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)

SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E)
REPLY COMMENTS ON JULY 15, 2011 RULING
REQUESTING COMMENTS ON NEW PROCUREMENT
TARGETS AND CERTAIN COMPLIANCE REQUIREMENTS
FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

AIMEE M. SMITH
101 Ash Street, HQ-12
San Diego, CA 92101
Phone: (619) 699-5042
Fax: (619) 699-5027
E-mail: amsmith@semprautilities.com

Attorney for
SAN DIEGO GAS & ELECTRIC COMPANY

September 12, 2011

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I.
INTRODUCTION AND BACKGROUND

In accordance with the Rules of Practice and Procedure of the California Public Utilities Commission (the "Commission" or "CPUC") and the *Administrative Law Judge's Ruling Requesting Comments on New Procurement Targets and Certain Compliance Requirements for the Renewables Portfolio Standard Program* dated July 15, 2011 (the "ALJ Ruling"), San Diego Gas & Electric Company ("SDG&E") hereby submits these reply comments regarding implementation of new procurement targets and certain compliance requirements for the Renewable Portfolio Standard ("RPS") program contained in Senate Bill ("SB") 2 (1X) ("SB 2").[1/]

The ALJ Ruling set forth 19 specific questions relating to transition from the existing RPS program (the "20% RPS program") to the new RPS program (the "33% RPS program"), and to new procurement targets and compliance requirements for the 33% RPS program. Opening

[1/] SB 2 (1X) (Stats. 2011, Ch. 1).

comments were filed by 24 parties, including SDG&E. SDG&E responds below to certain arguments raised in parties' comments. To the extent SDG&E does not address other matters raised in parties' comments, its silence should not be interpreted as agreement.

II. DISCUSSION

A. Existing Flexible Compliance Rules Apply to the 20% in 2010 Compliance Target

In comments filed jointly by The Utility Reform Network ("TURN") and the Coalition of California Utility Employees ("CUE"), TURN/CUE generally acknowledge that SB 2 is intended to apply to compliance obligations beginning on January 1, 2011, and that the Commission must apply the 20% program rules to compliance requirements through December 31, 2010.[2/] In response to a specific question concerning the relevance of flexible compliance rules to 2010 and prior compliance years, however, TURN/CUE take the inconsistent view that retail sellers may not rely upon the full suite of flexible compliance options available under the 20% RPS program to demonstrate compliance with the 2010 and pre-2010 procurement targets.[3/] This claim is entirely without merit and must be rejected.

As SDG&E observed in its opening comments, it is clear that SB 2 does not operate to modify the procurement and flexible compliance rules associated with the 20% RPS program; these rules remain in effect through December 31, 2010 and apply to procurement targets through the 2010 compliance year. Most parties, including the Division of Ratepayer Advocates

[2/] Opening Comments of TURN/CUE, p. 1.
[3/] *Id*. at p. 8.

(“DRA”), share the view that compliance determinations for years 2010 and prior should be based upon the 20% program rules.[4/] Indeed, TURN/CUE appear to be the *only* parties to claim that SB 2 operates to retroactively modify application of the 20% program rules to the 20% program compliance targets.

TURN/CUE offer no support for their position that retail sellers may not rely on 20% program flexible compliance measures to demonstrate compliance with the 2010 (or earlier) RPS targets, other than the observation that “the authorization for flexible compliance rules in § 399.14(a)(2)(C)(i) has been deleted.”[5/] It is abundantly clear, however – indeed, it is the consensus view of most, if not all, stakeholders that addressed the issue[6/] – that the modifications to the RPS program made by SB 2 (including § 399.14(a)(2)(C)(i)’s deletion of flexible compliance rules) do not apply to the 20% program targets and are instead intended to apply on a going-forward basis as of January 1, 2011. Thus, TURN/CUE’s proposed retroactive revision of the 20% program rules as they relate to the 2010 and prior compliance years must be rejected as being wholly without statutory support and a flagrant violation of Commission well-settled policy disfavoring *ex post facto* regulation.[7/]

Retail sellers reasonably relied upon the regulatory framework in place in 2010 in determining their RPS compliance strategy for that compliance year (and in years prior to 2010), Plainly, there is nothing in SB 2 to justify disturbing the compliance showings made by retail sellers in 2010 or in any earlier compliance year. Accordingly, the Commission should make

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4/ *See, e.g.*, Opening Comments of DRA, pp. 6, 10; Opening Comments of Union of Concerned Scientists (“UCS”), p. 5, 10.

5/ Opening Comments of TURN/CUE, p. 8.

