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)

THE DIVISION OF RATEPAYER ADVOCATES' REPLY COMMENTS ON PROCUREMENT TARGETS AND CERTAIN COMPLIANCE REQUIREMENTS FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

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I. INTRODUCTION

The Division of Ratepayer Advocates (DRA) respectfully submits these Reply Comments pursuant to the July 15, 2011 Administrative Law Judge (ALJ) Ruling.[1] These Reply Comments address the comments of parties to some of the questions contained in the July 15, 2011 Ruling.

II. DISCUSSION

2.(B) Compliance Targets for 2014-2016 and 2017-2020.

Party responses to these questions were generally in two categories: those that recommend a linear trend for the transition from the 20% RPS compliance goal in 2013 to the 33% compliance goal in 2020, and those that recommend a concaved trend, i.e. lower, but progressive intermediate targets with a jump to achieve the compliance target in the compliance years of 2016 and 2020. Among the parties who supported a linear trend toward reaching the goals of the 33% RPS program were developers and environmental groups[2] who favor the additional clean energy sales to be gained from a linear approach. DRA believes that the higher requirements resulting from a linear approach would be detrimental to California ratepayers in what is still essentially a seller's market.

Those seeking a concaved trajectory from the 20% RPS program to the goals of the 33% RPS program included the utilities and DRA;[3] parties that wish to minimize ratepayer exposure to renewable costs. The utilities generally seek a 1% annual increase in intermediate targets

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[1] *Administrative Law Judge's Ruling Requesting Comments on New Procurement Targets And Certain Compliance Requirements for the Renewables Portfolio Standard Program*, July 15, 2011 (July 15, 2011 Ruling or Ruling), p. 3.

[2] Comments of the California Wind Energy Association and the Large-Scale Solar Association on New Procurement Targets and Certain Compliance Requirements for the Renewables Standard Portfolio Program, August 30, 2011 (CALWEA/LSA Comments), pp. 4,7; Comments of the Independent Energy Producers Association on Procurement Targets and Compliance Requirements, August 30, 2011, (IEPA Comments), p 4; Opening Comments of Shell Energy North America (U.S.) on New Procurement Targets and Certain Compliance Requirements for the Renewables Standard Portfolio Program, August 30, 2011 (Shell Energy Comments), p. 2; Comments of the Sierra Club California on the Administrative Law Judge's Ruling Requesting Comments on New Procurement Targets and Certain Compliance Requirements for the Renewables Standard Portfolio Program, August 30, 2011 (Sierra Club Comments), p. 3; Opening Comments of The Utility Reform Network and the Coalition California Utility Employees on the Administrative Law Judge's Ruling Requesting Comments on New Procurement Targets and Certain Compliance Requirements for the Renewables Standard Portfolio Program, August 30, 2011 (TURN/CUE Comments), p. 2.

[3] The Division of Ratepayer Advocates Comments on Procurement Targets and Certain Compliance Requirements for the Renewables Portfolio Standard Program, August 30, 2011 (DRA Comments), p. 4.

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years: 21% in 2014; 22% in 2015; 25% in 2016.[4] DRA questions the wisdom of the utility-proposed 5% jump in procurement between 2019 and 2020. Such a jump risks leaving too much to the last compliance year and therefore jeopardizes the success of achieving the 33% target by 2020.

Moreover, a 5% increase in the final year of the program would put further pressure on prices in the final year and, therefore, likely increase the cost of compliance in a potential renewable gold rush à la that of 2009-2010. Those two years were similar to the 2020 situation the utilities now propose to create – they were a short time span in which the utilities were expected to substantially ramp up renewable deliveries. The result in 2009-2010 was the execution of extremely high-priced renewable contracts for which ratepayers will continue to pay for two decades. DRA agrees with Southern California Edison Company's (SCE's) observation that in addition to the four principles articulated in the ALJ Ruling, "minimizing customer costs should be a top priority for the new RPS program."[5] For purposes of establishing targets for the years following 2012, DRA's concaved approach is the best way to achieve this important goal.

