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 THE CALIFORNIA WIND ENERGY ASSOCIATION AND THE LARGE-SCALE SOLAR ASSOCIATION ON NEW PROCUREMENT TARGETS AND CERTAIN COMPLIANCE REQUIREMENTS FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

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September 12, 2011

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I. INTRODUCTION

Pursuant to the *Administrative Law Judge's Ruling Requesting Comments on New Procurement Targets and Certain Compliance Requirements for the Renewables Portfolio Standard Program* issued by Administrative Law Judge ("ALJ") Simon on July 15, 2011 ("ALJ Ruling"), the California Wind Energy Association ("CalWEA") and the Large-scale Solar Association ("LSA") respectfully submit these reply comments.

CalWEA and LSA have reviewed the opening comments filed by various parties in response to the ALJ Ruling. Based upon this review, CalWEA and LSA respectfully recommend that the California Public Utilities Commission ("Commission"):

A. Calculate compliance period penalty caps based on the existing $25 million per year cap on non-compliance penalties multiplied by the number of years in each compliance period;

B. Ensure that renewable energy certificate ("REC") retirement rules are consistent with the statutory banking restrictions;

C. Require that a minimum of 75% of the products categorized under new Sections 399.16(b)(1) or 399.16(b)(2) must be procured through contracts with a duration of 10 years or longer; and

D. Confirm that SB 2 (1x) creates total procurement compliance obligations for each compliance period and annual procurement compliance obligations with respect to each of calendar years 2016 and 2020.

Each of these recommendations is addressed in further detail below.

II. DISCUSSION

A. The Commission Should, At A Minimum, Retain The Existing $25 Million Per Year Cap On Non-Compliance Penalties And Calculate The Compliance Period Penalty Caps Based On The Number Of Years In Each Compliance Period

In their opening comments, The Utility Reform Network ("TURN") and the Coalition of California Utility Employees ("CUE") take the position that the Commission should adjust the existing $25 million per year cap to reflect the multi-year nature of the new compliance periods.[1] CalWEA and LSA support the TURN/CUE position. The Commission should, at a minimum, modify the current annual cap by multiplying $25 million by the number of years in the compliance period to establish a compliance period cap for each compliance period. The existing cap is based on application to a single year. In contrast, SB 2 (1x) will measure compliance with RPS procurement obligations (multi-year and annual) at the end of the compliance period. Maintaining the current $25 million annual cap, but applying it to multi-year procurement obligations, would result in a diminution of the current deterrent value. Thus, the Commission should, at a minimum, establish compliance period caps equal to the product of $25 million and the number of years in the compliance period.

[1] *See* TURN/CUE Opening Comments at 10.

B. The Commission Should Ensure That The Commission's RPS Compliance Rules Are Consistent With SB 2 (1x) Banking Restrictions

In their opening comments, TURN and CUE ask that the Commission "prevent gaming through 'REC reshuffling' strategies."[2] CalWEA and LSA join TURN and CUE in this request. However, to prevent additional gaming opportunities described below, CalWEA asks the Commission to go a step further than proposed by TURN and CUE by clarifying that RECs must be retired for compliance purposes in the same compliance period in which they are generated.

CalWEA and LSA support TURN/CUE's goal of ensuring that the Commission's RPS compliance rules align with the new statutory restrictions on banking. TURN/CUE describe "REC reshuffling" as a strategy in which a retail seller procures RECs in one compliance period and then delays the retirement of the REC for compliance purposes until a subsequent compliance period, which results in a retail seller circumventing the statutory prohibition on banking procurement categorized under new Section 399.16(b)(3).[3] To ensure compliance with the statutory prohibition on banking these products,[4] TURN/CUE ask the Commission to assume that procurement in a given compliance period is applied to compliance in the same compliance period.[5]

While the TURN/CUE request is a step in the right direction, CalWEA is concerned that a variation of the "REC reshuffling" strategy could still circumvent the statutory restrictions on banking under TURN/CUE's proposal to assume that procurement in a given compliance period