6/ *See, e.g.*, Opening Comments of DRA, p. 10; Opening Comments of UCS, 10; Opening Comments of the Green Power Institute (“GPI”), p. 5; Opening Comments of SCE, p. 19; Opening Comments of the Independent Energy Association (“IEP”), p. 12; Opening Comments of the Alliance for Retail Energy Markets (“AReM”), p. 21; Opening Comments of PacifiCorp, p. 15; Opening Comments of Shell Energy, p. 8; Opening Comments of Calpine, p. 10; Opening Comments of Noble Solutions, p. 10.

7/ *See, e.g.,* D.02-01-001, *mimeo*, p. 8.

clear that for purposes of demonstrating compliance with the 2010 and pre-2010 compliance year procurement targets, retail sellers may rely upon the full range of flexible compliance measures available under the 20% RPS program.

B. The 14% Showing Under New § 399.15(a) Must Include Flexible Compliance

If a retail seller has an RPS procurement deficit in 2010 or a prior compliance year, new § 399.15(a) requires the retail seller to demonstrate that it procured at least 14% of retail sales from "eligible renewable energy resources" in 2010.[8/] TURN/CUE and DRA assert that the 14% showing under new § 399.15(a) must be made on the basis of renewable energy credits ("RECs") from bundled or REC-only contracts associated with RPS-eligible energy that was generated and delivered in 2010.[9/] Thus, according to TURN/CUE and DRA, in order to make the 14% showing, a retail seller would be required to rely *solely* on the calculation of energy delivered in 2010 and could not rely upon banked procurement or any other any flexible compliance measure. Neither TURN/CUE nor DRA, offer any statutory support for this claim, however, as indeed the provision contains no such limitation.

New § 399.15(a) provides that a retail seller making the 14% showing must demonstrate that it procured "at least 14 percent of retail sales *<u>from eligible renewable energy resources</u>* in 2010." (Emphasis added). As SDG&E explained in its opening comments, this same reference to "eligible renewable energy resources" is included in the prior § 399.11(a) (setting the 20% by

8/ It is important to note that the 14% showing is required *only* where a retail seller has a deficit associated with 2010 and/or a prior compliance year. *See* § 399.15(a) ("For any retail seller procuring at least 14% of retail sales from eligible renewable energy resources in 2010*<u>, the deficits associated with any previous renewables portfolio standard</u>* shall not be added to any procurement requirement pursuant to this article.") (Emphasis added).

9/ Opening Comments of TURN/CUE, p. 3; Opening Comments of DRA, p. 5.

2010 goal) and the new § 399.11(a) (setting the 33% by 2020 goal).[10/] Thus, under new § 399.15(a) a retail seller must demonstrate satisfaction of the 14% procurement requirement in exactly the same manner that it demonstrates compliance with either the 20% or 33% procurement requirements. In other words, under both the 20% and 33% RPS programs, a retail seller could satisfy the requirement to attain a specified percentage of total retail sales "from eligible renewable energy resources" through a combination of 2010 deliveries and banking/flexible compliance. Therefore, it is logical to conclude that a retail seller can demonstrate that it attained 14% of total retail sales "from eligible renewable energy resources" through a combination of 2010 deliveries and banking/flexible compliance.

Accordingly, SDG&E concurs with parties such as the Union of Concerned Scientists ("UCS"), which points out that "[s]ince banked resources represent eligible renewable energy resources that have already generated electricity (and met the delivery rules under the previous RPS program) . . . it is also reasonable to account for these deliveries when calculating the 14% threshold."[11/] Allowing retail sellers to rely on their 2010 bank to make the 14% showing will ensure that ratepayers receive the full value of the products purchased for compliance under the 20% program rules. If the bank is not applied for the 14% showing, it will essentially go to waste, thereby subjecting ratepayers to additional compliance costs. Elimination of the bank for 2010 compliance would violate Guiding Principle No. 1 and basic tenets of fairness by disregarding the fact that compliance had been achieved under the rules in place in 2010.

10/ Prior § 399.11(a) required retail sellers to "attain a target of generating 20 percent of total retail sales of electricity in California *from eligible renewable energy resources* by December 31, 2010." (Emphasis added). New § 399.11(a) requires retail sellers to "attain a target of generating 20 percent of total retail sales of electricity in California *from eligible renewable energy resources* by December 31, 2013." (Emphasis added).

11/ Opening Comments of UCS, p. 4.