In addition to achievement of the total goal in megawatt-hours for the second and third compliance period, DRA's Comments argue that by 2016 retail sellers must achieve the 25% goal for that year, and that by 2020, retail sellers must achieve the 33% goal.[6] SCE disagrees and claims "there are not two RPS targets for each period. There is only one multi-year target."[7] SCE is correct as to the first period; Section 399.15(b) (2)(B) establishes the required procurement in 2013 as "an average of 20% of retail sales for 2011 through 2013." However, SCE incorrectly interprets Section 399.15(b)(2)(B) to allow for compliance flexibility for the second and third compliance periods. Section 399.15(b)(2)(B) provides that the quantities

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[4] Southern California Edison Company's Comments on Administrative Law Judge's Ruling Requesting Comments on New Procurement Targets and Certain Compliance Requirements for the Renewables Portfolio Standard Program, August 30, 2011 (SCE Comments), p. 9; Pacific Gas and Electric's Comments on Administrative Judge's Ruling Requesting Comments on New Procurement Targets and Certain Compliance Requirements for the Renewables Portfolio Standard Program, August 30, 2011, (PG&E Comments), p. 8; San Diego Gas & Electric Company Opening Comments on July 15, 2011 Ruling Requesting Comments on New Procurement Targets and Certain Compliance Requirements for the Renewables Portfolio Standard Program (SDG&E Comments), p. 6.

[5] SCE Comments, p. 3; *see also* PG&E Comments, p. 9; TURN/CUE Comments, pp. 2-3

[6] DRA Comments, p. 3.

[7] SCE Comments, p. 10.

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established for those periods should be "sufficient to ensure that the procurement of electricity products from eligible renewable energy resources achieves 25% of retail sales by 2016 and 33% of retail sales by 2020." According to SCE, this language is intended only to "encourage procurement flexibility and to allow for the lumpiness of renewable development….."[8]
The Commission should reject SCE's interpretation of Section 399.15(b)(2)(B) because that interpretation would ignore the plain meaning of the word[9] 'achieve,' which means to attain or to accomplish.[10] Instead, the Commission should enforce the explicit 25% and 33% targets identified in Section 399.15(b)(1)(B).

3.(A) Interpreting the 14% threshold for waiving deficits.

DRA reiterates that the Commission should interpret Section 399.15(a) as meaning that only bundled RECs and REC-only contracts associated with RPS-eligible energy that are generated and delivered in 2010 should count towards the 14% target. TURN and CUE agree.[11] Other parties would allow the use of the 20% RPS program flexible compliance rules in meeting the 14% threshold for excusal of 20% program deficits. For example, SCE recommends that the Commission look at a retail seller's actual renewable energy sales in 2010 "plus any surplus procurement bank balance" and compare that number to the retail seller's 2010 sales for 2010.[12] SCE correctly notes that earmarking and deficit deferrals would create a system that would be too complicated to measure, especially in light of the fact that legislative intent seeks to provide a clean break between the old 20% RPS regime and the new 33% regime.[13] DRA agrees, but believes that the issue of complexity would also apply to flexible compliance banking rules and,

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[8] SCE Comments, p. 10.

[9] *Dyna-Med,Inc, v. Fair Employment Housing Agency,* 43 Cal. 3d 1379, 1386-87 (1987) (first task in construing a statute is to "ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided.")

[10] Webster's New Twentieth Century Dictionary Unabridged, 1983.

[11] TURN/CUE Comments, p. 3 ("The Legislature did not envision that retail sellers could utilize accounting mechanisms to meet this threshold but rather any waiver be based on a showing of actual procurement 'in 2010.')

[12] SCE Comments, p. 6; PG&E Comments, p. 10.

[13] SCE Comments, p. 6.

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for that reason, neither banking, earmarking or deferral rules should be used to measure attainment of the 14% RPS target.

Other parties advocate for measuring achievement of the 14% threshold using banking, earmarking and deficit deferrals.[14] Alliance for Retail Energy Markets (AReM) recommends not only that banking should be used to meet the 14% target, but also that banking of past renewable energy procurement should carry forward to the 33% program.[15] Such a liberal interpretation of the statute violates the clear legislative intent to provide a clean break between the old 20% regime and the new 33% regime. AReM's proposal would also add to the accounting complexity for the 33% by 2020 compliance target as it would overlap rules from the old 20% regime with the new 33% regime. Thus, the Commission should interpret "at least 14 percent of retail sales from eligible renewable energy resources in 2010" to mean that renewable energy procurement must have occurred in 2010 and should be applied to compliance in that year to count towards the 14% target.

3.(B) Meaning of "the deficits associated with any previous renewables portfolio standard"Section 399.15(a).

