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

REPLY COMMENTS OF THE ALLIANCE FOR RETAIL ENERGY MARKETS ON ADMINISTRATIVE LAW JUDGE'S RULING REQUESTING COMMENTS ON NEW PROCUREMENT TARGETS AND CERTAIN COMPLIANCE REQUIREMENTS FOR THE RENEWABLES PORTFOLIO STANDARD

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I. INTRODUCTION AND SUMMARY

Pursuant to the instruction in Administrative Law Judge Anne E. Simon's *Ruling Requesting Comments on New Procurement Targets and Certain Compliance Requirements for the Renewables Portfolio Standard Program*, dated July 15, 2011 ("ALJ Ruling"), the Alliance for Retail Energy Markets ("AReM")[1] submits these reply comments to the California Public Utilities Commission ("Commission" or "CPUC") concerning the implementation of SB 2 (1x), the 33% Renewable Portfolio Standard ("RPS") program.

SB 2 (1x) will now become the new RPS law for California 22 days before the start of 2012. Notwithstanding the Governor's signature on April 12, 2011, the bill's effective date is a function of when the First Extraordinary session concluded. That special session adjourned at 1:18 am on September 10, 2011, closing out the session. Accordingly, SB 2(1x) will be effective 90 days from September 10, 2011, or December 9, 2011, some 22 days before the start of 2012. Accordingly, the most pressing challenge before the Commission is how to address the

[1] AReM is a California mutual benefit corporation formed by electric service providers that are active in California's direct access market. The positions taken in this filing represent the views of AReM but not necessarily individual members or the affiliates of its members with respect to the issues addressed herein.

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uncertainties created by the Legislature where RPS-obligated entities were subject to the existing 20% RPS regime for 94% of 2011, but then subject to a new law on December 9, 2011 that purports to retroactively apply a new RPS regime applicable for the whole of 2011.

AReM has reviewed the extensive comments submitted by parties and provides its concise responses here.[2] Silence with respect to particular issues should not be interpreted as AReM agreement. Rather, our comments are focused on particularly critical transitional issues associated with moving from the current 20% RPS program to the new 33% program. There are two primary points to AReM's reply comments: (1) Retail sellers who accumulated excess procurement through 2010 should not forfeit those banks and impose increased costs on their customers, especially if retail sellers that primarily relied on earmarking under the flexible compliance rules are no longer required to pay back the earmarked volumes; and (2) the program design to meet the procurement goals under the 33% program should provide sufficient flexibility to allow retail sellers to manage their procurement across the multi-year compliance periods in light of dynamics inherent to RPS generation production as well as customer loads, and should provide bright line certainty about the economic penalty that will be imposed for an unexcused procurement failure, particularly for retail sellers, such as electricity service providers ("ESPs") who serve the contestable load segment.

AReM has organized its reply comments into general topic areas, rather than the specific set of questions outlined in its original comments. Section II provides a four-part response to

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[2] AReM responds to the Division of Ratepayer Advocates ("DRA"), Pacific Gas and Electric Company ("PG&E"), Southern California Edison Company ("SCE"), San Diego Gas & Electric Company ("SDG&E"), PacifiCorp, California Pacific Electric Company, LLC ("CalPeco"), Los Angeles Department of Water and Power ("LADWP"), The Utility Reform Network and the Coalition of California Utility Employees ("TURN/CUE"), Independent Energy Producers Association ("IEP"), Shell Energy North America (US), L.P. ("Shell Energy"), Noble Americas Energy Solutions LLC ("Noble"), Calpine PowerAmerica-CA, LLC ("CPA"), Sierra Club California ("Sierra Club"), the Union of Concerned Scientists ("UCS"), and the California Wind Energy Association and the Large-Scale Solar Association ("CalWEA/LSA").

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parties' comments concerning: (A) the treatment of earmarking and banks and urges the Commission to avoid a fundamentally unfair and confiscatory outcome; (B) the mechanics of the multi-year compliance target and the need to avoid the imposition of a two-tiered compliance target; (C) the structure of the enforcement and potential monetary sanction, and the need to avoid a "one-size fits all" approach to any penalty cap; and, (D) the need for clarity with respect to 2011 procurement requirements, given the December 2011 effective date of SB 2 (1x). Section III of these comments provides a concluding summary and suggestion on next steps.

II. REPLY COMMENTS

While parties agreed that there is no "intervening year" procurement obligations or potential sanctions for specific annual procurement levels, the bulk of the comments filed shows a range of views on various implementation details. AReM's comments below focus on critical implementation issues raised in parties' responses to the ruling's detailed questions.