Thus, even assuming, *arguendo*, that 20% program flexible compliance measures such as earmarking and deficit deferral cannot be relied upon to reach the 14% threshold, it is clear under any reasonable analysis that banked procurement (which may be relied upon for compliance purposes under both the 20% and 33% programs) may be used by a retail seller, along with 2010 deliveries, to demonstrate compliance with the 14% target.[12/] Hence, the Commission should find that for purposes of making the 14% showing, retail sellers may rely upon both 2010 deliveries and banked procurement. In addition, the Commission should expressly provide that since the 14% showing relates to the 2010 compliance year, the relevant procurement bank for purposes of the 14% showing is the procurement bank available in 2010.

C. A Retail Seller that Fails to Achieve either the 20% or 14% Procurement Targets Must Make Up the Deficit in the 2011-2013 Compliance Period, but Should Not be Subject to Penalties

New § 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 the previous renewables portfolio standard shall not be added to any procurement requirement pursuant to this article*." (Emphasis added). Thus, it is logical to assume that to the extent a retail seller has a deficit associated with a previous RPS, the inability to demonstrate that it had procured at least 14% of retail sales from eligible renewable energy resources would mean that such deficits *would* be added to procurement requirements established under SB 2. This interpretation is based upon common sense and a reading of the plain language of the statute.[13/] The retail seller would be required to make up the pre-2011 deficit within the 2011-2013 compliance period (rather than in 2011 or a particular intervening year). This conclusion is based upon the plain language of the provision, which refers to adding the deficit to the

12/ Banking is permitted in the 33% program pursuant to new § 399.13(a)(4)(B); banking is permitted in the 20% program pursuant to § 399.14(a)(2)(C)(i).

13/ D.04-04-020, *mimeo*, p. 4.

"procurement requirement" established under SB 2. Since the procurement requirement established in SB 2 is expressed in terms of multi-year compliance periods rather than annual compliance periods, it is reasonable to interpret the provision as requiring the pre-2011 deficit to be added to the first multi-year compliance period.

TURN/CUE challenge this interpretation of new § 399.15(a), asserting that the Commission may not require a retail seller to satisfy a pre-2011 deficit through additional procurement during the 2011-2013 period "since § 399.15(b)(3) prohibits the commission from requiring any retail seller to procure more than the quantities established pursuant to § 399.15(b)(2)."[14] TURN/CUE assert that a pre-2011 deficit would trigger penalties rather than a deficit make up requirement.[15] TURN/CUE's interpretation is not supported by the plain language of § 399.15(a) and, indeed, would render the provision meaningless. Thus, it must be rejected.

New § 399.15(a) is the only provision of SB 2 to specifically address pre-2011 deficits. The provision includes *no* discussion of imposition of penalties for deficits associated with prior RPS programs. Rather, it provides that satisfaction of the 14% showing will prevent carry-forward of any pre-2011 deficit, and is logically interpreted as establishing that the inverse would also be true – *i.e.*, that if a retail seller failed to achieve its RPS target in 2010, and could not make the 14% showing, it would be required to add the deficit to its 2011-2013 compliance period. Thus, taking into account the principle of statutory construction that "the expression of one thing in a statute ordinarily implies the exclusion of other things,"[16] the fact that the provision focuses on adding pre-2011 deficits to the 2011-2013 procurement requirement, and omits any reference to penalties, demonstrates that TURN/CUE's argument concerning penalties in the event of a pre-2011 deficit lacks merit.

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[14] Opening Comments of TURN/CUE, p. 4.
[15] *Id*; *see also* Opening Comments of DRA, p. 7.
[16] *In re J.W.*, 29 Cal. 4th 200, 209 (2002).

Similarly, TURN/CUE's claim that the Commission may not add a pre-2011 deficit to the 2011-2013 compliance period must be rejected where it would render § 399.15(a) meaningless. Specifically, if § 399.15(b)(3) operates to prohibit, under *any* circumstance, the addition of a pre-2011 deficit to a future compliance period, as TURN/CUE suggest, there would exist no need for a separate provision stating that a pre-2011 deficit would not be added to a future compliance period upon satisfaction of the 14% showing. TURN/CUE's interpretation of § 399.15(b)(3) makes § 399.15(a) redundant and superfluous. The rules of statutory construction make clear that "every word, phrase or provision is presumed to have been intended to have a meaning and perform a useful function."[17/] If a particular construction would render a statutory provision ineffective and meaningless, that construction must be rejected.[18/] Thus, consistent with the principle of statutory construction that requires statutory provisions to be harmonized to the extent possible, § 399.15(b)(3) must be read to limit the Commission's ability to require procurement of eligible renewable energy resources in excess of the quantities identified in § 399.15(b)(2), <u>except</u> that the Commission may require procurement of eligible renewable energy resources to satisfy a pre-2011 deficit, in accordance with § 399.15(a).[19/]