[2] TURN/CUE Opening Comments at 6-7.
[3] *Id.* at 6.
[4] New Section 399.13(a)(4)(B).
[5] TURN/CUE Opening Comments at 6.

is applied to compliance in the same compliance period.[6] Specifically, a retail seller could circumvent TURN/CUE's proposal (and the statutory restrictions on banking) by restructuring its existing contracts to shift procurement (i.e., delivery and payment) of RECs that would have been received in one compliance period until a subsequent compliance period. For example, instead of entering into a long-term contract for the purchase of RECs, a retail seller could easily enter into an option agreement allowing the retail seller to take delivery of the specified volume of RECs on multiple different dates. This would allow the retail seller to claim that it procured the RECs in the later compliance period and thus should be permitted to use such RECs in the later compliance period.

To avoid the potential for this type of activity, CalWEA asks the Commission to clarify that RECs must be retired for compliance purposes in the same compliance period in which they are generated, or before the end of their 36-month life,[7] whichever comes sooner.

C. The Commission Should Require That A Minimum Of 75% Of The Products Categorized Under New Sections 399.16(b)(1) or 399.16(b)(2) Must Be Procured Through Contracts With A Duration Of 10 Years Or Longer

In its opening comments, the Union of Concerned Scientists ("UCS") recommends that the Commission adopt a minimum long-term contract requirement that "at least 75% of all the electricity products that meet the requirements of [new] § 399.16(b)(1) or [new] § 399.16(b)(2) should be [sic] consist of contracts that are 10 years or longer for each compliance period."[8] In the CalWEA/LSA opening comments, CalWEA and LSA noted that the Commission should, *at the very least*, maintain the existing requirement that retail sellers must enter into long-term

[6] LSA takes no position on this issue.
[7] New Section 399.21(a)(6) provides that a REC must be retired in the tracking system within 36 months from the initial date of generation of the associated electricity. To remain consistent with this provision, the Commission should clarify that the 36-month deadline continues to apply to the use of RECs within a compliance period.
[8] UCS Opening Comments at 6-7.

contracts for a minimum of 0.25% of the prior year's retail sales before entering into short-term contracts.[9] CalWEA and LSA support the more stringent requirement proposed by UCS because, as UCS notes, the purpose of the State's RPS program is to facilitate the development of new renewable energy resources that contribute to Califomia's energy supply. In turn, developing new renewable energy resources requires long-term contracts to support financing, but large volumes of short-term contracts reduce the opportunity for developers to obtain long-term contracts. Thus, the Commission should require that a minimum of 75% of the products categorized under new Sections 399.16(b)(1) or 399.16(b)(2) must be procured through contracts with a duration of 10 years or longer.[10]

D. The Commission Should Confirm That SB 2 (1x) Creates Total Procurement Compliance Obligations For Each Compliance Period And Annual Procurement Compliance Obligations With Respect To Calendar Years 2016 and 2020

As described in the CalWEA/LSA opening comments, new Section 399.15(b) establishes a framework that includes a dual compliance obligation for the 2014-2016 and 2017-2020 compliance periods – the retail seller must procure (1) a total amount of RPS-eligible energy over the compliance period that is no less than the sum of the requirements for each year of the compliance period, and (2) an annual amount of RPS-eligible energy in the final year of the compliance period that is no less than the amount required in the statute (i.e., 25% of retail sales by the end of 2016 and 33% of retail sales by the end of 2020).[11] Thus, the Commission should confirm that SB 2 (1x) creates total procurement compliance obligations for each compliance

[9] CalWEA/LSA Opening Comments at 11.
[10] CalWEA and LSA also support a requirement that the long-term contracts categorized under new Section 399.16(b)(2) must include some fixed price element in order to count towards the 75% minimum long-term contract requirement.
[11] CalWEA/LSA Opening Comments at 10.

period and annual procurement compliance obligations with respect to each of calendar years 2016 and 2020.

