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 PACIFICORP (U 901 E) ON ADMINISTRATIVE LAW JUDGE'S RULING REQUESTING COMMENTS ON NEW PROCUREMENT TARGETS AND CERTAIN COMPLIANCE REQUIREMENTS FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

Mary M. Wiencke
Legal Counsel
PacifiCorp
825 NE Multnomah, Suite 1800
Portland, OR 97232
Telephone: (503) 813-5058
Facsimile: (503) 813-7252
Email: mary.wiencke@PacifiCorp.com
Attorney for PacifiCorp

Jedediah J. Gibson
Ellison, Schneider & Harris, LLP
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816
Telephone: (916) 447-2166
Facsimile: (916) 447-3512
Email: jjg@eslawfirm.com
Attorney for PacifiCorp

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Pursuant to the instructions in Administrative Law Judge (ALJ) Anne E. Simon's July 15, 2011 *Ruling Requesting Comments on New Procurement Targets and Certain Compliance Requirements for the Renewables Portfolio Standard Program* (ALJ Ruling), PacifiCorp (U-901-E), d.b.a. Pacific Power (PacifiCorp or Company) hereby provides these reply comments on the ALJ Ruling.

I. Introduction and Summary.

PacifiCorp appreciates this opportunity to respond to opening comments of parties addressing new targets and requirements for the renewables portfolio standard (RPS) found in Senate Bill No. 2 of the California Legislature's 2011-2012 First Extraordinary Session (SB 2 (1x)). These reply comments focus on issues where parties provided varying proposals for implementation of the new SB 2 (1x) program (33% program). PacifiCorp's reply comments address four main issues:

(1) To maintain basic equity principles, any RPS procurement bank remaining under the existing RPS program (20% program), should be carried forward and eligible to count towards the 33% program, without restriction.

(2) When determining what qualifies as excess procurement that is eligible to apply to subsequent compliance periods, there is no language in the law that supports the deduction of new Section 399.16(b)(3) (bucket 3) products from total renewable procurement.

(3) When deciding whether to proceed with an enforcement action against a retail seller, the new law only allows for consideration of whether the retail seller met the procurement target for the entire compliance period.

(4) Minimum contracting requirements for long-term contracts must consider the unique characteristics of each retail seller, and should not be imposed on PacifiCorp.

These issues, and others, are described in greater detail below.

II. Equity and the Realization of Customer Expectations Dictate that any Pre-2011 Excess Procurement Must Count in Full under the 33% Program.

PacifiCorp maintains that the effective date of the 33% program should not occur until January 1, 2012, at the earliest. The First Extraordinary Session of the Legislature closed on September 10, 2011, so SB 2 (1x) becomes effective on December 9, 2011. It makes little sense to retroactively apply a statutory program that is effective for less than a month to an entire year. Until the Legislature closed, parties had no idea when SB 2 (1x) would become effective. Additionally, until December 9, 2011, existing law under the 20% program remains in place. Therefore, the Commission should not implement new requirements under SB 2 (1x) until January 1, 2012 at the earliest.

Regardless of when the Commission determines the 33% program becomes effective, however, it is vital that any excess procurement under the 20% program must carry forward into the 33% program. Although a number of parties take the position that any procurement bank remaining at the end of 2010 is extinguished and cannot be used for 2011 or later years,[1] equity, fundamental fairness, and advancement of RPS goals dictate that surplus procurement under the 20% program should carry forward and apply to the 33% program. A number of other parties, including the Division of Ratepayer Advocates (DRA), the Alliance for Retail Energy Markets

[1] *See* the Opening Comments of Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), San Diego Gas & Electric Company (SDG&E), The Utility Reform Network and the Coalition of California Utility Employees (TURN/CUE), Independent Energy Producers Association (IEP), Sierra Club California (Sierra Club), and the California Wind Energy Association and the Large-Scale Solar Association (CalWEA/LSA).

(AReM), Shell Energy North America (US), L.P. (Shell Energy), Calpine PowerAmerica-CA, LLC (CPA), Marin Energy Authority (MEA), Noble Americas Energy Solutions LLC (Noble), and L. Jan Reid, agree that surplus procurement under the 20% program should carry forward and be eligible under the 33% program.

