**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 PACIFICORP (U 901 E) ON 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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August 30, 2011

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Pursuant to the instructions in Administrative Law Judge (ALJ) Anne E. Simon's July 15, 2011 *Ruling Requesting Comments on New Procurement Targets and Certain Compliance Requirements for the Renewables Portfolio Standard Program* (ALJ Ruling), PacifiCorp (U-901-E), d.b.a. Pacific Power (PacifiCorp or Company) hereby provides these comments on the ALJ Ruling.

## I. Introduction and Summary

PacifiCorp is a multi-jurisdictional electric utility (MJU) with approximately 1.7 million customers in California, Idaho, Oregon, Utah, Washington and Wyoming. Approximately 45,000 of those customers are located in Shasta, Modoc, Siskiyou and Del Norte counties in Northern California, representing less than two percent of the total retail load served across PacifiCorp's six-state system. PacifiCorp's California service territory is not connected to the California Independent System Operator (CAISO), but rather PacifiCorp is the balancing authority for its California service territory, which is operated on an integrated basis with other states in the western portion of its multi-state territory.

PacifiCorp, as an MJU, is also subject to somewhat different renewables portfolio standard (RPS) requirements as provided in new Section 399.17 of Senate Bill No. 2 of the



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California Legislature's 2011-2012 First Extraordinary Session (SB 2 (1x)). Where applicable, these differing requirements are described in PacifiCorp's responses to the ALJ Ruling, below.

## II. Responses to Issues Posed in the ALJ Ruling

PacifiCorp provides the following responses to specific issues posed 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)? [Footnote omitted.] Please provide detailed support for your position.***

Given the on-going uncertainty of the effective date of the 33% program, as well as for simplicity, clarity, administrative efficiency and commercial stability, the 20% program rules should apply through the 2011 compliance year, or, at the least until such time that the 33% program is effective: i.e., the law should not apply retroactively. Any application of the 33% program to compliance years occurring before the effective date of SB 2 (1x) will result in retroactive application of new rules. Such retroactive application of the law may be subject to a takings claim to the extent that there is a loss of value in transactions made for the purpose of achieving compliance with the RPS program.

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

   ***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 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…"***



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- ***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)?***

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

The language of new § 399.15(b)(2)(B) does not require setting compliance targets for intervening years, and in fact, § 399.15(b)(2)(C) explicitly states that "[r]etail sellers shall *not be required to demonstrate a specific quantity of procurement for any individual intervening year*." (Emphasis added). Because the new RPS program establishes multi-year compliance periods with a procurement obligation requirement associated with the end of those periods, no intermediate compliance target should be required within a compliance period. The Commission should allow entities flexibility to determine the amount of renewable resource procurement during intervening years and manage their portfolios in a manner that aims to achieve the obligation required at the end of each compliance period.

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

Compliance targets for intervening years should not be set for this period because the language of § 399.15(b)(2)(B) does not require the setting of compliance targets for intervening years and § 399.16(b)(2)(C) explicitly states that no specific procurement showing demonstration will be required for intervening years.

***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***



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***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 2014-2016compliance 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***
  ***-- 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?***

The statute requires the Commission to set compliance period quantities that reflect "reasonable progress" in intervening years. Procurement targets for intervening years for the compliance period 2014-2016 and 2017-2020 should not be set using a linear trend, for two reasons: 1) it is overly prescriptive given year-to-year weather and market changes that impact demand and renewable resource availability and are outside of the direct control of the retail seller; and 2) establishing specific quantities for individual intervening years could be inconsistent with new section 399.15(b)(2)(C), which states that "[r]etail sellers shall not be required to demonstrate a specific quantity of procurement for any individual intervening year."

PacifiCorp proposes that the Commission adopt a more flexible approach by setting a range for what constitutes "reasonable progress." Further, the Commission should consider setting compliance period goals for intervening years that may be demonstrated by mechanisms other than actual procurement. For instance, an entity could have actually procured 21% in 2014

but may have made substantial progress, e.g. through negotiated contracts or other means, toward actual procurement. Incorporating non-procurement factors into what constitutes "reasonable progress" is desirable because it will more accurately reflect a retail seller's progress toward meeting the goal for the entire compliance period. In addition, the determination of the compliance period quantities that reflect "reasonable progress" should be based on the adjusted procurement percentage (the amount after banking is applied), which more accurately reflects a retail seller's progress.

