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)

REPLY COMMENTS OF L. JAN REID ON NEW PROCUREMENT TARGETS

September 12, 2011

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I. Introduction

Pursuant to the July 15, 2011 Ruling (Ruling) of Administrative Law Judge (ALJ) Anne Simon, L. Jan Reid (Reid) submits these reply comments in Rulemaking 11-05-005 concerning procurement targets and compliance requirements for the Renewables Portfolio Standard (RPS) program. Reply comments are due on Monday, September 12, 2011. I will send this pleading to the Docket Office using the Commission's electronic filing system on September 12, 2011, intending that it be timely filed.

II. Summary and Recommendations

I have relied on state law and past Commission decisions in developing recommendations concerning the implementation of Senate Bill 2(1x) (SB2(1X)). I recommend the following:[1]

1. The Commission should set RPS compliance goals of 19% in 2011, 20% in 2012, 21% in 2013, 22.33% in 2014, 23.67% in 2015, and 25% in 2016. (p. 3)

2. The Commission should not count the Annual Procurement Target (APT) deferral as part of retail sales as recommended by the Alliance for Retail Energy Markets (AReM). (pp. 5-6)

3. Pursuant to new PUC § 399.16(d), the Commission should find that an entity may not use procurement banking for energy associated with contracts executed after May 31, 2010. (p. 7)

4. The Commission should find that REC-only contracts may not be banked because the Commission did not authorize the use of REC-only contracts until January 13, 2011. (p. 7)

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[1] Citations for these recommendations and proposed findings are given in parentheses at the end of each recommendation and finding.

5. Retail sellers should consider the benefits of portfolio diversification when establishing a mix of long-term and short-term contracts in their RPS portfolios. (p. 9)

6. The Commission should order the IOUs to consider the benefits of portfolio diversification when establishing a mix of long-term and short-term contracts in their RPS portfolios. (p. 9)

7. The Commission should not adopt The Marin Energy Authority's (MEA's) recommendation related to pre-qualifying RPS. (pp. 7-8)

My recommendations are based on the following proposed findings:

1. The Commission was established by the California Constitution and has broad authority under the law. (p. 3)

2. PUC § 399.15(b)(2)(B) requires that "In establishing quantities 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." The Commission cannot calculate an average for a three-year period unless it establishes a compliance target for each year. (p. 3)

3. The California legislature did not intend for deferrals to be counted as part of retail sales. Otherwise, the legislature would not have eliminated the statutory language that authorized the Commission to allow flexible compliance mechanisms such as deferrals. (pp. 5-6)

4. The Commission can apply the net deficits for all years prior to 2010 to the retail seller's ongoing procurement requirement. (p. 6)

5. The Commission does not have the authority to apply flexible compliance rules after December 8, 2011. (p. 9)

6. The Commission is obligated to establish policies that are consistent with California law, even if that means changing the RPS procurement rules retroactively. (p. 8)

III. Targets for Intervening Years

A. AReM's Comments

The Alliance for Retail Energy Markets (AReM) states that "AReM believes that the Commission should avoid setting specific targets for the intervening years of the compliance period because the statute does not require the Commission to limit procurement flexibility in that way, nor does it permit the Commission to impose penalties for failure to achieve any specific procurement target in the intervening years." (AReM Comments, p. 6)

First of all, the Commission is an agency established by the California Constitution and has broad authority under the law. The Commission is not limited by the "strict construction" of a particular statute. The Commission has authority that goes beyond the specific authority granted in a particular statute and the Commission can exercise its best judgment in a manner consistent with state and federal law.

AReM cites no legal precedents or statutes that specifically prohibit the Commission from establishing compliance goals for the intervening years. Therefore, the Commission has the authority to establish such goals.

Secondly, PUC § 399.15(b)(2)(B) requires that "In establishing quantities 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." The Commission cannot calculate an average for a three-year period unless it establishes a compliance target for each year.

Therefore, I recommend that the Commission set RPS compliance goals of 19% in 2011, 20% in 2012, and 21% in 2013. (See Opening Comments of L. Jan Reid, pp. 5-7)

B. Calpine's Comments

Calpine argues that: (Calpine Comments, p. 3, footnotes omitted)

> 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 and that retail sellers "shall not be required to demonstrate a specific quantity of procurement for any individual intervening year." Thus, no compliance targets may be set for the intervening years in the 2011-2013 compliance period.

Calpine confuses a compliance target with a compliance requirement. A compliance target is a goal established by the Commission. Although the Commission should expect retail sellers (such as Calpine) to make a good-faith effort to meet or exceed a target, the Commission may not fine the retail seller if it does not meet the compliance target. Compliance targets and reporting are important because they give the Commission a report on the progress of retail sellers toward meeting their eventual compliance requirements. The Commission can then address RPS procurement problems as they arise and make necessary changes to the RPS system.

C. PacifiCorp's Comments

PacifiCorp states that: (PacifiCorp Comments, pp. 4-5)

> 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.

The Commission should not adopt a "reasonable progress" standard as proposed by PacifiCorp. The message of SB2(1X) is clear. The state legislature wants actual RPS procurement: not flexible compliance, and certainly not "reasonable progress."

Therefore, the Commission should not adopt a "reasonable progress" standard as suggested by PacifiCorp.

IV. Deferrals

In its response to Question 3, AReM states that: (AReM Comments, p. 9)

> The 14% figure should be based on actual procurement made for 2010 requirements consistent with the 20% program rules applicable to the 2010 compliance year. That means that the 14% should include procurement of eligible renewable resources procured and received for 2010 delivery, plus actual delivered procurement from prior years that the retail seller banked in accordance with established CPUC rules. It should also include the 0.25% APT deferral as well.