DRA agrees that "the deficits associated with any previous renewables portfolio standard" refers to the cumulative procurement deficits incurred by any retail seller through December 31, 2010 and not beyond that date. Such an interpretation provides a clean break between the old 20% and the new 33% RPS regimes and is consistent with the understanding of the parties working to craft this provision in SB2 (1x). AReM[16] and PacifiCorp[17] argue that procurement above 14% of retail sales from eligible renewable energy resources in 2010 should be banked and usable in the 33% program. DRA disagrees, because such a policy would add to

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[14] Opening Comments of PacifiCorp on Administrative Law Judge's Ruling Requesting Comments on New Procurement Targets and Certain Compliance Requirements for the Renewables Standard Portfolio Program, August 30, 2011 (PacifiCorp Comments), p. 3.

[15] 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 Program, August 30, 2011 (AReM Comments), p. 10.

[16] AReM,Comments, p.10.

[17]PacifiCorp Comments, p. 7 ("Prohibiting retail sellers from carrying forward surplus procurement from 2010 or prior years effectively punishes those parties that met the 20% requirement and had remaining banked surplus.")

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accounting complexity and run counter to legislative intent that seeks to provide a clean break between the 20% RPS regime and the 33% RPS regime.

3.(C) Treatment of waived deficits.

DRA agrees with the recommendations of other parties'[18] that as long as a retail seller meets the 14% threshold with actual renewable energy procured in 2010, the retail seller should be exempt from requirements under the 20% regime. However, as stated above, DRA disagrees with AReM's position that earmarks in 2010 should be netted with total banked renewable energy procurement in 2010 and any excess bank should carry forward into the 33% RPS regime. Such a proposal runs counter to the intent of the Legislature to provide a clear break between the 20% and 33% RPS regimes and implementing it would exacerbate accounting complexity.

4. Treatment of deficits incurred in the 2011-2013, 2014-2016, and 2017-202 compliance periods.

Some parties agree[19] that deficits should not be added to future compliance periods starting in 2011. DRA's Comments recommended that the Commission consider remedies such as increased reporting requirements to encourage compliance with the interim targets set by SB2 (1x), i.e. 20% renewables procurement by 2013 and 25% renewables procurement by 2016. Therefore, DRA supports AReM's proposal,[20] or some variation thereof, to provide the Commission with discretion to waive or penalize a retail seller's deficient renewables procurement during a compliance period.

5. Satisfying deficits associated with pre-2011 RPS obligations.

In order to comply with the intent of SB 2 (1x) and provide retail sellers a new start on RPS compliance, DRA agrees with most parties[21] that for retail sellers meeting the 14% threshold, no deficit prior to December 31, 2010 should be satisfied with procurement beyond

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[18] PG&E Comments, p. 13; SCE Comments, p. 13; *see also* SDG&E Comments, p. 13 ("It is clear under § 399.15(a) that a showing that a retail seller has attained 14% of retail sales from RPS-eligible resources cures any deficits existing under the previous RPS program.").

[19] *See e.g.,* TURN/CUE Comments, p. 4; Shell Energy Comments, p. 4.

[20] AReM Comments, p. 14.

[21] IEPA Comments, p. 7; Comments of Calpine Power-American-CA, LLC (Calpine Comments), p. 7; PG&E Comments, p. 14 ("[C]ompliance deficits… from any compliance year through 2010 are waived if the retail seller achieved at least 14% of retail sales from eligible renewable resources in 2010.")

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2011. Furthermore, as also stated by the Union of Concerned Scientists[22] and TURN/CUE,[23] a retail seller that does not meet the 14% target in 2010 should face enforcement proceedings and noncompliance penalties.

6. Minimum quantity requirements under new Section 399.13(b).

SCE[24] and PG&E[25] proposed the same interpretation of "minimum quantities" as DRA proposed in its Opening Comments.[26] Some parties[27] suggested that any excess generation over and above the minimum quantity of long-term contracts procured in the 20% regime should be usable to satisfy the minimum quantity requirements of the 33% regime. DRA recognizes that this carry-over proposal would reward those parties that emphasized procurement from long-term contracts. The question arises, however, whether such a carry-over of generation constitutes the type of "clean break" from the previous regime that appears consistent with the intent of SB 2 (1x) to clearly delineate between the 20% RPS program and the 33% RPS program. In addition, since the short-term contracts are being grandfathered from the old regime to the new – they would be included in the calculation of short-term contract procurement limited by Section 399.13(b) – it is unclear why long-term contracts should not also be treated in the same way. In short, if retail sellers cannot be punished for over-procuring from short-term contracts in the previous regime, why should they be rewarded for over-procuring from long-term contracts?

