BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.	Rulemaking R.11-05-005

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

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

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

California's original RPS program was created by landmark legislation in 2002, and went into effect in 2003. It has undergone refinement and overhaul ever since, most recently in the form of SB 2 (1x). At no time has the amending legislation ever negated those parts of the program that have already taken place, and that is certainly not the case with SB 2 (1x). Yet that is exactly what the IOUs are arguing for. Our *Reply Comments* are focused on the Aug. 30 *Comments* of the three IOUs.

SB 2 (1x) Does Not Negate All that Came Before

As we pointed out in our April 28, 2011, *Comments of the Green Power Institute on the March 2011 IOU RPS Compliance Reports* in this proceeding, the California IOUs have failed consistently to meet their programmatic RPS-procurement obligations without the aid of flexible-compliance mechanisms. Because the original flexible-compliance regime (D.03-06-071), which explicitly rejected earmarking as a way of rolling-over compliance obligations, would not have been enough to prevent the IOUs from incurring penalties for noncompliance over the past several years, the Commission eventually reversed its initial determination and allowed earmarking, first of individual contracts, later of portfolios of contracts, in order to allow the IOUs to achieve paper compliance throughout the program's initial decade. The fact is that compliance with RPS obligations was achieved

throughout the first phases of the RPS program despite an appallingly small amount of growth in new renewable generating capacity in California, the actual intent of the original law, and of all of its amendments.

The IOUs are arguing that SB 2 (1x) not only sets the path for phase 2 of the RPS program, which runs from the previous milestone year of 2010 to the new milestone year of 2020, but that it also retroactively relieves retail sellers of their obligations under the already-completed first phase of the program (2003 – 2010). There is nothing in SB 2 (1x) to suggest that that is its intent. The new legislation replaces the old RPS program with a revised program. It describes the new program, and the transition from the old program to the new program. It does not remove obligations associated with the already completed first phase of the program. The new program sets some aggressive procurement targets for the state. In the opinion of the GPI, until the regulated retail sellers believe that non-compliance has consequences, continuing chronic non-compliance is likely to be the result. Negating past compliance obligations does not reinforce the belief that non-compliance has consequences.

The Last Sentence of New Section 399.15 (a)

A considerable source of the controversy about how to apply SB 2 (1x) results from the last sentence in § 399.15 (a):

> 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 renewables portfolio standard shall not be added to any procurement requirement pursuant to this article.

It is important to understand that in the original RPS program (2003 – 2010), unsatisfied deficits, including unsatisfied deficits for which fines have been assessed, are carried forward to future compliance years. The new legislation in the sentence above specifies that deficits for PG&E and SCE, the two IOUs whose 2010 procurement was over 14 percent, will not be carried forward from the old program to the new program. It says nothing about how such deficits, if any, should be dealt with in closing out the original, pre-2011 program. We are not offering a legal opinion, but our understanding is that the

rules that were in place for that portion of the program (2003 – 2010) are the rules that govern that phase of the program.

Fulfilling Pre-2011 Earmarking Obligations

Perhaps the crucial issue that is in dispute in this set of *Comments* and *Replies* is the treatment of previously (pre-2011) earmarked energy that will be generated during the first compliance period (2011 – 2013) of the new program. Question no. 14 in the *Ruling* asks the question directly:

> 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 complianceperiod 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?

As a first principle, retail sellers should be required to honor their legal and regulatory obligations, particularly if those obligations are necessary to allow them to achieve compliance and/or avoid penalties in any particular compliance year (pre-2011), or compliance period (post-2010).

For the pre-2011 program, the final determination on compliance, which is made by the CEC, cannot be made until three years after the end of the compliance year, after flexible-compliance options expire. There is nothing in the new legislation that excuses the CEC from its duty to verify compliance for compliance years 2008, 2009, or 2010. Each retail seller files annual *RPS Procurement Reports* with the Commission, in which they report on actual procurement for the previous year, and provide a plan, if necessary, for how they will achieve compliance using flexible compliance options. These plans are not compulsory, and the flexible-compliance transfers can only be made if the energy is actually generated in the year in which it is anticipated.

Because their 2010 procurement is greater than 14 percent, if PG&E or SCE choose not to use their earmark options for energy generated in 2011 – 2013, they will nevertheless **not** have any residual deficits from pre-2011 to carry through to the SB 2 (1x) program

(beginning in 2011), and they will be able to count the previously earmarked energy towards their 2011 – 2013 compliance-period obligation. But they will also be answerable for the resulting procurement deficits in accounting for their RPS obligations for 2010, and possibly for 2008 and 2009 as well. They cannot have it both ways. That would be double counting.

Procurement Targets for the Unspecified Years

Question no. 2 of the *Ruling* asks about setting procurement targets for the years covered by the SB 2 (1x) program for which the targets are not specified in the legislation. The *Ruling* presents a schedule that is near to linear as one possible approach. All three of the IOUs propose schedules that are more in tune with the approach taken in the pre-2011 program, in which unspecified-year steps are one percent, with a steep rise to the specified value in the final-year of a compliance period. The IOUs argue that they need this kind of a function in order to deal with the lumpiness and unpredictability of renewable project development and production. However, considering the fact that the intermediate-year targets are not enforceable individually, the real question is: how high should the Commission set the multi-year compliance-period targets, which are the aggregate of their individual-year components? In our opinion, either the schedule suggested in the *Ruling*, or a linear schedule, should be used. Considering their past records of performance with respect to the procurement of renewable energy, minimizing the compliance obligations of retail sellers for future compliance periods does not seem like a good idea.

Penalty Caps and Multi-Year Compliance Periods

In the original RPS program (2003 – 2010), procurement deficits incur penalties of 5¢/kWh, with an annual cap of $50 million per retail seller. In the absence of flexible compliance mechanisms, most of the procurement deficits wracked up by the IOUs would have been more than large enough to qualify for the maximum penalty, and in many cases actual penalties on a per-kWh basis would have been less than half of the 5¢/kWh nominal level.

The new RPS program (2011 – 2020) uses multi-year compliance periods for their inherent flexibility, in place of allowing the use of flexible-compliance transfers to achieve annual compliance obligations. All three of the IOUs propose that if penalties are imposed at all, then the current, $50 million penalty cap that is designed for annual compliance periods be applied as is to the multi-year compliance periods that will be used post-2010. In the opinion of the GPI, there are two fundamental flaws with this proposal. First, it is inappropriate to apply an annual cap amount to a multi-year compliance period. The correct approach is to apply the annual cap amount on an annual basis to a multi-year compliance period. Second, the annual cap amount of $50 million is too low. We propose $75 million.

Dated September 12, 2011

Respectfully Submitted,

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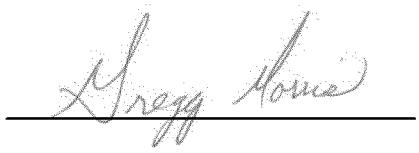
VERIFICATION

I, Gregory Morris, am Director of the Green Power Institute, and a Research Affiliate of the Pacific Institute for Studies in Development, Environment, and Security. I am authorized to make this Verification on its behalf. I declare under penalty of perjury that the statements in the foregoing copy of *Reply Comments of the Green Power Institute on the ALJ's Ruling Requesting Comments on Targets and Compliance*, filed in R.11-05-005, are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

Executed on September 12, 2011, at Berkeley, California.



Gregory Morris