BEFORE THE PUBLIC UTILITIES COMMISSION OF

THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program	Rulemaking 11-05-005 (Filed May 5, 2011)

REPLY COMMENTS OF THE UTILITY REFORM NETWORK ON THE ADMINISTRATIVE LAW JUDGE'S RULING REQUESTING SUPPLEMENTAL COMMENTS ON REPORTING AND COMPLIANCE REQUIREMENTS ON THE RENEWABLES PORTFOLIO STANDARD PROGRAM

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Pursuant to the February 1, 2012 ruling of ALJ Simon, The Utility Reform Network (TURN) hereby submits these reply comments on the certain reporting and compliance requirements for retail sellers under SBx2. TURN responds to issues raised in the opening comments of the Alliance for Retail Energy Markets (AREM), Pacific Gas & Electric (PG&E), Southern California Edison (SCE), Marin Energy Authority (MEA), Noble Energy, the Division of Ratepayer Advocates (DRA), and Bear Valley Electric Service (BVES).

I. THE PROCUREMENT CONTENT LIMITS ARE A CRITICAL FEATURE OF SBX2 AND REPRESENT AN INDEPENDENT LIMITATION

In opening comments, TURN urged the Commission to recognize that a retail seller may not avoid the §399.16(c) limits simply by satisfying the procurement quantity targets for a given compliance period. The Commission must treat the limitations imposed by §399.16(c) as independent of the targets established pursuant to §399.15(b). To achieve this result, TURN recommends only allowing the retail seller to receive full compliance credit for total procurement quantities if the §399.16(c) limits are satisfied.

Various retail sellers ask the Commission to adopt a very different outcome by divorcing the portfolio content limitations from the procurement quantity targets. All of the approaches suggested by these parties either violate an explicit statutory provision or are designed to eviscerate the entire limitation. The only practical and implementable proposals are those submitted by TURN in opening comments.

In the event that a retail seller fails to satisfy the procurement content limitations, SCE proposes that the Commission should conduct a case-by-case review to "determine what remedial action is appropriate."[1] Specifically, SCE suggests that the Commission could allow a retail seller to satisfy shortfalls in one compliance period with "an additional percentage of Category 1 resources in the next compliance period."[2] The Commission does not have the flexibility to adjust future portfolio content limitations to address shortfalls in a past compliance period. SCE's proposal runs counter to the SBx2 requirement that "deficits associated with the compliance period shall not be added to a future compliance period."[3] TURN is surprised by the proposal to ignore this statutory restriction since the language in §399.15(b)(9) was included in the final legislation at the explicit request of SCE.

PG&E offers two approaches to the problem, first suggesting that a retail seller be permitted to bank any procurement in excess of the limits for Category 2 and 3 products and apply these quantities to a future compliance period.[4] PG&E's proposal would violate the statutory prohibition on banking excess procurement of short-term contracts and Category 3 products.[5] The Commission may not allow retail sellers to evade these restrictions by procuring excess Category 3 products (or any short-term Category 2 products) in one period and carrying over quantities into a future period. Therefore, this approach is simply unworkable.

PG&E's second idea is to allow procurement in excess of the applicable product category limitation to "be credited toward the applicable compliance period

[1] SCE opening comments, page 12.
[2] SCE opening comments, page 12.
[3] Cal. Pub. Util. Code §399.15(b)(9).
[4] PG&E opening comments, page 12.
[5] Cal. Pub. Util. Code § 399.13(a)(4)(B).

target."[6] Adopting this proposal is tantamount to ignoring the portfolio content limitations altogether. PG&E fails to explain how its proposal could be implemented while maintaining the portfolio content limitations. If a retail seller is permitted to violate the limits and count the excess towards compliance, there would be no compelling reason for any entity to abide by the limits.

AREM proposes that the Commission adopt a "good faith" test in the event that a retail seller fails to satisfy the portfolio content limitations.[7] Specifically, AREM wants the compliance determination to hinge upon "the intent of the RPS obligated entity", an exercise that appears to require a lengthy examination designed to reveal the true motivations of a particular retail seller.[8] This approach is unworkable and does not comport with the statutory limitations. The Commission is unlikely to be able to determine what lies in the hearts and minds of various corporate actors. AREM's approach would fail to provide regulatory certainty and merely encourage each retail seller to craft sympathetic narratives rather than achieving compliance.