1. The Commission Should Reject SCE's Argument That There Are No Annual Procurement Obligations Until Post-2020 Because SCE Misreads The Statute

In contrast to the CalWEA/LSA position, in its opening comments, Southern California Edison ("SCE") presents a series of statutory arguments that "there are no enforceable RPS targets for any individual year from 2011 through 2020 under the new RPS program" and "[i]nstead, there are overall RPS targets covering the multi-year first, second, and third compliance periods."[12] Stated simply, SCE is misreading SB 2 (1x). CalWEA and LSA respond to SCE's arguments below.

SCE argues that SB 2 (1x) is "clear" that there are no annual targets until after 2020 because new Section 399.15(b) "specifically provides that the Commission 'shall implement renewables portfolio standard procurement requirements *only as follows*,' and then goes on to state that '[e]ach retail seller shall procure a minimum quantity of eligible renewable energy resources *for each of the following compliance periods*:'."[13] SCE's presentation of the statute, however, is heavily truncated and results in an incomplete analysis of the meaning of the statute. The Legislature's direction that the Commission implement the program "only as follows" is located in subdivision (b) of new Section 399.15, and that provision contains nine subparagraphs. SCE's subsequent reference to the 2010-2013, 2014-2016, and 2017-2020 compliance periods is located in the first subparagraph (1) of subdivision (b) of new Section 399.15. Yet, there are eight additional paragraphs in subdivision (b) of new Section 399.15 that further inform the Legislature's direction that the Commission implement the program "only as follows", including

[12] SCE Opening Comments at 5-11.
[13] *Id.* at 5 (emphasis in original; internal citations omitted).

new Section 399.15(b)(2)(B), which provides the Legislature's instruction that the Commission should establish procurement targets for intervening years "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." Thus, the Commission should read the Legislature's direction in new Section 399.15(b) in its entirety, including the provisions of new Section 399.15(b)(2)(B) requiring procurement of 25 percent of retail sales by December 31, 2016, and 33 percent of retail sales by December 31, 2020, and confirm that it creates both total procurement compliance obligations for each compliance period and annual procurement compliance obligations with respect to each of calendar years 2016 and 2020.

SCE further argues that SB 2 (1x) does not allow for annual compliance obligations because new Section 399.15(b)(2)(C) states "that '[r]etail sellers shall be obligated to procure no less than the quantities associated with all intervening years *by the end of the compliance period*,' and that '*[r]etail sellers shall not be required to demonstrate a specific quantity of procurement for any individual intervening year.*' "[14] SCE's analysis ignores a key term in the statute. Reading this provision as a whole, the term "intervening" can only mean those years for which the Commission is instructed by the statute to establish interim targets, and not every year within each compliance period, as explained below.

This provision of SB 2 (1x) provides that a retail seller does not have an annual compliance obligation with respect to "any individual intervening year," where "intervening year" refers to those years for which the Commission is required to establish targets "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

[14] *Id.* at 6 (emphasis in original).

December 31, 2020."[15] By claiming that there are no annual compliance obligations whatsoever until post-2020, SCE reads the adjective "intervening" out of the statute—i.e., the word "intervening" would be redundant and convey no meaning- which is incompatible with a reading of the statutory provisions as a whole. If the Legislature had intended that there would be no annual procurement obligations within a compliance period, it could have done so by referring to each year of the compliance period rather than the intervening years, as in "retail sellers shall not be required to demonstrate a specific quantity of procurement for any individual year through 2020." Giving effect to the Legislature's choice of the term "intervening" requires a starting and ending point to determine what falls in between. The Legislature provided these bookends in new Section 399.15(b)(2)(B) by establishing three milestones – (1) procurement of an average of 20% of retail sales over the 2011-2013 compliance period, (2) procurement of 25% of retail sales by December 31, 2016, and (3) procurement of 33% of retail sales by December 31, 2020. The Legislature's choice of the term "intervening year" applies to those years falling between these milestones – i.e., 2014 and 2015 in the case of the second compliance period, and 2016 through 2019 in the case of the third compliance period.[16] These are the years for which the Commission is instructed to establish interim targets in new Section 399.15(b)(2)(B), and these are the years for which a retail seller will not be required to demonstrate a specific annual quantity of procurement under new Section 399.15(b)(2)(C). Because SCE's interpretation would read the adjective "intervening" out of the statute, the Commission should reject SCE's claim that SB 2 (1x) does not allow for annual procurement obligations in 2016 and 2020.