***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?***

See PacifiCorp's response to 2(B) above. New § 399.15(b)(2)(C) clearly states that retail sellers shall not be required to demonstrate a specific quantity of procurement for any individual intervening year. The statute requires compliance to be demonstrated at the end of the final year of each compliance period. Therefore, there should be no "consequences" for failure to procure a specific quantity during intervening years.

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?***

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 2010through 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.***

The "procuring at least 14 percent of retail sales from eligible renewable energy resources in 2010" may be based on the "Actual Procurement Percentage" for 2010 as calculated under the August 2011 Commission RPS compliance report submission.

***B. How should "the deficits associated with any previous renewables portfolio standard" be interpreted? Please provide detailed support for the proposal.***

1. ***As applying only to deficits in meeting the 2010 target of20% of retail sales, without the use of flexible compliance; or***

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

3. ***As applying to any year in which a retail seller has an APT obligation, using allowable flexible compliance rules in the calculation of any deficit. or***

4. ***Another interpretation should be used.***

The Commission should interpret "the deficits associated with any previous renewables portfolio standard" based on the treatment of deficits occurring in any year prior to the implementation of SB 2 (1x).

The 14% procurement value should be used to establish the procurement floor applicable to retail sellers in 2010. If a retail seller's actual procurement percentage was 18% in 2010, then the remaining 2% deficit would not be subject to the Commission's prior rules that required a deficit to be made up in subsequent years through eligible procurement, including procurement consistent with flexible compliance provisions. With the new program, any procurement above

14% in 2010 may be carried forward and applied in future years under the 33% program. Any other approach will result in an inequitable and unfair interpretation and application of the law. Prohibiting retail sellers from carrying forward surplus procurement from 2010 or prior years effectively punishes those parties that met the 20% requirement and had remaining banked surplus.

The statute does not prohibit retail sellers from carrying forward surplus from the 20% program to the 33% program; it simply allows retail sellers to not carry forward deficits. The language of SB 2 (1x) simply does not support a conclusion that because deficits will not be added to any procurement requirement, surplus will also not be included in any procurement requirement. Reaching this conclusion, for the reasons described above, would have negative impacts on the intent of the entire RPS program and would unnecessarily punish positive behavior previously encouraged by the Commission. Such a result is unacceptable and must be avoided. Accordingly, any surplus over 14% should be banked forward to preserve equity and to avoid punishing those parties that made good faith efforts to meet the RPS requirements.

***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?***

- ***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?***

A retail seller does not need to satisfy any prior year's procurement target if in 2010 it achieves a procurement target pursuant to the 20% program of at least 14%. If a retail seller's



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actual procurement target was above 14% in 2010, then, as stated, "the deficits associated with any previous renewables portfolio standard shall not be added to any procurement requirement pursuant to this article."

Furthermore, if the Commission determines that a retail seller's slate is effectively wiped clean if the retail seller procured at least 14% in 2010, it is vital that any procurement above and beyond 14% be carried forward and applied to the 33% program. Retail sellers should be rewarded, and not punished, for efforts made to meet the 20% target. It is fundamentally unfair to disallow procurement from a retail seller simply because that entity made sound procurement decisions based on existing rules. If certain retail sellers are relieved of the obligation to meet the 20% target in 2010, the same allowances must be made for others. Therefore, any procurement above 14% in 2010 should be eligible to be banked forward and allowed to qualify under the 33% program.

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?***

As explained in response to Issue #1 above, the Commission should make the new 33% program effective starting January 1, 2012, at the earliest. As such, new section 399.15(b)(9) should, at most, only apply to the compliance year 2012 and future years. Whether or not deficits associated with the 20% program are added to the 33% program, regardless of when the 33% program is effective, should be in accordance with new section 399.15(a), addressed in response to Issue 3 above.

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)?***

See response to Issue #4.