For the most part, those parties that recommend that any banked surplus under the 20% program is forfeited under the 33% program rely upon language in SB 2 (1x) to support their recommendation. Namely, parties contend that because SB 2 (1x) provides that retail sellers may "accumulate, beginning January 1, 2011, excess procurement…,"[2] any procurement prior to January 1, 2011 may not be banked forward. This language does not address the treatment of excess procurement prior to January 1, 2011, and should not be interpreted to do so. In addition, this contention should be rejected because forcing parties to forfeit any procurement banked under the 20% program will violate fundamental principles of equity as well as the core goals of the RPS program.

New Section 399.13(a)(4)(B) explicitly provides for banking of "excess procurement *in one compliance period* to be applied to *any subsequent compliance period*."[3] The only definition of compliance periods in SB 2 (1x), however, refers to the periods: (1) January 1, 2011 – December 31, 2013; (2) January 1, 2014 – December 31, 2016; and (3) January 1, 2017 – December 31, 2020.[4] Accordingly, as SB 2 (1x) remains silent about treatment of excess procurement prior to January 1, 2011, the Commission should not prohibit retail sellers from carrying forward surplus from the 20% program to the 33% program.

More importantly, any implementation of the new 33% program must allow excess procurement to be carried forward to avoid an impermissible taking of value paid for by

[2] New § 399.13(a)(4)(B).

[3] Emphasis added.

[4] *See* new § 399.15(b)(1).

customers pursuant to existing and currently effective procurement requirements. Prohibiting retail sellers that met the 20% requirement and had remaining banked surplus from carrying forward surplus procurement from 2010 or prior years punishes those retail sellers for meeting RPS program goals. Efforts by retail sellers to meet the goals of the 20% program should be rewarded and not punished. It is fundamentally unfair to disallow procurement from a retail seller simply because that entity made sound procurement decisions based on existing rules.

The inequity that results by disallowing excess procurement from the 20% program to apply to the 33% program is amplified when one considers that procurement deficits and earmarking obligations are relieved for those retail sellers that met 14% in 2010. By excusing such retail sellers from the requirement to meet prior deficits and to apply earmarked contracts to earlier years, SB 2 (1x) is effectively providing those retail sellers with a procurement bank under the 33% program. That is, retail sellers that would otherwise have to use current deliveries to meet prior deficits and earmarking obligations, can now use current deliveries to meet current targets, effectively gifting those retail sellers a "surplus" in the current period. Given the choice between compliance with the 20% program and forfeiture of the procurement bank and failing to meet the 20% target but having deficits and earmarking obligations relieved, the sound decision would be the latter. The Commission should foster a regime that encourages compliance pursuant to the effective law and policy in place at the time of procurement. To do otherwise would unnecessarily increase costs to customers as they would have to pay for compliance twice.

III. Bucket 3 Products Need Not be Subtracted from Renewable Procurement When Determining Excess Procurement.

As noted by SDG&E in its opening comments:

> The Supreme Court of California has made clear that in construing a statute to ascertain the intent of the Legislature, the Commission must first and foremost give effect to the plain meaning of the language in the statute. [Footnote omitted.] The Commission has

> explained that under the most fundamental rules of statutory interpretation, "[f]irst, one looks to the plain language of the statute. If the language is unambiguous, then the language controls and the inquiry is over. Otherwise, one proceeds to the legislative history. The final step -- and one which we believe should only be taken when the first two steps have failed to reveal clear meaning -- is to apply reason, practicality, and common sense to the language at hand." [Footnote omitted.][5]

PacifiCorp agrees with SDG&E's interpretation of statutory construction and maintains that under the plain language of the statute only short-term contracts must be subtracted from total procurement when determining excess procurement. There is no similar requirement for new Section 399.16(b)(3) (bucket 3) category products. Although TURN/CUE reference legislative analyses and legislative history to support their position that new Section 399.13(a)(4)(B) requires that bucket 3 products be subtracted from any excess procurement,[6] the clear language of the statute unambiguously states that only "contracts of less than 10 years in duration" need be subtracted from excess procurement. Accordingly, the language of the statute is controlling and bucket 3 products should not be subtracted when determining excess procurement.