7. Calculating any excess procurement eligible for forward banking.

DRA agrees[28] that that generation associated with short-term contracts must be subtracted from actual procurement quantities, and that generation associated with Bucket 3 products cannot be counted as excess procurement. However, Section 399.13(a)(4)(B) does not require

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[22] Comments of the Union of Concerned Scientists on New Procurement Targets and Certain Compliance Requirements for the Renewables Standard Portfolio Program, August 30, 2011 (UCS Comments), p. 6.

[23] TURN/CUE Comments, p. 4.

[24] SCE Comments, pp. 14-16.

[25] PG&E Comments, pp. 15-16.

26 DRA Comments, pp. 8-9.

[27] *See e.g.* PG&E Comments p. 15-16; SCE Comments, p. 16; SDG&E Comments, p.17.

[28] SDG&E Comments, pp. 19-20; PG&E Comments, pp. 22-23; PacifiCorp Comments, pp. 12-13.

the subtraction of Bucket 3 quantities from actual procurement quantities. TURN/CUE[29] and SCE[30] disagree and instead construe Section 399.13(a)(4)(B) to require the subtraction of Bucket 3 products from actual procurement quantities along with the generation from short-term contracts. However, Section 399.13(a)(4)(B) requires only that the Commission "deduct from actual procurement quantities, the total amount of procurement associated with contracts of less than ten years in duration." SDG&E correctly points out that the:

> "deduction requirement is expressly limited to short-term contracts; the [language in Section 399.13(a)(4)(B)] could have included additional types of procurement, but deliberately excludes them. Rules of statutory construction make clear that 'the expression of one thing in a statute ordinarily implies the exclusion of other things.'"[31]

TURN/CUE contend that it is critical that both short-term contracts and Bucket 3 products be deducted "off the top" of actual procurement during a compliance period to prevent retail sellers from circumventing the restrictions on banking Bucket 3 products.[32] However, requiring that any Bucket 3 products be used first in calculating the amount of renewables procurement for a given compliance period prevents the impermissible banking that Section 399.13(a)(4)(B) seeks to prohibit.

TURN/CUE cite several bill analyses that summarize SB 2 (1x) as allowing excess generation from one compliance period to apply to a subsequent compliance period as long as the generation source is from contracts of more than 10 years duration, "not including unbundled RECs."[33] These legislative analyses say nothing about an additional requirement that Bucket 3 products including RECs must be subtracted first from actual procurement quantities. The Commission should not further constrain the use of Bucket 3 products on top of those that the

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[29] TURN/CUE Comments, pp. 4-5.

[30] SCE Comments, p. 17.

[31] SDG&E Comments, p. 19.

[32] TURN/CUE Comments, p. 5.

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

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legislature clearly intended to apply to these products.[34]

TURN/CUE recommend that the Commission impose an additional restriction on the use of RECs by assuming that any procurement during a particular compliance period must be credited toward compliance in that period.[35] According to TURN/CUE, this is necessary to prevent "REC reshuffling" in which a retail seller would procure a REC in one compliance period, but delay its retirement to a subsequent compliance period. TURN/CUE's recommended approach would essentially truncate the shelf life of any REC purchased after the first day of a compliance period by requiring its use within that compliance period, regardless of whether it was needed. The only alternative would be to try to recoup value by selling it to another retail seller who could use it. However, a REC's value would likely decline precipitously toward the end of a compliance period creating unavoidable losses for ratepayers as utilities scrambles to sell unneeded RECs toward the end of each period. TURN/CUE's recommendation to require the use of RECs within the period in which they were acquired would therefore result in additional costs to ratepayers without commensurate value to ratepayers or the 33% RPS program.

The Commission should not impose additional restrictions on the use of RECs and other Bucket 3 products other than those present in the plain language of Section 399.13(a)(4)(B), because such restrictions would not benefit ratepayers or advance the goals of the 33% RPS program.

9. Calculating pre-2011 deficits for retail sellers failing to procure at least 14% of retail sales from RPS-eligible resources in 2010.

DRA reiterates its support for calculating any retail seller's shortfall in 2010 using the 20% target instead of the new SB 2 (1x), 14% target. In implementing the 33% RPS program, it would be unfair to absolve retail sellers who failed to meet the 14% threshold from their deficits in meeting the 20% RPS target in 2010. As TURN/CUE point out in their comments, nothing in the legislation suggests the 2010 RPS procurement goals should be reset.[36] Therefore, all retail

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[34] *See e.g.* Section 399.16(c)(2) (decreasing for each compliance period the amount of procurement from Bucket 3 that may be credited toward each compliance period; Section 339.21(a)(6) (36 month shelf life for Bucket 3 products).