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. [Footnote omitted.] 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.***

PacifiCorp is not subject to the same contract approval process as other investor owned utilities.[1] Rather than approve all contracts, the Commission relies on PacifiCorp's integrated resource plan (IRP) and defers to PacifiCorp's multi-state resource planning efforts. Therefore, any calculation of minimum quantities of eligible renewable energy that PacifiCorp must procure through contracts of at least 10 years' duration must take this into account. PacifiCorp proposes that the Commission implement new section 399.13(b) in the same way that current section 399.14(b) was implemented.

- ***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)?***

With respect to PacifiCorp, the minimum quantity should not include content category requirements because those requirements do not apply to small and multi-jurisdictional utilities

[1] *See* D.08-05-029. *See also* current § 399.17(d) and new § 399.17(d).

(SMJUs), including PacifiCorp.[2]

- ***Should the minimum quantity requirement under new § 399.13(b) carry forward the requirement in D.07-05-028 that the long-term contracts for the minimum quantity must be signed in the same year as the short-term contracts sought to be counted for RPS compliance? If not, what basis for accounting for the minimum quantity of long-term contracts should be used?***
- ***Should the minimum quantity requirement under new § 399.13(b) have a termination? If so, what should the termination be?***
- ***How should deliveries in 2011 and later years from short-term contracts entered into in 2010 and earlier years, and in compliance with D.07-05-028, be treated?***
- ***Should such deliveries be deducted from actual procurement quantities as part of the calculation of excess procurement that may be applied to a subsequent compliance period pursuant to new § 399.13(a)(4)(B)?***
- ***Should short-term contracts entered into in 2011 but prior to the effective date of SB 2 (1x) be treated differently? Why or why not?***

See PacifiCorp's response above. With respect to grandfathering of contracts, all contracts executed prior to the effective date of the new law should be given their full value provided that those contracts meet the current requirements for RPS-eligibility. While the statute provides for full grandfathering of contracts entered prior to June 1, 2010, excluding other contracts executed for the purposes of achieving compliance with the existing RPS law will create the potential for unconstitutional takings. To avoid this, the Commission should recognize the full value of contracts executed pursuant to the then-effective RPS program. To the extent that contracts were executed in a manner that did not meet the SB 107 requirements then in effect, those short-term contracts would not be recognized pursuant to that provision. However, after SB 2 (1x) becomes effective, the SB 107 provision (and the Commission's prior implementation of that law) should no longer apply.

For PacifiCorp, because its procurement is made under the auspices of its IRP, and

[2] New § 399.17(b). *See also* the July 8, 2011 Scoping Memo and Ruling of Assigned Commissioner, pp. 4-5, as well as the July 12, 2011 ALJ Ruling Requesting Comments on Implementation of New Portfolio Content Categories for the RPS Program, p. 4, FN 4.

because it has been adding renewable resources to its system through owned facilities and facilities under long-term contracts, the Commission should not establish a minimum volume for PacifiCorp. Alternatively, the Commission should recognize that PacifiCorp has already achieved a minimum level of long-term contracts and is accordingly not required to enter into a minimum requirement of future long-term contracts.

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).***

The determination of the compliance period quantities that reflect "reasonable progress" during intervening years under new section 399.15(b) should be based on the adjusted procurement percentage (the amount after banking is applied) as well as any efforts by the retail seller to negotiate contracts or take other steps toward actual procurement. The adjusted procurement percentage should be used because it is a more accurate reflection of the retail seller's compliance position and therefore its progress toward meeting the compliance target at the end of the compliance period.

With respect to banking, according to the statute:

> 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.[3]

However, the statute *separately* provides:

> 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.[4]

Based on the plain language of the statute, only short-term contracts must be subtracted from total procurement when determining excess procurement. There is no similar requirement for Section 399.16(b)(3) category products. Accordingly, a retail seller would be able to apply Section 399.16(b)(3) category products towards the current compliance period (up to a product-specific procurement limitation, if applicable) and any additional renewable procurement that exceeded the RPS target for that compliance period, other than procurement from short-term contracts, would be allowed to qualify as excess procurement.

Any 399.16(b)(3) procurement above the applicable percentage limitations would not be

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[3] New § 399.13(a)(4)(B).