Although new Section 399.13(a)(4)(B) provides that bucket 3 products shall not "be counted as excess procurement," there is no language in the statute that prohibits the application of bucket 3 products towards the compliance targets for the current period nor any prohibition on counting bucket 1 and 2 products (new Sections 399.16(b)(1) and (2)) as excess procurement. In fact, SB 2 (1x) explicitly provides that bucket 3 products do count (up to a specific procurement limitation for certain retail sellers) towards RPS procurement targets.[7] Accordingly, a retail seller would be able to apply bucket 3 products towards the current compliance period (up to a product-specific procurement limitation, if applicable) and any additional renewable

[5] SDG&E Opening Comments, p. 3.

[6] TURN/CUE Opening Comments, pp. 5-6.

[7] New § 399.16(c).

procurement that exceeded the RPS target for that compliance period, other than procurement from short-term contracts, would be allowed to qualify as excess procurement. This interpretation is consistent with the clear language of new Section 399.13(a)(4)(B).

Additionally, PacifiCorp agrees with SCE that "any limitations on banking excess procurement in one period to the next period under new Section 399.13(a)(4)(B) do not limit a retail seller's ability to retire RECs created in one period during the next period."[8] Although TURN/CUE assert that procurement occurring during a compliance period may only be credited towards that same compliance period,[9] the clear language of new Section 399.21(a)(6) provides that RECs need only be "retired … within 36 months from the initial date of generation of the associated electricity." Again, based on the unambiguous language of SB 2 (1x), the Commission must not impose a requirement to retire RECs sooner than 36 months from the initial date of generation.

IV. Any Assessment and Imposition of Penalties Must Ensure a Flexible Approach and Must be Based on a Retail Seller's Achievement of the Compliance Target for the Entire Compliance Period at Issue.

Although most parties agree that any penalties must be based on whether a retail seller has met the overall procurement target for the entire compliance period, a few parties recommend penalties for both failing to meet the compliance period procurement target *and* for failing to meet an additional procurement target for the final year of the compliance period.[10] PacifiCorp opposes any double penalty structure as such a structure is not consistent with SB 2 (1x). According to SB 2 (1x), the only procurement obligation is that a retail seller must "procure no less than the quantities associated with all intervening years by the end of each

[8] SCE Opening Comments, p. 18.

[9] TURN/CUE Opening Comments, p. 6.

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

compliance period."[11] However, a retail seller "shall not be required to demonstrate a specific quantity of procurement for any individual intervening year."[12] Therefore, the determination as to whether a retail seller has met its RPS-goals should only be assessed at the end of each multi-year compliance period and should evaluate the retail seller's procurement over the entire compliance period, not for individual intervening years (even if the intervening year is the final year of a compliance period).

Allowing a retail seller to meet a single compliance target for an entire compliance period provides retail sellers with greater flexibility and allows retail sellers to make procurement decisions that account for year to year economic, load, and weather fluctuations. For example, for the first compliance period there is no requirement that retail sellers procure a minimum percentage of renewables for an intervening year, but only that retail sellers must demonstrate "an average of 20 percent" renewable procurement for the entire compliance period. Retail sellers should therefore have the option to procure less than 20 percent during any given intervening year, provided that any difference is made up by the end of the compliance period.

Allowing a retail seller to meet a single compliance target for an entire compliance period also reduces the potential for a market disrupting spike in demand for renewable products, with corresponding increased procurement and customer costs, at the end of the last year of each compliance period.[13] Such a "gold rush" for renewable products is likely to increase procurement and customer costs and could result in decreased availability of renewable products, leading to shortfalls in required procurement and increased enforcement actions against retail

[11] New § 399.15(b)(2)(C).