It is also important to note that TURN/CUE's claim that existence of a pre-2011 deficit would trigger enforcement proceedings and noncompliance penalties violates Guiding Principle No.1 and the goal of efficiency set forth in the ALJ Ruling.[20/] In order to assess penalties for pre-2011 deficits, both the Commission and the California Energy Commission ("CEC") would be required to undertake burdensome accounting and verification efforts related to pre-2011 RPS compliance, and the Commission would be required to conduct potentially time-consuming

17/ *Rosenfield v. Superior Court,* 143 Cal. App. 3d 198, 202 (1983).
18/ *Id.*
19/ *See, e.g.,* D.88-02-028, 1988 Cal. PUC LEXIS 98, p *4 ("All acts relating to the same subject should be read together and harmonized if possible.")
20/ ALJ Ruling, pp. 3-4.

enforcement proceedings involving complex evaluation of the specific circumstances that caused the deficit – all at the same time that both agencies are engaged in implementing the comprehensive new RPS program established in SB 2. Thus, given the lack of any statutory support for the claim that a pre-2011 deficit triggers noncompliance penalties – and in light of the administrative burden inherent in imposing such penalties – the Commission should reject TURN/CUE's claim that noncompliance penalties should be imposed for the failure to satisfy pre-2011 RPS procurement targets.

The Commission should, likewise, reject UCS' assertion that if the 14% showing is not satisfied, a retail seller's failure to achieve its pre-2011 RPS target would result in addition of its pre-2011 deficit to its 2011-2013 compliance requirement ***and*** imposition of noncompliance penalties.[21/] As explained above, SB 2 does not contemplate imposition of penalties for pre-2011 deficits. Moreover, UCS' proposed interpretation is overly punitive and is at odds with the intent of SB 2 to re-set retail sellers' RPS compliance obligation in recognition of the challenges faced by retail sellers in achieving RPS compliance under the 20% program. SB 2 clearly does not envisage stringent enforcement of prior RPS requirements. Accordingly, UCS' proposed interpretation should not be adopted.

D. TURN/CUE's Concern Regarding "REC Reshuffling" is Misplaced

In their opening comments, TURN/CUE assert that the 36-month period established under § 399.21(a)(6) for retirement of a renewable energy credit ("REC") offers retail sellers the ability to avoid limitations on banking RECs included in § 399.16(b)(3) ("Category 3 RECs").[22/] SDG&E agrees with Pacific Gas & Electric Company ("PG&E") and Southern California Edison Company ("SCE") that the "re-shuffling" concern identified by TURN/CUE is unfounded.

[21/] Opening Comments of UCS, p. 5 (see responses to Question 3 and 4).
[22/] Opening Comments of TURN/CUE, pp. 6-7.

As a practical matter, REC retirement and banking of a REC are separate and distinct actions. In other words, a REC is first retired in WREGIS and is then either used or banked for RPS compliance pursuant to the retail seller's bi-annual compliance reports filed with the Commission. Similarly, because they are separate actions, retirement and banking are addressed in two separate, but entirely consistent, provisions of SB 2: § 399.21(a)(6) provides that RECs must be retired in WREGIS within 36 months of the initial date of generation, while § 399.13(a)(4)(B) addresses banking of excess procurement that has been retired in WREGIS. TURN/CUE relies on flawed analysis that ignores the distinction between the action of retiring a REC, on the one hand, and banking a REC, on the other. TURN/CUE essentially argue that banking limitations set forth in § 399.13(a)(4)(B) are intended to apply to retirement of RECs under § 399.21(a)(6). TURN/CUE's claim is plainly incorrect and, accordingly, must be rejected.

In addition, TURN/CUE improperly assert that "[t]he Commission should assume that any procurement occurring during a particular compliance period is credited towards compliance in that period."[23/] This limitation is not included in SB 2 and, indeed, the proposal directly violates the statutory language discussed above that allows for a 36-month shelf life for RECs. This three-year life span has been accepted by the market since the establishment of WREGIS in 2008 and is clearly spelled out in § 399.21(a)(6). Forcing the market to contemplate two separate limitations on a REC's life span adds complexity to the process and violates Guiding Principle No. 1 and the goal of efficiency described in the ALJ Ruling.[24/] If the Commission

[23/] Opening Comments of TURN/CUE, p. 6.
[24/] ALJ Ruling, pp. 3-4.

nevertheless elects to adopt TURN/CUE's proposal, it should make clear that the rule would not apply to contracts that were signed prior to 2011. In other words, this additional restriction on a REC's shelf life should not apply retroactively to procurement that occurred before such rule was in place.