The Commission should not count the APT deferral as part of retail sales as recommended by AReM. Prior to the passage of SB2(1x), state law required 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. (PUC § 399.14(a)(2)(C)(i))

SB2(1x) repealed PUC § 399.14 and replaced it with a new section. The legislative counsel has pointed out that SB2(1x) "would delete an existing requirement that the PUC adopt flexible rules for compliance for retail sellers." (SB2(1x) Legislative Counsel's Digest, p. 2)

It is clear that the legislature did not intend for deferrals to be counted as part of retail sales. Otherwise, the legislature would not have eliminated the statutory language that authorized the Commission to allow flexible compliance mechanisms such as deferrals.

V. Net Deficits

AReM argues that "For any entity with a net deficit under this approach that is eliminated, the entity should be relieved of the obligation to procure those quantities and should not be subject to a compliance review or any penalty for that net deficit." (AReM Comments, p. 13)

An entity should not be relieved of the obligation to procure those quantities as suggested by AReM. The Commission should rely on the plain language of the new statute. PUC § 399.15(a) states that "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."

Since the statute refers to "deficits associated with any previous renewables portfolio standard," it is clear that the Commission can apply the net deficits[2] for all years prior to 2010 to the retail seller's ongoing procurement requirement.

[2] The net deficit is total deficits minus total surpluses for all years through 2010.

VI. Procurement Banking

A. AReM's Comments

AReM argues that "Specifically, an entity's bank as of December 31, 2010, net of any deficit that is forgiven as a result of the application of the 14% threshold, should be fully usable by that entity in future compliance periods, as provided for in the grandfathering provisions of the statute." (AReM Comments, p. 20)

AReM's position is inconsistent with the new statute. PUC § 399.16(d) states that "Any contract or ownership agreement originally executed prior to June 1, 2010, shall count in full towards the procurement requirements established pursuant to this article . . ." Thus, contracts executed after May 31, 2010 may not be banked.

B. Calpine's Comments

Calpine argues that "Unlimited forward banking of excess procurement from bundled and REC-only transactions should be allowed." (Calpine Comments, p. 9)

The Commission can only authorize unlimited forward banking if a contract was executed prior to June 1, 2010. (See Reid Comments, p. 15) REC-only contracts cannot be banked, because the Commission did not authorize the use of REC-only contracts until January 13, 2011. (See D.11-01-025)

C. Marin Energy Authority's Comments

The Marin Energy Authority (MEA) argues that "any new methodology for determining excess procurement and banking should allow for the use of Pre-Qualifying RPS, such as grandfathered short-term contracts, in the excess procurement equation." (MEA Comments, p. 8)

The Commission can only authorize unlimited forward banking if a contract was executed prior to June 1, 2010. (See Reid Comments, p. 15) REC-only contracts cannot be banked because the Commission did not authorize the use of REC-only contracts until January 13, 2011. (See D.11-01-025)

Therefore, the Commission should not adopt MEA's recommendation related to pre-qualifying RPS.

D. PacifiCorp's Comments

PacifiCorp argues that: (PacifiCorp Comments, p. 2)

> 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.

In several instances, the statute mandates retroactive application of new rules. For example, the Commission can only authorize unlimited forward banking if a contract was executed prior to June 1, 2010. (See Reid Comments, p. 15) REC-only contracts cannot be banked because the Commission did not authorize the use of REC-only contracts until January 13, 2011. (See D.11-01-025)

The Commission is obligated to establish policies that are consistent with state law, even if that means changing the RPS procurement rules retroactively. If PacifiCorp believes that certain sections of SB2(1X) violate the Fifth Amendment (takings clause) to the United States Constitution, PacifiCorp should file suit in federal court instead of attempting to resolve this issue at the Commission. It is the United States Supreme Court, not the CPUC that has the authority to determine whether or not a particular law is unconstitutional.

VII. Flexible Compliance

In response to Question 10, AReM incorrectly states that "nothing in the new statute changes the prior year's compliance regime." (AReM Comments, p. 21)

The Commission does not have the authority to apply flexible compliance rules after December 8, 2011. (See Reid Comments, answer to Question 11) Prior to the passage of SB2(1x), (PUC § 399.14(a)(2)(C)(i) gave the Commission authorization to adopt flexible compliance rules. SB2(1x) repealed PUC § 399.14 and replaced it with a new section. The legislative counsel has pointed out that SB2(1x) "would delete an existing requirement that the PUC adopt flexible rules for compliance for retail sellers." (SB2(1x) Legislative Counsel's Digest, p. 2)

VIII. Minimum Quantities

In response to Question 6, the Independent Energy Producers Association (IEPA) argues that "Retail sellers should have the ability to respond to changes in demand and market conditions to vary the proportion of long-term and short-term contracts in their portfolios from year to year." (IEPA Comments, p. 9)

Retail sellers should also consider the benefits of portfolio diversification when establishing a mix of long-term and short-term contracts in their RPS portfolios. The Commission should adopt this suggestion as optional for unregulated entities but mandatory for the IOUs.

IX. Conclusion

The Commission should adopt my recommendations for the reasons given herein.

* * *

Dated September 12, 2011, at Santa Cruz, California.

/s/

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VERIFICATION

I, L. Jan Reid, make this verification on my behalf. The statements in the foregoing document are true to the best of my knowledge, except for those matters that 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.

Dated September 12, 2011, at Santa Cruz, California.

/s/_____

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