[12] *Id.*

[13] Similarly, when determining whether a retail seller should be excused from procurement target requirements, one factor the Commission must consider is whether the retail seller has "[t]aken reasonable measures, under the control of the retail seller, to procure cost-effective distributed generation and allowable unbundled renewable energy credits." (New § 399.15(b)(5)(B)(iv).) This consideration could cause a similar spike in demand for distributed generation facilities and unbundled renewable energy credits at the end of a compliance period.

sellers by the Commission. Accordingly, the Commission should only assess whether to initiate an enforcement action based on whether a retail seller met the singular procurement target for the entire compliance period.

V. Minimum Contracting Requirements Must Consider the Unique Characteristics of Each Retail Seller.

According to Section 399.13(b):

> The commission may authorize a retail seller to enter into a contract of less than 10 years' duration with an eligible renewable energy resource, if the commission has established, ***for each retail seller***, minimum quantities of eligible renewable energy resources to be procured through contracts of at least 10 years' duration.[14]

As noted by AReM in its opening comments,

> [SB 2 (1x)] provide[s] the Commission with significant discretion in how it applies the long term contracting requirement in that it specifically provides that the Commission can enforce different long term contracting requirements for different retail sellers, as is clear from the inclusion of the phrase '***for each retail seller'***…[15]

PacifiCorp agrees with AReM, particularly as PacifiCorp, as a multi-jurisdictional utility, is not subject to the same contract approval process as other investor owned utilities.[16] PacifiCorp procures renewable and traditional resources on a system-wide basis over its multi-state service territory. Much of PacifiCorp's procurement, including renewable procurement, comes from utility owned resources and facilities under long-term contracts. The Commission has recognized this distinction by relying on PacifiCorp's integrated resource plan (IRP) and deferring to PacifiCorp's multi-state resource planning efforts. In light of PacifiCorp's unique circumstances, the Commission should either: (1) avoid establishing a minimum quantity of long term contracts for PacifiCorp, or (2) recognize that PacifiCorp has already achieved a minimum

[14] Emphasis added.

[15] AReM Opening Comments, p. 16, emphasis in original.

[16] *See* D.08-05-029. *See also* current § 399.17(d) and new § 399.17(d).

level of long-term contracts and utility-owned facilities and need not satisfy a minimum level of future long-term contracts.

VI. Conclusion.

PacifiCorp appreciates this opportunity to respond to opening comments on the ALJ Ruling and urges the Commission to adhere to the following principles when implementing the new 33% program:

(1) To maintain basic equity principles, any RPS procurement bank remaining under the 20% program should be carried forward and eligible to count towards the 33% program, without restriction.

(2) When determining what qualifies as excess procurement that is eligible to apply to subsequent compliance periods, there is no language in SB 2 (1x) that supports the deduction of new Section 399.16(b)(3) (bucket 3) products from total renewable procurement.

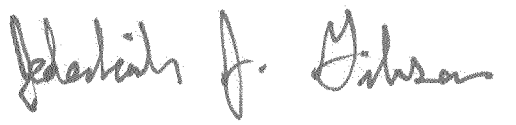
(3) When deciding whether to proceed with an enforcement action against a retail seller, the new law only allows for consideration of whether the retail seller met the procurement target for the entire compliance period.

(4) Minimum contracting requirements for long-term contracts must consider the unique characteristics of each retail seller, and should not be imposed on PacifiCorp.

PacifiCorp looks forward to working with the Commission and stakeholders to refine the RPS program.

Dated: September 12, 2011

Respectfully submitted,



Mary M. Wiencke
Legal Counsel
PacifiCorp
825 NE Multnomah, Suite 1800
Portland, OR 97232
Telephone: (503) 813-5058
Facsimile: (503) 813-7252
Email: Mary.Wiencke@PacifiCorp.com
Attorney for PacifiCorp

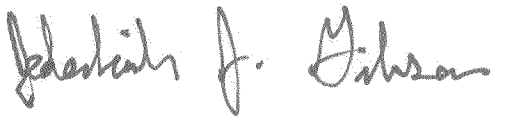
Jedediah J. Gibson
Ellison, Schneider & Harris, LLP
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816
Telephone: (916) 447-2166
Facsimile: (916) 447-3512
Email: jjg@eslawfirm.com
Attorney for PacifiCorp

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.



Jedediah J. Gibson