[4] *Id.*

eligible for banking. For example, assume a retail seller has a procurement obligation of 80 MWh for the first compliance period. It procures 10 MWh of eligible renewable procurement from short-term contracts, another 10 MWh of eligible renewable procurement from Section 399.16(b)(3) category products, and another 80 MWh of eligible renewable procurement from Section 399.16(b)(1) category products. Pursuant to Section 399.13(a)(4)(B), the short term contracts must be deducted from the total renewable procurement amount. However, there is no similar requirement to deduct the 10 MWh of Section 399.16(b)(3) products. Accordingly, the retail seller could apply the 10 MWh of Section 399.16(b)(3) products towards its current compliance obligation and use 70 of the 80 MWh of its Section 399.16(b)(1) products to meet its remaining compliance obligation, and have 10 of the 80 MWh of its Section 399.16(b)(1) products carried forward in a bank into the next compliance period. Therefore, the retail seller would have 10 MWh of excess procurement for the 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?***



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- ***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)?***

As previously noted, PacifiCorp believes that the 33% program should not be effective until January 1, 2012, at the earliest. The Commission has not notified retail providers that the current RPS program is no longer applicable, and therefore the prudent course of action that PacifiCorp has followed is continued compliance with existing law. Accordingly, the calculation of excess procurement for the compliance year 2011 should be based on the current 20% program. Forward banking allowed for excess procurement calculated in accordance with the 20% program should remain consistent with the provisions of the 20% program, i.e. banking of REC-only contracts should be allowed. This means that banked procurement counted in years in which the 20% program was effective should not be subject to the limits on the use of specific portfolio content categories set out in new section 399.16(c).

Beginning with the effective date of the 33% program, the Commission should allow unlimited forward banking of excess procurement from bundled contracts for all compliance periods. There is nothing in the new rule that prevents the Commission from adopting a flexible approach to banking. Additionally, as described in greater detail above, any excess procurement from the 20% program should carry forward to the 33% program.

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?***

PacifiCorp provides no comment on this issue, but reserves the right to address this issue at a later time.

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

Yes, as described in PacifiCorp's response to Issue #1, the Commission should continue to apply the current flexible compliance rules until at least January 1, 2012 or when the 33% program becomes effective, whichever is later.

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 previously described in PacifiCorp's response to Issue #1, flexible compliance rules, and all current RPS program requirements, should remain in effect through at least 2011.

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?***

Given the uncertainty of the effective date of the 33% program, the procurement and flexible compliance rules for the 20% program should apply at least until January 1, 2012 or such time that the 33% program is effective, whichever is later. At a minimum, the 20% program rules should apply through the 2011 compliance year. This means that, with respect to any deficits that occur when the 20% program is effective, a retail seller should be allowed to defer a shortfall of 0.25% of APT without explanation, so long as the deficit is made up within three years. This means that those deficits may be carried forward into the 33% program. This approach is appropriate given the current requirements of existing law (the 20% program) and is

not inconsistent with new section 399.15(b)(9), which prohibits adding deficits "associated" with a compliance period to a future compliance period. Deficits being carried forward in a manner consistent with the 20% program should not be considered "associated" with the compliance period referenced in new section 399.15(b)(9).

***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.") [Footnote omitted.] 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?***

- ***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.***

See PacifiCorp's response to Issue # 3(B). PacifiCorp provides no additional comment on this issue at this time, but reserves the right to address this at a later date.

***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?***

PacifiCorp provides no comment on this issue at this time, but reserves the right to address this at a later date.

***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. [Footnote omitted.] 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***



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> ***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?***

Commission-jurisdictional entities should be able to rely upon contractual warranties of statutory compliance from a POU. Commission-jurisdictional entities can have this reviewed on contract approval (if applicable), or by submission of a verification to the Commission with any compliance reporting. Should a POU fail to meet its obligations as overseen by the CEC due to overselling RECs, then the CEC should address that concern when recommending enforcement against a POU. This approach minimizes transaction costs on Commission-jurisdictional entities, allows for standard reliance in the contracts, and places the ultimate responsibility for failure to achieve compliance with the POU. This is particularly important to the extent a secondary market for RPS products operates during the compliance periods as entities seek to balance out their portfolios against procurement limitations and prohibitions on banking of certain product categories.

