minimum quantity of 0.25% of the prior year's retail sales that have a minimum duration of 10 years (long-term contracts), or are with RPS-eligible generation facilities commencing commercial operation on or after January 1, 2005. This obligation ends when a retail seller reaches the goal of 20% of retail sales obtained from eligible renewable resources. (D.07-05-028, OP 5.)**

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

The minimum quantity should be calculated as 0.25 percent of preceding years 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)?**

Procurement in any of the portfolio categories should qualify for satisfying 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?**

No. The minimum quantity requirement should only require that 0.25 percent of the preceding year retail sales be satisfied by a long-term contract, regardless of when the contract was entered into.

- **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?**

Such deliveries should be counted in full for RPS compliance purposes.

- **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)?**

Deliveries in 2011 from short-term contracts entered into in 2010 (or earlier) should be included in the calculation of excess procurement that may be applied to a subsequent compliance period. Absent such treatment, retail sellers would be penalized for procurement consistent with the RPS rules in effect at the time procurement activities were undertaken.

- **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?**

Given that SB 2 (1x) is not yet effective, transitional rules should allow short-term contracts entered into in 2011 to be included in the calculation of excess procurement that may be applied to a subsequent compliance period.

**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.**

**The Commission has adopted rules that, among other things, allow unlimited forward banking of excess RPS procurement and allow inadequate procurement to be deferred, in certain circumstances, for no more than the following three years. (See, e.g., D.03-06-071, D.06-10-050, D.08-02-008.)**

**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?**
- **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?**
- **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?**
- **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)?**

Unlimited forward banking of excess procurement from bundled and REC-only transactions should be allowed. Although section 399.13(a)(4)(B) precludes retail sellers from accumulating excess procurement in the form of short-term contracts and Category 3[10] resources "beginning January 1, 2011," the fact that SB 2 (1x) will not take effect until late 2011 necessitates the use of transitional rules to permit unlimited forward banking of excess procurement from bundled and REC-only transactions entered into prior to SB 2(1x) taking effect. Transitional rules are warranted in this case because such RECs were accumulated with the expectation that the procurement would be available to satisfy future RPS compliance obligations.

**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?**

The deficit should be calculated from 14 percent of retail sales in 2010.

[10] *See* §399.16(b)(3).

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

Yes.

**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?**

Yes. As discussed above, absent transitional rules that apply current flexible compliance rules for 2011, the wholesale retroactive application of SB 2 (1x) could potentially penalize retail sellers for acting in reliance on the RPS rules in effect at the time certain procurement decisions were made.

**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.**

As discussed above, a retail seller's compliance obligation only arises at the end of each compliance period[11] and SB 2 (1x) expressly provides that retail sellers are "not be required to demonstrate a specific quantity of procurement for any individual intervening year."[12] Thus,

[11] § 399.15(b)(2)(B).
[12] § 399.15(b)(2)(C).

penalties should only be imposed if a retail seller does not procure an average of 20 percent by 2013, 25 percent by the end of 2016, or 33 percent by the end of 2020.

- **If a penalty cap is imposed, should it cover an entire compliance period?**

If a penalty cap is imposed, it should be calculated based on a retail seller's failure to satisfy its compliance obligation at the end of a compliance period. As noted above, SB 2 (1x) makes clear that a retail seller's compliance obligation only arises at the end of each compliance period.[13]

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

Existing mechanisms could be used to verify compliance.

**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?**

The Commission should adopt transitional rules that carry forward the existing RPS rules through calendar year 2011 as a means of preserving the reasonable expectations of retail sellers who took action in reliance on the existing rules. As discussed above, the wholesale retroactive

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[13] *See* § 399.15(b)(1)(A)-(C), § 399.15(b)(2)(C).

application of SB 2 (1x) to January 1, 2011 would be unfair to retail sellers and could potentially penalize them for decisions that were, in all respects, consistent with the law and RPS rules in effect at the time the decisions were made.

Respectfully submitted,

/s/

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Dated: August 30, 2011

Attorneys for Calpine PowerAmerica-CA, LLC

## VERIFICATION

I am the attorney for the Calpine Corporation, and I have been authorized to make this verification on the behalf of Calpine PowerAmerica-CA, LLC. Said party is located outside of the County of San Francisco, where I have my office, and I make this verification for said party for that reason.

I have read the foregoing document and based on information and belief, believe the matters in the application to be true.

I declare under penalty of perjury that the foregoing is true and correct and executed on August 30, 2011, at San Francisco, California.

/s/
Jeffrey P. Gray