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

JOINT RESPONSE OF THE ALLIANCE FOR RETAIL ENERGY MARKETS AND RETAIL ENERGY SUPPLY ASSOCIATION IN SUPPORT OF THE APPLICATION OF PUBLIC UTILITY DISTRICT NO. 1 OF COWLITZ COUNTY FOR REHEARING OF DECISION 11-12-052

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Sue Mara, Principal
RTO Advisors, L.L.C.
164 Springdale Way
Redwood City, CA 94062
Telephone: (415) 902-4108
E-Mail: sue.mara@rtoadvisors.com

Consultant to
Retail Energy Supply Association

Andrew B. Brown
Ellison Schneider & Harris L.L.P.
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816-5905
Telephone: (916) 447-2166
Facsimile: (916) 447-3512
Email: abb@eslawfirm.com

Attorneys for the
Alliance for Retail Energy Markets

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Pursuant to Rule 16.1 of the California Public Utilities Commission ("Commission" or "CPUC") Rules of Practice and Procedure, the Alliance for Retail Energy Markets ("AReM")[1] and the Retail Energy Supply Association ("RESA")[2] (collectively "AReM/RESA") submit this response in support of the *Application of Public Utility District No. 1 of Cowlitz County for Rehearing of Decision 11-12-052* ("Cowlitz Application").

AReM/RESA support the Cowlitz Application with respect to the arguments that the additional requirements imposed by the Commission for Category 2 transactions are not supported by the record, are an abuse of discretion, and violate the Commerce Clause. The Public Utility District No. 1 of Cowlitz County ("Cowlitz") states that the "three additional restrictions on Category 2 firmed and shaped transactions that are not required by SB 2 (1X)…will only serve to further limit the transactions with out-of-state generators that may

[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 those of individual members or affiliates of its members with respect to the issues addressed herein.

[2] RESA's members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

qualify for RPS compliance purposes."[3] Specifically, Cowlitz challenges D.11-12-052's requirement that Category 2 transactions include the following three elements:

> 1. the buyer's simultaneous purchase of energy and associated RECs from the RPS-eligible generation facility without selling the energy back to the generator; [Footnote omitted.]
>
> 2. the availability of the purchased energy to the buyer (i.e., the purchased energy must not in practice be already committed to another party); and
>
> 3. the initial contract for substitute energy is acquired no earlier than the time the RPS-eligible energy is purchased and no later than prior to the initial date of generation of the RPS-eligible energy under the terms of the contract between the buyer and the RPS-eligible generator. [Footnote omitted.][4]

The Cowlitz Application asks the Commission to grant rehearing of D.11-12-052 and to eliminate the three restrictions on Category 2 products. AReM/RESA agree with Cowlitz with respect to the elimination of conditions 1 and 3 above for Category 2 transactions found in D.11-12-052 as they are not explicitly contemplated by SB 2 (1X).[5]

As described in earlier comments by AReM and AReM/RESA,[6] imposing additional rules on procurement that go above and beyond the statutory eligibility criteria for Category 2

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[3] Cowlitz Application, p. 16.

[4] D.11-12-052, p. 47.

[5] AReM/RESA do not oppose the second condition since there is a requirement that the energy purchase be incremental to the existing portfolio and because it is axiomatic that a counterparty that had already committed energy deliveries to another entity cannot double sell that commodity.

[6] *See,* August 8, 2011 *Comments of the Alliance for Retail Energy Markets on Administrative Law Judge's Ruling Seeking Comments on Implementation of New Portfolio Content Categories for the Renewables Portfolio Standard*, pp. 10-12, available at http://docs.cpuc.ca.gov/efile/CM/140949.pdf; August 19, 2011 *Reply of the Alliance for Retail Energy Markets to Opening Comments on Implementation of New Portfolio Content Categories for the Renewables Portfolio Standard*, pp. 13-16, available at http://docs.cpuc.ca.gov/efile/CM/141766.pdf; October 27, 2011 *Joint Comments of the Alliance for Retail Energy Markets and Retail Energy Supply Association on Proposed Decision Implementing Portfolio Content Categories for the Renewables Portfolio Standard*, pp. 12-13, available at http://docs.cpuc.ca.gov/efile/CM/146409.pdf; and the November 1, 2011 *Joint Reply Comments of the Alliance for Retail Energy Markets and Retail Energy Supply Association on Proposed Decision Implementing Portfolio Content Categories for the Renewables Portfolio Standard*, pp. 2-3, available at http://docs.cpuc.ca.gov/efile/CM/146733.pdf.