It is critical that the Commission's statutory interpretation with respect to transitioning from the 20% RPS program to the new 33% regime avoid impermissible confiscation of compliance value from retail sellers and their customers. Positions advanced by PG&E, SCE, SDG&E, TURN/CUE, IEP, Sierra Club, and CalWEA/LSA[3] are inherently anti-consumer because they would potentially create significantly increased consumer costs by prohibiting retail sellers that relied upon the banking mechanism of the 20% program's flexible compliance rules from carrying forward excess RPS-eligible procurement that had been banked as of December 31, 2010, as well as excess procurement from one compliance period into the next compliance period. Moreover, the position advanced by these entities would require the Commission to adopt a discriminatory outcome that would strip away the property value held by those entities

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[3] *See* opening comments of PG&E, pp. 24-25, SCE, p. 19, SDG&E, p. 21, TURN/CUE, pp. 7-8, IEP, p. 11, Sierra Club, p. 8, CalWEA/LSA, pp. 15-16.

utilizing banking as part of a compliance strategy during the 20% program, but relieving other retail sellers of their past procurement obligations via the forgiveness of earmarks.

A. The Program Transition Should Not Treat Entities Differently Based Upon The Flexible Compliance Tools They Utilized In The Past.

As emphasized in our opening comments,[4] AReM is concerned about a fundamentally unfair interpretation of the 33% RPS program changes that would strip away RPS compliance value associated with excess procurement through 2010 from entities that relied upon the approved flexible compliance "banking" tool, as opposed to those entities that relied upon the "earmarking" tool. These two flexible compliance tools operate very differently. On the one hand, the 20% RPS program's banking mechanism can be thought of as a "debit card" approach—where an entity tracks surplus credits from one year of its RPS compliance and can apply that banked currency in subsequent compliance periods. This debit card approach uses actually procured and delivered RPS-eligible MWhs as the commodity—the compliance currency—that is banked via the compliance reports submitted to the CPUC staff. On the other hand, the earmarking mechanism should be thought of as a "credit card" approach—where an entity achieves compliance in the current compliance period based upon its promise to commit future RPS deliveries in the next three years to meet the current obligation. Earmarking was extensively used by the Investor Owned Utilities ("IOUs"), and noted by AReM in its opening comments.[5]

The immediate issue before the Commission in its interpretation of Sections 399.13(a)(4)(B) and 399.15(a), is whether those entities that relied on the *credit card* approach will be relieved of their past debts incurred under the 20% program as directed by the statute,

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[4]*See* AReM Opening Comments, pp. 10-13.

[5] *Ibid.*

while those entities that relied upon the debit card approach will be stripped of their compliance currency—the previously paid for and delivered RPS-eligible MWhs. AReM believes it would be fundamentally unfair and likely illegal to eliminate the compliance value first saved under the 20% program and held in existing banks. Beside constituting a taking of property, such a result would be discriminatory based upon which flexible compliance tool was used, since the mandated forgiveness of earmarked volumes under the credit card approach effectively results in the creation of a bank of RPS compliance value in the 33% program from now-forgiven obligations incurred under the 20% program. A number of parties have argued that the 399.13(a)(4)(B) language regarding potential banking of the new RPS products results in elimination of the banks accumulated under the 20% program.[6] Others would permit surplus compliance from the 20% program to carry-forward into the 33% program, with caveats.[7] The comments of PG&E, SCE, SDG&E, TURN/CUE, IEP, Sierra Club, and CalWEA/LSA fail to address the critical distinction between forgiveness of an obligation covered by the "credit card" earmarking during the 20% program, and the potential taking of property if the balance in the "debit card" banking is eliminated. While 399.13(a)(4)(B) addresses the initiation of banking of the new product types under the new 33% regime, there is absolutely no language in SB 2(1x) that mandates the Commission to extinguish the compliance values banked under the 20% program.

To avoid this perverse result while honoring the statute's goal of forgiving past deficits, AReM presented a transitional approach which avoids an impermissible taking of property by

[6] IEP comments, p. 11; Sierra Club comments, p. 5; SCE Comments, p. 19; TURN comments, p. 7; SDG&E comments, pp. 15, 21; PG&E comments, pp. 3, 24; CalWEA/LSA comments, p. 15.