Noble suggests a "more liberal standard for waivers during the first compliance period" to address legacy procurement and transitional issues.[9] In evaluating this proposal, the Commission should recognize that the Legislature created less restrictive limits in the first compliance period in order to address these transitional issues. During the first compliance period, a retail seller need only show that 50% of post-June 2010 procurement satisfies Category 1. Under the rules applicable prior to the enactment of SBx2, retail sellers could not procure more than 25% of total compliance via Tradable Renewable Energy Credits (TRECs). By comparison, any Category 2 and 3 products under SBx2 would have

[6] PG&E opening comments, page 12.
[7] AREM opening comments, page 8.
[8] AREM opening comments, page 8.
[9] Noble opening comments, page 8.

been classified as TRECs under Decision 10-03-021 or Decision 11-01-026. Therefore, Noble cannot reasonably argue that SBx2 created more restrictive requirements that could not have been anticipated. As enacted, SBx2 already provides more flexibility for ESPs to procure substantial quantities of renewable energy that does not qualify for the first product category.

None of the retail sellers offer reasonable proposals for addressing violations of the portfolio content limitations. The Commission should recognize that since none of these entities support the limitations, their proposals are designed to reduce or eliminate the overall requirement. This element of SBx2 was hotly debated and reflects a critical compromise achieved in the legislative process. The Commission must make the limitations meaningful and assess some form of penalty or disallowance for failure to achieve compliance. Absent such a mechanism, this element of SBx2 could become an aspirational goal rather than a binding limit.

II. REQUESTS FOR A REDUCTION IN PROCUREMENT CONTENT REQUIREMENTS SHOULD OCCUR AT THE END OF A COMPLIANCE PERIOD

In opening comments, TURN urged the Commission to allow requests for a reduction in procurement content requirements to be submitted only at the end of a compliance period as part of a final report detailing cumulative procurement (by product category) and highlighting any shortfalls. This request should be considered within the context of the enforcement waiver provisions of §399.15(b)(5). By contrast, SCE, PG&E and MEA propose that the Commission should allow a retail seller to submit a waiver request at any time during the compliance period.

SCE urges the Commission to provide "flexibility" in the timing of a request based on the circumstances relevant to each retail seller.[10] MEA similarly proposes that a request could be submitted "at any time prior to the end of the procurement year."[11] PG&E asserts that providing this discretion to the retail seller would allow early requests to be submitted and thereby "avoid a potential last-minute scramble by the retail seller to meet its obligations."[12]

TURN disagrees with these proposals. If the Commission provides unfettered discretion for a retail seller to submit this request at any time, the likely consequence is that the Commission will receive an advance request from practically every retail seller. Since there is no downside risk associated with submitting a request, each retail seller will be encouraged to claim hardship at the earliest possible date, seek a reduction, and roll the dice on receiving a positive response from the Commission. If the Commission fails to provide definitive responses to these advance requests in a timely manner, retail sellers will be emboldened to complain about regulatory uncertainty and lobby for enforcement waivers. The result is that Commission staff will be diverted from critical tasks to process and respond to the flood of requests. The entire process could consume substantial amounts of time, staff resources and money.

Retail sellers should be highly motivated to make their best efforts to comply with all applicable requirements including the portfolio content limitations. Adopting the proposals of PG&E, SCE and MEA would encourage retail sellers to request a relaxation in procurement requirements early and often, thereby reducing the motivation to achieve full compliance and potentially leading to uneven requirements across retail sellers. In short, providing unfettered discretion will only decrease regulatory certainty, lead to a scramble for early reductions, and

[10] SCE opening comments, page 9.
[11] MEA opening comments, page 8.
[12] PG&E opening comments, page 10.

encourage retail sellers to devote resources to seeking exemptions rather than achieving compliance. The Commission should therefore not permit retail sellers to choose the timing of their requests and instead consolidate any such submission with filings requesting an overall enforcement waiver at the end of the compliance period.

III. THE COMMISSION SHOULD REQUIRE MORE PUBLIC DISCLOSURE RATHER THAN THE GREATER CONFIDENTIALITY PROTECTIONS SOUGHT BY ELECTRIC SERVICE PROVIDERS

In opening comments, TURN stressed the importance of improving RPS program transparency by requiring annual (or semi-annual) reports to provide public disclosure of all information relating to prior year procurement activities. Both Noble and AREM argue for more expansive confidentiality protections although it is not clear whether they propose to redact historical information. To the extent that AREM and Noble seek to shield any past year information from public disclosure, the Commission should reject this effort.

AREM asserts that making any procurement information public "will serve to alert other market participants to RPS obligated entities' compliance position" and thereby "compromise effective commercial negotiations, and as a result financially harm the RPS obligated entity and its customers."[13] Noble similarly claims that confidentiality is essential to prevent market participants from using information in these reports to "obtain an unfair commercial advantage."[14] While TURN recognizes the need for some confidentiality in the submission of procurement data, any protections should apply only to projections of future retail sales and portfolio commitments. There is no rational basis for allowing retail sellers to

[13] AREM opening comments, page 3.
[14] Noble opening comments, page 4.

redact any historical information other than to protect certain retail sellers from negative public opinion.