products does nothing to advance compliance with the new, elevated RPS requirement, but instead creates new commercial and regulatory risks for RPS obligated entities and parties contracting with such entities. The additional Category 2 requirements and the requirement to acquire substitute energy at the same time as the RPS eligible energy impair the ability of retail sellers to have flexibility in procurement structures, particularly based on potential changes in regional loads, transmission availability, and technological changes.[7] These additional requirements will increase the overall costs of complying with the RPS program for retail sellers and will negatively impact the ability of out-of-state renewable generators to sell their output into California.

By imposing the additional restrictions enumerated in D.11-12-052, a retail seller will be barred from using certain generation that may otherwise qualify for the RPS program, thus increasing costs for customers. For example, the restrictions in D.11-12-052 prohibit a retail seller from converting contracted deliveries expected under a Category 1 contract to a Category 2 contract in light of changes in transmission availability unless the substitute energy transaction has been lined up at the time of the original transaction. This is unlikely to be the case, as a contract with a specific out-of-state facility may be fully and reasonably anticipated to provide a Category 1 product. However, if, due to anticipated circumstances[8] , or factors beyond the control of the generator and retail seller, the generation cannot be delivered pursuant to the requirements to qualify as a Category 1 product, that generation will also not qualify as a Category 2 product unless the initial acquisition of the substitute energy occurred "no earlier than

[7] For example, technological changes supporting short term ancillary service transactions or prompting inter-balancing authority area scheduling modification in support of renewables integration can have an impact on contracts delivering generation into California.

[8] Such anticipated circumstances might include periodic overgeneration conditions, transmission capacity derates, or a period where new transmission is not yet available.

the time the RPS-eligible energy is purchase and no later than prior to the initial date of the generation of the RPS-eligible energy under the terms of the contract …."[9] Even if these circumstances are foreseen, it is impractical and administratively burdensome to require advanced or simultaneous contracting for substitute energy. Accordingly, the Commission should reject its imposition of additional requirements for Category 2 products as such requirements impede commercial innovation, increase costs, and impede interstate commerce of wholesale, renewable energy.

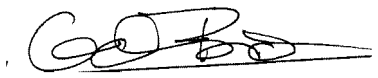
AReM/RESA also agree with the Commerce Clause concerns raised in the Cowlitz Application.[10] While SB 2 (1X) is said to have removed the "delivery requirement" found in the prior iteration of California's RPS laws, it in fact has recast that obligation into the forms found in the Product 1 and Product 2 categories. In both instances, sales of renewable power in interstate commerce are subjected to state-imposed rules regarding production and delivery, rules that were clearly designed with the intent to favor California-based project development over other development of similar (if not identical) technologies based outside of California. California is a major participant in the regional, WECC-wide wholesale market, and imports a significant portion of the energy used to serve its loads. This reliance on the interstate, regional market comes with benefits to state consumers insofar as the regional diversity of loads and generation means that assets can be made available to help serve loads arising throughout the region. While the Commission is required to implement the new statute, it should avoid creating new, additional barriers on access to out-of-state resources participating in the wholesale markets.

[9] D.11-12-052, p. 47, and Ordering Paragraph 2.

[10] Cowlitz Application, pp. 10-15.

For the reasons enumerated in the Cowlitz Application, the reasons described herein, as well as the reasons previously articulated by AReM and RESA in earlier comments, AReM/RESA urge the Commission to approve Cowlitz's Application and eliminate the additional restrictions for Category 2 firmed and shaped products prescribed in D.11-12-052.

Respectfully submitted,



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Andrew B. Brown
Ellison Schneider & Harris L.L.P.
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816-5905
Telephone: (916) 447-2166
Facsimile: (916) 447-3512
Email: abb@eslawfirm.com

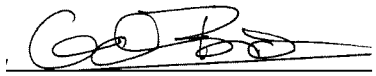
Attorneys for the
Alliance for Retail Energy Markets

VERIFICATION

I am an agent of 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 February 6, 2012 at Sacramento, California.



Andrew B. Brown
Ellison, Schneider & Harris L.L.P.
Attorneys for the Alliance for Retail Energy Markets