[7] UCS comments, p. 8 (would permit carry-forward, but only from quantities associated with long-term contracts); DRA comments, p. 10 (excess procurement from prior to January 1, 2011 that meets 399.16 requirements can be carried forward. "To do otherwise would penalize utilities that successfully complied with the 20% RPS program and impose greater costs on their ratepayers.")

carrying forward excess procurement through 2010 after (i) allowing retail sellers to reduce their 2010 compliance requirement to the statutory 14% threshold and bank the quantities in excess of 14%, and (ii) deducting any outstanding earmarked quantities from their existing bank.[8] To the extent an entity has a positive balance because their bank exceeds any outstanding earmarked quantities, that balance will be carried forward to the first multi-year compliance period. To the extent the entity has a zero or negative balance (meaning their earmarks exceed any bank), that quantity is forgiven by operation of law, and there will be no compliance value to carry forward into the first multi-year compliance period under the 33% program. Concisely put, an entity who only has a "debit card" account should not have its positive compliance balance wiped out, while entities who have used the "credit card" approach will be completely forgiven their past compliance debts.

B. The Multi-Year Compliance Obligation Should Be A Single and Straight-Forward Target With A Range To Reflect Reasonable Progress Toward 33% by 2020.

Certain parties[9] have advocated for a dual compliance obligation metric to be reviewed at the end of the second and third multi-year compliance periods—one target being a cumulative volume of RPS-eligible MWhs collected over the course of the compliance period, and the second target being an single, annual volume that achieves at least 25% for 2017 or 33% in 2020. AReM disagrees that this dual compliance target approach is required by statute.

The purpose of the multi-year compliance period is to provide a realistic goal that acknowledges the need for flexibility around portfolio management, the realities of long-lead RPS project development, as well as the impacts of weather on both intermittent renewables

[8] "Outstanding earmarked quantities" means those past volumes covered by earmarking that are yet to be satisfied by deliveries prior to the effectiveness of the 33% program.

[9] *See* opening comments of DRA, Sierra Club, and CalWEA/LSA.

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production and customer demand. The compliance targets will always be subject to variance due to swings in customer load due to weather or economic conditions, as well as potential swings in intermittent or weather-sensitive renewable production from hydro, wind, solar and geothermal resources, as well as project development delays. Imposing a single-year compliance obligation for the last year of a multi-year compliance period would undermine the benefit of the multi-year compliance period approach. For this reason AReM opposes DRA, Sierra Club, and CalWEA/LSA dual compliance target proposals.

The central issue from AReM's perspective with respect to procurement targets is the establishment of a single, straight-forward compliance volume target applicable for the entire multi-year compliance period. Some minimum threshold for that cumulative volume obligation must be set so that retail sellers know that failure to meet that requirement at the end of the multi-year compliance period may result in an enforcement action, unless a waiver is granted. AReM's proposal, which is similar to the proposals of CalPeco and Noble, uses a minimum volume calculation derived from the statute. Other parties endorsed or suggested changes to the procurement curve calculations (linear average[10] or step-functions[11]). Generally, parties suggested that volumes exceeding those levels would be eligible for potential banking, subject to the statutory rules for carrying surplus procurement to the next multi-year compliance period.[12]

AReM opposes the substantial departure found in the TURN/CUE comments. These parties suggest that irrespective of the language on surplus eligibility, there should be additional restrictive "vintaging" limitations that would essentially extinguish the ability to manage

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[10] Use of a linear trend was proposed by TURN/CUE, IEP (it should be noted that IEP advocated for a straight-line linear progression), Shell Energy, Sierra Club, UCS, and CalWEA/LSA. DRA recommended a "concave" approach that is less than linear.

[11] PG&E, SCE, and SDG&E recommended a 1% and "jump" approach.

[12] *See* opening comments of PG&E, SCE, SDG&E, PacifiCorp, DRA, TURN/CUE, IEP, Shell Energy, UCS, CalWEA/LSA, CPA, and LADWP.

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portfolios and maintain value of resources between compliance periods.[13] This proposed restriction should be rejected because it will impose higher costs on California consumers, unnecessarily complicate the market, and negate the statutory structure which seeks to provide a certain degree of flexibility for portfolio management within and between compliance periods. Moreover, the proposal will result in increased compliance costs as well as potential loss of value from some RPS-eligible production.

AReM's proposed compliance target mechanism applies a range approach. First, a safe-harbor volume threshold is established whereby procurement compliance is achieved and any potential enforcement actions are avoided if a minimum cumulative level of procurement occurs for the compliance period. The mechanism also reflects procurement planning realities by accounting for potential project delays, production variation or demand swings before a procurement level would be eligible for treatment as surplus to be carried to the next multi-year compliance period. AReM proposed this approach to provide certainty with respect to a mandatory minimum procurement level before a bright-line is broken that triggers compliance action, while simultaneously ensuring that higher levels of renewables deliveries will be usable in a future compliance period, consistent with the banking rules.

Not only does such an approach lower RPS procurement costs, we see an additional benefit to the Commission in terms of reduced administrative work that avoids the need for very precise tracking and compliance review efforts, a bright-line for the enforcement action trigger, provision of a "stretch factor" before a banking option exists, as well as a pragmatic fact that procurement efforts and ultimate results can be influenced by the variances of load and production swings.