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.***

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

- ***For compliance periods beginning in 2011, should a penalty cap be in place?***

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

- ***What method should be used to set a new penalty cap under SB 2 (1x)?***

New § 399.15(b)(2)(C) clearly states that retail sellers shall not be required to demonstrate a specific quantity of procurement for any individual intervening year. Therefore, there should be no "consequences" for failure to procure a specific quantity during intervening years. Penalties are not mandatory under SB 2 (1x). In fact, SB 2 (1x) makes no mention of penalties for failure to meet procurement targets. Accordingly, the Commission should not automatically require penalties for failure to procure a specific quantity of RPS-eligible generation. The assessment as to whether a retail seller has met its RPS-goals should only be assessed at the end of each multi-year compliance period. The Commission should then determine whether to proceed with any potential enforcement action against the retail seller. The Commission should conduct any enforcement action per Commission rules and should avoid a strict liability interpretation. This is consistent with Section 399.15(b)(8), which provides that

failure to comply will result in the Commission exercising its Section 2113 authority. However, to the extent a penalty cap is imposed by the current rules, a penalty cap should be in place for the 2011 compliance period.

A new penalty cap under SB 2 (1x) should be flexible enough to account for aggravating or mitigating factors. Furthermore, the Commission should establish formal review under the "five factors" of the Commission's Affiliate Rules (*see* D.98-12-075) to the extent that any waiver is denied and an entity has failed to make reasonable progress to achieve the procurement obligation applicable at the end of the compliance period. This is the standard approach for enforcement actions. The imposition of a static penalty amount has market distorting effects, and is contrary to the analysis to be done under a waiver proceeding. Because of the dynamic nature of RPS production and the energy based target, creating a static, strict liability structure should be avoided.

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

Compliance filings for entities subject to § 399.17 will differ from filings for entities subject to § 399.16 product categories and procurement limits, and will also need to reflect how the specific procurement cost cap mechanism should come into play. Compliance reporting by the SMJU group covered by § 399.17 and § 399.18 should be developed separately from those entities subject to the § 399.16 product categories.

***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.***

PacifiCorp addresses the current processes of facility certification and output verification by the CEC, with some changes to reflect verification of specific product types. The CEC has jurisdiction to certify and verify procurement to ensure it qualifies for the RPS program, and has

selected WREGIS for tracking and verifying renewable energy generation. Tracking will continue through WREGIS, an information system that is auditable and protects against double counting or otherwise using the same REC or renewable generation for multiple programs. The CEC or Commission may need to seek changes to WREGIS to accommodate the different product content categories in § 399.16. Although PacifiCorp is not subject to procurement limitations by product types, it expects that its WREGIS reporting will nonetheless require characterization of products.

***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.***

Yes, the Commission should carry forward the existing RPS rules through at least calendar year 2011. Assuming that SB 2 (1x) becomes effective in late 2011, the new program structures should be prospectively applied in 2012 and only after sufficient implementation details are adopted by the relevant agencies. If the law does not become effective until 2012 or if the implementation details at the agencies are not sufficiently defined by that time, then implementation of the new program and the transition to the new program should be moved to a date after both agencies have adopted a functional structure. See PacifiCorp's response to Issue #1.

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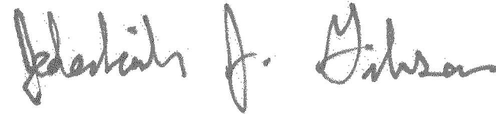
## III. Conclusion

PacifiCorp appreciates this opportunity to provide comments on the ALJ Ruling and looks forward to working with the Commission and stakeholders to refine the RPS program.

Dated: August 30, 2011

Respectfully submitted,



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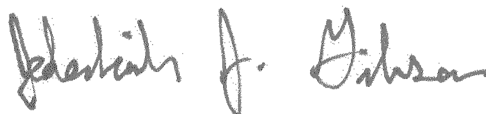
**VERIFICATION**

I am the attorney for the respondent corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document 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 that the forgoing is true and correct.

Executed on August 30, 2011 at Sacramento, California.



Jedediah J. Gibson



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