E. Intervening Year Targets are Not Enforceable

New § 399.15(b)(2)(C) makes clear that retail sellers are not required to demonstrate compliance with intervening year targets and therefore are not subject to penalties for failure to achieve individual compliance year targets. This conclusion is supported by the analysis of SB 2 prepared for the Energy, Utilities and Communications Committee of the California State Senate:

> **This bill eliminates the annual goal and replaces it with the three compliance windows of an average of 20% between 2011 and 2013, 25% by 2016 and 33% by 2020**. The compliance periods were intended to reflect the realities of electricity procurement which does not come online in regular intervals, tends to be lumpy and to come online in chunks when new generation is interconnected. Given that the utilities must show progress toward 33% during each of the three compliance periods, **the need for the CPUC to set interim goals within each compliance period is not apparent and not reflective of the procurement process**.[25/]

Plainly, intervening year targets are intended to operate as "soft targets" or guideposts that assist the Commission in monitoring progress toward the "hard target" compliance goals in 2013 and 2020.[26/] Nevertheless, TURN/CUE, DRA and UCS assert that the Commission must enforce the intervening year procurement targets.[27/] Commission enforcement of both "soft" intervening year targets and "hard" compliance year targets would essentially create an annual

[25/] Bill Analysis dated February 15, 2011 prepared for the Energy, Utilities and Communications Committee of the California State Senate, p. 8.

[26/] New § 399.11(a) states that the RPS program is intended to "attain a target of generating 20 percent of total retail sales of electricity in California from eligible renewable energy resources *by December 31, 2013* and 33 percent *by December 31, 2010*."

[27/] Opening Comments of TURN/CUE, pp. 2-3; Opening Comments of DRA, p. 4; Opening Comments of UCS, p. 3.

RPS compliance requirement. This would directly contravene the plain language and clear intent of the statute. Accordingly, the proposal to make both intervening year targets and compliance year targets enforceable must be rejected.

F. The Penalty Cap Proposed by TURN/CUE is Excessive and Violates § 399.15(b)(2)(C)

In their opening comments, TURN/CUE propose that the Commission multiply the $25 million annual penalty cap established under the 25% RPS program by the number of years in the relevant 33% program compliance period in order to derive the penalty cap applicable to that period.[28/] This would mean that for the first compliance period, 2011-2013, the penalty cap would be $75 million.

The penalty cap proposed by TURN/CUE is overly punitive and violates the clear intent of SB 2, discussed above, to move away from enforcement of annual compliance requirements. Multiplying the current annual penalty cap by the number of years in the compliance period is essentially a back-door method of imposing an annual compliance requirement. Moreover, in D.03-06-071, the Commission observed that the purpose of the penalty structure, including the penalty cap, was to "create clear consequences for utility inaction and to provide further incentive to each utility to meet its APT."[29/] In the several years since issuance of D.03-06-071, it has become apparent that any concerns that may have existed regarding inaction by the utilities were unfounded. Plainly, there exists no rationale at this point for imposing the excessive penalty cap proposed by TURN/CUE. Accordingly, the proposal should be rejected.

28/ Opening Comments of TURN/CUE, p. 10.
29/ *Id.*

III.
CONCLUSION

For the reasons set forth above and in SDG&E's opening comments, the Commission should implement the relevant aspects of the 33% RPS program in a manner consistent with SDG&E's proposals.

Respectfully submitted this 12th day of September, 2011.

/s/ *Aimee M. Smith*
AIMEE M. SMITH
101 Ash Street, HQ-12
San Diego, CA 92101
Phone: (619) 699-5042
Fax: (619) 699-5027
E-mail: amsmith@semprautilities.com

Attorney for
SAN DIEGO GAS & ELECTRIC COMPANY

AFFIDAVIT

I am an employee of the respondent corporation herein, and am authorized to make this verification on its behalf. The matters stated in the foregoing **SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E) REPLY COMMENTS ON JULY 15, 2011 RULING REQUESTING COMMENTS ON NEW PROCUREMENT TARGETS AND CERTAIN COMPLIANCE REQUIREMENTS FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM** 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 under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Executed this 12th day of September, 2011, at San Diego, California

/s/ Hillary Hebert
Hillary Hebert
Partnerships and Programs Manager
Origination and Portfolio Design Department