Under current practice, the IOUs provide full disclosure of historical retail sales and renewable procurement. A report submitted by an IOU in 2012 will disclose this information for activities in 2011. By contrast, some Electric Service Providers (ESPs) will file reports in 2012 that provide no public disclosure for 2011 procurement and retail sales. This practice results in different confidentiality practices and violates the statutory requirement that ESPs "shall be subject to the same terms and conditions applicable to an electrical corporation pursuant to this article."[15]

AREM and Noble fail to demonstrate the competitive harm that would occur if previous year procurement and retail sales are publicly disclosed, especially given that IOUs already disclose this information and operate in the same competitive environment. TURN urges the Commission to recognize the critical role of transparency in allowing for the public to assess progress and the ongoing success of the RPS program. Keeping basic compliance information shielded from public view will only serve to undermine public confidence in the RPS program and prevent informed public debate over the evolving rules and practices.

IV. THE COMMISSION SHOULD PROHIBIT 'REC RESHUFFLING' STRATEGIES INTENDED TO DEFEAT THE PORTFOLIO CONTENT LIMITATIONS

The opening comments of PG&E highlight the potential for retail sellers to defeat the statutory restrictions on banking excess procurement associated with short-term contracts and Category 3 products. PG&E argues that the portfolio content

[15] Cal. Pub. Util. Code §399.12(j)(3).

limitations should apply "only to the procurement retired in WREGIS by a retail seller for use in a given compliance period."[16] This phrasing strongly suggests that PG&E and other retail sellers intend to engage in 'REC reshuffling' strategies in which the retail seller procures unbundled RECs in one compliance period but delays their retirement (in the WREGIS system) until a future compliance period.

TURN identified this issue in prior comments on SBx2 compliance issues.[17] In those comments, TURN and CUE recommended that the Commission assume that any procurement occurring during a particular compliance period is credited towards compliance in that period. PG&E's comments serve as a fresh warning that retail sellers intend to evade the statutory restrictions on banking of short-term procurement and Category 3 products by delaying the retirement of associated RECs in WREGIS until a subsequent compliance period.

The Commission should prevent this type of gaming by adopting TURN's initial proposal. Failure to enact this limit would encourage creative strategies designed to evade both the portfolio content limitations and the restrictions on banking of quantities associated with certain transactions.

V. BEAR VALLEY ELECTRIC SYSTEM IS NOT ENTITLED TO AN AUTOMATIC EXEMPTION FROM PORTFOLIO CONTENT LIMITATIONS

The Legislature enacted §399.17 to address the unique situation of electrical corporations that cannot reasonably comply with a wide range of RPS rules due to the fact that they operate within balancing authorities located primarily outside of California. This section offers differential treatment to any electrical corporation

[16] PG&E opening comments, page 9.
[17] Joint Comments of TURN and CUE, August 30, 2011, page 6.

with 60,000 or fewer customer accounts that meets either of the following requirements:[18]

> (A) Served retail end-use customers outside California.
>
> (B) Was located in a control area that is not under the operational balancing authority of the Independent System Operator or other California balancing authority and receives the majority of its electrical requirements from generating facilities located outside of California.

In opening comments, Bear Valley Electric System (BVES) asserts that it qualifies for §399.17 and is therefore "not subject to the procurement content limitations of Section 399.16".[19] Despite this statement, BVES has not demonstrated that it satisfies the test in §399.17(a)(1). BVES does not serve retail customers located outside of California and is located within the California ISO balancing area authority. By contrast, CalPeco is located within the NV Energy balancing area authority and satisfies the requirements of §399.17(a)(1)(B).

The Commission should not provide an exemption from the portfolio content limitations to BVES. BVES is fully capable of complying with these requirements and is statutorily ineligible to receive an exemption.

[18] Cal. Pub. Util. Code §399.17(a)(1).
[19] Opening comments of BVES-CalPeco, page 7.

Respectfully submitted,

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VERIFICATION

I, Matthew Freedman, am an attorney of record for THE UTILITY REFORM NETWORK in this proceeding and am authorized to make this verification on the organization's behalf. The statements in the foregoing document are true of my own knowledge, except for those matters which are stated on information and belief, and as to those matters, I believe them to be true.

I am making this verification on TURN's behalf because, as the lead attorney in the proceeding, I have unique personal knowledge of certain facts stated in the foregoing document.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 21, 2012, at San Francisco, California.

_____/s/_____

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