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[15] New Section 399.15(b)(2)(B).

[16] Note that there are no "intervening years" for the first compliance period because the Legislature chose to mandate the requirement for the entire compliance period in new Section 399.15(b)(2)(B) ("the commission shall require procurement for each retail seller equal to an average of 20 percent of retail sales") rather than mandating the requirement for the end of the compliance period and allowing the Commission to establish the targets for the intervening years ("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").

SCE's interpretation of the intent of SB 2 (1x) differs markedly from the Legislature's own statement of its intent. This is evidenced by SCE's assertion that "the 33% renewables in 2020 language included in the statute should be incorporated into the multi-year target for the third period (i.e., (0.26 x 2017 retail sales) + (0.27 x 2018 retail sales) + (0.28 x 2019 retail sales) + (0.33 x 2020 retail sales))" and its claim that this "multi-year MWh RPS target" is "consistent with the language and intent of SB 2 (1x)."[17] SB 2 (1x) amends California Public Resources Code Section 25740 to clearly and expressly state that the Legislature's intent in establishing the RPS program is "to increase the amount of electricity generated from eligible renewable energy resource per year, so that it equals at least 33 percent of total retail sales of electricity in California per year by December 31, 2020." Thus, the Legislature clearly contemplated that retail sellers would be required to procure RPS-eligible energy at a rate of at least 33% of retail sales per year by the end of 2020.

Yet, SCE's interpretation of SB 2 (1x) is that SCE can meet the requirements of the statute without procuring anywhere near 33% of its retail sales from RPS-eligible generators in 2020. As noted above, SCE's position is that "the 33% renewables in 2020 language included in the statute should be incorporated into the multi-year target for the third period (i.e., (0.26 x 2017 retail sales) + (0.27 x 2018 retail sales) + (0.28 x 2019 retail sales) + (0.33 x 2020 retail sales))."[18] Assuming, for ease of calculation, that SCE's retail load growth is flat from 2017 through 2020, SCE's interpretation of the statute would allow SCE to meet its proposed compliance obligation by procuring less than 29% of its retail sales in each year from 2017 to 2020. Because the total compliance period target proposed by SCE is 114% of a single year's retail sales (i.e., 26% + 27% +28% +33% = 114%), SCE would only need to average

[17] SCE Opening Comments at 11.
[18] *Id.*

procurement of 28.5% of retail sales over the four-year period (i.e., 114% / 4 years = 28.5%/year). Put another way, if SCE procured at least 28.5% of its retail sales in each of 2017, 2018, and 2019, it would have enough excess procurement in those first three years to carry over into 2020, satisfy its shortfall in 2020 (33% - 28.5%), and achieve the SCE version of the 33% by 2020 mandate. While SCE believes that this outcome is "consistent with the language and intent of SB 2 (1x)" because it has met its "multi-year MWh RPS target,"[19] procurement of less than 29% of its retail sales in 2020 is a far cry from the Legislature's stated intent of "at least 33 percent of total retail sales of electricity in California *per year* by December 31, 2020."[20] Because SCE's interpretation of the intent of SB 2 (1x) is contrary to the Legislature's own statement of intent, the Commission should reject SCE's argument that there are no annual procurement obligations until after 2020.