[35] TURN/CUE Comments, p. 6.

[36] TURN/CUE Comments, p. 8.

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sellers who did not procure at least 14% of retail sales from RPS-eligible resources in 2010 should have their deficits calculated using the 20% RPS program target.

SDG&E states that any deficit in 2010 should be reset to "acknowledge the challenges faced by retail sellers in achieving RPS compliance."[37] DRA disagrees. All retail sellers were required to comply with the RPS program and most retail sellers have been able to meet this challenge. The legislature, in recognition that achievement of a 20% RPS would be challenging, instituted banking, earmarking and flexible compliance tools for the utilities to mitigate these challenges and reach the compliance target in a timely fashion. Given these tools and the fact that most retail sellers appear to have met at least the 14% threshold, the Commission should not accept some retail sellers' shortfalls in the 20% RPS program compliance target without penalizing these sellers, especially when all utilities had the same tools to use and the same time frame in which to comply.

10. Relevance of flexible compliance rules to 2010 and prior compliance years.

As DRA and many other parties[38] argued in opening comments, the flexible compliance rules for the 20% RPS program should apply in all years through 2010, but should not carry extend beyond that date to conflict with the new compliance rules of SB 2 (1x). The Legislature established January 1, 2011 as the start date for the 33% RPS program, and all procurement conducted after this date should fall under the new 33% program requirements. To eliminate the need to revisit the 20% program requirements and streamline the transition to a 33% RPS program, the Commission should continue to retain and enforce the 20% RPS program goals only through December 31, 2010, the sunset date of this program.

11. Relevance of 20% RPS program current flexible compliance to RPS procurement for 2011.

DRA does not support application of the 20% RPS flexible compliance rules to RPS procurement in 2011 and beyond. As many parties have noted,[39] the 33% RPS program commenced on January 1, 2011 and effectively discontinued many of the procurement rules and

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[37] SDG&E Comments, p. 22.

[38] *See e.g,* PG&E Comments, p. 3; SDG&E Comments, pp.3-4; TURN/CUE Comments, p. 1; Comments of L. Jan Reid on New Procurement Targets and Certain Compliance Requirements for the Renewables Standard Portfolio Program, August 30, 2011, p, 5.

[39] *See e.g* CALWEA/LSA Comments, pp. 1-2; UCS Comments, p. 10; SCE Comments, pp. 3-4.

requirements of the 20% RPS program. Given that, the Commission would be in conflict with the SB 2 (1x) legislation if it were to continue to apply the flexible compliance rules of the 20% RPS program to the new 33% RPS program. As the Union of Concerned Scientists states, "the Commission does not have any authority to authorize the use of flexible compliance towards compliance requirements that began in 2011."[40] Therefore, DRA agrees with those parties that the flexible compliance rules should not be applied beyond December 31, 2010, the 20% RPS program sunset date. DRA reiterates that during this transition period the Commission needs to clarify for retail sellers what procurement rules and requirements apply and those that do not so that these sellers clearly understand their compliance obligations.

16. RPS Penalty Structure.

DRA agrees with parties that contend that the Commission should not automatically impose penalties for failure to meet RPS targets, but should first consider whether existing circumstances justify a waiver, and next consider the appropriate form of penalty: increased reporting, closer monitoring by the Commission, or an actual monetary penalty.[41] DRA disagrees with the Sierra Club's contention that there is no need for a penalty cap because "[p]enalty caps in the past have rendered the financial risk to the utility so minimal that it doesn't impose a serious commercial concern, as the profits for retail sellers are in the hundreds of millions of dollars per year."[42] The threat of excessive monetary penalties works to the detriment of ratepayers, because utilities are motivated to execute overpriced contracts (paid for by ratepayers) to avoid the possibility of penalties (paid for by shareholders).

III. CONCLUSION

For the reasons discussed above, the Commission should adopt DRA's recommendations contained herein.

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[40] UCS Comments, p. 10.

[41] PG&E Comments, p. 31, SCE Comments, pp. 21-22; SDG&E Comments, pp. 26-27.

[42] Sierra Club Comments, p. 7.

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VERIFICATION

I, Diana L. Lee, am an attorney for the Division of Ratepayer Advocates which is a party herein, and am authorized to make this verification on DRA's 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 foregoing are true and correct.

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

/s/ DIANA L. LEE

Diana L. Lee
Staff Counsel