[13] TURN/CUE comments, pp. 6-7.

C. Potential Monetary Penalties Should Be Subject to an Appropriate Cap Level and Not "One Size Fits All".

AReM agrees with CalPeco that the cap on potential monetary penalties (if such sanctions are the outcome of an enforcement action) should be appropriate to the size of the retail entity.[14] The existing 20% RPS program penalty cap was first established with a focus exclusively on the large IOUs. While that level may be appropriate for entities collectively serving more than 90% of the market,[15] those levels are entirely too large for other retail sellers. Moreover, the disproportionality of the cap to smaller entities cannot be squared with the Commission's traditional enforcement analysis described in the Affiliate Rules Decision.[16]

Other than this issue of the appropriate size of the penalty cap, AReM agrees with PG&E, SCE and PacifiCorp that the Commission should rely on the existing penalty structure and revisit this issue after the more urgent compliance program structure work is completed.

D. The Commission Should Evaluate The Implementation Timeline In Light of the Still-Pending Effective Date for SB 2(1x).

Today, California's RPS law is the 20% program. Based on action taken the legislature on September 9, 2011 closing the First Extraordinary session, the new 33% RPS regime will become effective on December 9, 2011 This creates a very awkward situation where, legally speaking, the 20% RPS program rules remain in effect for most of the first year of the new compliance period established by the statute. In light of these unique circumstances, the Commission has an additional burden to ensure that there is a fair and appropriate balance of regulations that allow retail sellers to realize full value of their 2011 procurement, conducted in accordance with the existing and currently-effective 20% program in the 33% program.

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[14] CalPeco Comments, p. 10.

[15] Based on most current Energy Information Agency data for the 2009 annual sales by IOUs and ESPs.

[16] *See* D.98-12-075 ("Affiliate Rules Decision").

Despite the fact that the 20% program has remained the law of the land through almost all of 2011, some parties have argued that retail sellers should have nevertheless been making renewable purchases in 2011 consistent with the 33% program.[17] While appealing in its simplicity, the concept is deficient from both a legal and commercial standpoint. First, there are significant implementation issues that must be addressed at the Commission before a retail seller knows the details that must be reflected in commercial structures. This is best exemplified by past Commission decisions requiring particular contract terms.[18] To suggest that retail sellers should be force to speculate as to what the Commission will require—and presumably bear the risk of guessing incorrectly—is unrealistic. It suggests that the *existing and effective* law should be ignored prior to its replacement, the epitome of regulatory uncertainty. Retail sellers should not be held to requirements of a program that is not yet law and which does not yet have its implementation structure in place. Unfortunately the Commission has been placed in the position of dealing with the fact that almost 95% of 2011 will be subject to overlapping legal directives. Because of this unique circumstance, the Commission's decision outlining the implementation processes should explicitly acknowledge this conflict and the problem it creates for entities who complied with the existing 20% program when it comes time to review compliance with the new 33% program during the first multi-year compliance period.

III. CONCLUSION

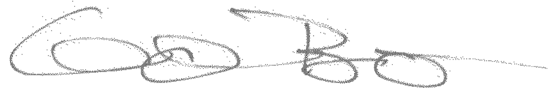
AReM appreciates the opportunity to respond to parties' comments on the ALJ Ruling, and urges adopting implementation rules for the new 33% RPS program that becomes effective

[17] IEP, p. 13: ("To the extent possible and lawful, procurement for 2011 should be governed by the provisions of SB 2X."); CalWea/LSA, p. 18 ("To the extent that the contract was signed after June 1, 2010 or fails to meet the enumerated conditions for contracts signed prior to June 1, 2010, it would be subject to the portfolio content limitations of new Section 399.16(c)."); DRA comments, p. 14 ("DRA expects that retail sellers have been procuring in light of SB 2 (1x) since at least the beginning of 2011, and therefore believes that to the extent feasible, the 33% RPS rules should begin applying in 2011.").

[18] See, e.g., D.08-04-009.

December 9, 2011, that will not negatively impact customers of retail sellers that have actively managed compliance with the 20% program. Specifically, the Commission should avoid confiscatory rules with respect to a retail seller's accumulation of compliance credits for those entities that relied on the "banking" rules, as opposed to deferral of compliance through the "earmarking" rules.

Respectfully submitted,



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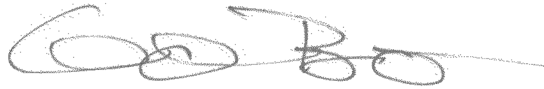
VERIFICATION

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 September 12, 2011 at Sacramento, California.



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