SB 2 (1x) establishes a framework that includes a dual compliance obligation for the 2014-2016 and 2017-2020 compliance periods – the retail seller must procure (1) a total amount of RPS-eligible energy over the compliance period that is no less than the sum of the requirements for each year of the compliance period, and (2) an annual amount of RPS-eligible energy in the final year of the compliance period that is no less than the amount required in new Section 399.15(b)(2)(B). As described above, SCE's arguments to the contrary are based on a misreading of the language and intent of SB 2 (1x). As such, the Commission should confirm that SB 2 (1x) creates total procurement compliance obligations for each compliance period and annual procurement compliance obligations with respect to each of calendar years 2016 and 2020.

[19] SCE Opening Comments at 11.
[20] New Cal. Pub. Resources Code Section 25740 (emphasis added).

2. Annual Procurement Obligations In 2016 And 2020 Are Compatible With Support For Accelerated Procurement And Unlimited Banking (Calculated In Accordance With New Section 399.13(a)(4)(B))

In addition, annual procurement obligations in 2016 and 2020 are compatible with accelerated procurement and banking of excess procurement in accordance with SB 2 (1x). In opening comments, CalWEA and LSA asserted that there should be no limit on forward banking of excess procurement (calculated in accordance with new Section 399.13(a)(4)(B) to remove short-term procurement and unbundled RECs) because "[u]nlimited forward banking encourages accelerated procurement, which provides for a more robust market and greater overall environmental benefits."[21] While annual procurement obligations in 2016 and 2020 may reduce retail sellers' portfolio flexibility slightly in that they will not be able to procure less than 25% in 2016 and 33% in 2020, this slight reduction in procurement flexibility is not inconsistent with accelerated procurement and support for unlimited banking (calculated in accordance with new Section 399.13(a)(4)(B) to remove short-term procurement and unbundled RECs). Even with annual procurement obligations in 2016 and 2020, retail sellers will still have unlimited flexibility during the intervening years (i.e., 2014-2015 for the second compliance period and 2017-2019 for the third compliance period) to set their own internal procurement targets and procure less than the Commission-established targets, so long as the retail sellers procure enough RPS-eligible energy to meet the total compliance period procurement obligations. Moreover, retail sellers will still be entitled to the benefits of banking excess procurement (calculated in accordance with new Section 399.13(a)(4)(B)). Thus, even with annual procurement obligations in 2016 and 2020, a retail seller can still "under-procure" in the early years of a compliance period, make up for this by "over-procuring" during the final year of the compliance period, and

[21] CalWEA/LSA Opening Comments at 14.

bank excess procurement (calculated in accordance with new Section 399.13(a)(4)(B)) for compliance toward the following compliance period. Because annual procurement obligations in 2016 and 2020 are compatible with accelerated procurement and banking, the Commission should confirm that SB 2 (1x) creates total procurement compliance obligations for each compliance period and annual procurement compliance obligations with respect to each of calendar years 2016 and 2020.

III. CONCLUSION

For the foregoing reasons, the Commission should adopt the recommendations set forth in these reply comments, as summarized in the introduction to these reply comments.

Respectfully submitted,

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On behalf of California Wind Energy Association

September 12, 2011

VERIFICATION

I, Nancy Rader, am the Executive Director of the California Wind Energy Association. 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 California Wind Energy Association and the Large-scale Solar Association on New Procurement Targets and Certain Compliance Requirements for the Renewables Portfolio Standard Program* are true of my own knowledge, except as to the 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 foregoing is true and correct.

Executed on September 12, 2011 at Berkeley, California.

Nancy Rader

Executive Director, California Wind Energy Association

VERIFICATION

I, Kristin Burford, am the Policy Director of the Large-scale Solar Association. 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 California Wind Energy Association and the Large-scale Solar Association on New Procurement Targets and Certain Compliance Requirements for the Renewables Portfolio Standard Program* are true of my own knowledge, except as to the 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 foregoing is true and correct.

Executed on September 12, 2011 at San Rafael, California.

/s/ Kristin Burford

Kristin Burford

Policy Director, Large-scale Solar Association