

**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)

**COMMENTS OF THE ALLIANCE FOR RETAIL ENERGY MARKETS  
ON ADMINISTRATIVE LAW JUDGE'S RULING  
REQUESTING SUPPLEMENTAL COMMENTS ON  
REPORTING AND COMPLIANCE REQUIREMENTS  
FOR THE RENEWABLES PORTFOLIO STANDARD**

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February 10, 2012

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**I. INTRODUCTION AND SUMMARY**

Pursuant to the instruction in Administrative Law Judge (“ALJ”) Anne E. Simon’s February 1, 2012 *Ruling Requesting Supplemental Comments on Reporting and Compliance Requirements for the Renewable Portfolio Standard*, (“ALJ Ruling”), the Alliance for Retail Energy Markets (“AReM”)<sup>1</sup> submits these responses to the questions posed in the ALJ Ruling. The questions posed in the ALJ Ruling are intended to provide the ALJ and the California Public Utilities Commission (“Commission”) with additional stakeholder input on implementation of the reporting and compliance provisions with the Renewable Portfolio Standards (“RPS”) requirements in Senate Bill (“SB”) 2 1X.

SB 2 1X imposes a highly complex RPS program – far more complex than AReM members have generally encountered in other state jurisdictions where they serve customers.

This complexity significantly increases compliance risk. Therefore, as an initial matter, AReM

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<sup>1</sup> 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.

urges the Commission to acknowledge that as parties proceed with procurement to meet the new RPS requirements, there may well be procurement situations and transactions that have not been contemplated during the development of the regulations adopted in this proceeding. Because SB 2 1X was introduced and subsequently became law well into 2011, with subsequent Commission policy pronouncements rendered at the very end of 2011, its retrospective application for procurement already undertaken during 2011 creates compliance issues. The Commission should make accommodations in the first compliance period for RPS obligated entities that meet the first compliance period's 20% RPS mandate via the waiver process to provide assurances that RPS purchases made in good faith, under the rules and policies in place at that time, will not be devalued or stranded for RPS compliance purposes. Specifically, to ensure that such unintended situations do not subject retail sellers to onerous compliance penalties or risk of loss of value of RPS purchases, AReM urges the Commission to recognize and acknowledge that, especially for the first compliance period, there should be: (i) an effort to minimize the administrative burden associated with compliance; (ii) ample opportunity to seek and receive clarifications and direction from Energy Division staff throughout the compliance period without fear that the answers may change; and (iii) a clearly defined timeline for an opportunity for retail sellers to cure any compliance deficiencies before the imposition of any penalties, if the Commission were to contemplate such penalties.

In Section II of these comments, AReM responds to the questions posed in the ALJ Ruling and in Section III provides a framework for a compliance cure period.

## **II. RESPONSE TO THE QUESTIONS POSED IN THE ALJ RULING**

AReM offers the following responses to the questions posed in the ALJ Ruling:

- 1. Question 1:** Section 399.13(a)(3) requires that each retail seller must submit an annual RPS compliance report.

- When should the annual RPS compliance report be submitted? Please consider at least the following in choosing a date for your proposal:
  - i. The information identified by Section 399.13(a)(3) as necessary for the compliance report;
  - ii. The RPS reporting and verification requirements of the California Energy Commission;
  - iii. Any other reporting or information requirements that may be relevant to the RPS compliance reporting process. Please be specific.
- What information should the annual RPS compliance report contain? Please consider both the requirements set out in Section 399.13(a)(3) and the information provided in compliance reports submitted through 2010.

**AReM Response:** AReM recommends that annual compliance reports required by Section 399.13(a)(3) should be broken into two categories. The first category would include annual compliance progress reports to be submitted with respect to the intervening years of the compliance period (“Intervening Years RPS Annual Progress Report”). The second category of compliance report would include the final *compliance* progress report with respect to the final year and term of the compliance period (“Compliance Period RPS Compliance Report”).

Fundamentally, the issue AReM has with annual progress reports is that unless the information is kept confidential by the Commission, these annual progress reports will serve to alert other market participants to RPS obligated entities’ compliance position. Public disclosure of a RPS obligated entity’s long or short RPS position by product category type and year would compromise effective commercial negotiations, and as a result financially harm the RPS obligated entity and its customers. With this real concern, AReM urges the Commission to require that the annual progress reports be filed confidentially with the Commission and that any public versions of these reports would specifically redact market-sensitive information regarding anticipated loads and resourcing positions.

With respect to the content of the annual reports required under Section 399.13(a)(3), the Commission must take into account Section 399.15(b)(2)(C) which states “Retail sellers shall not be required to demonstrate a specific quantity of procurement for any individual intervening year” of the established compliance periods. As a result, the Intervening Years RPS Annual Progress Reports are informational only, carrying no RPS compliance consequences for the retail seller because RPS compliance is not assessed until after the end of the multi-year compliance period, and procurement to meet the compliance requirements can be made at any time during that compliance period. AReM respectfully requests that the Commission, in its final decision in

this phase of the implementation of SB 2 1X, specifically note the non-compliance related nature of the Intervening Years RPS Annual Progress Report.

AReM recommends that the appropriate due date for all RPS reporting, including the Intervening Years RPS Annual Progress Report and the Compliance Period RPS Compliance Report, should all be due as of August 15 of the year following the calendar year for which the report is applicable.

- 2. Question 2:** In addition to the annual RPS compliance reporting requirement in Section 399.13(a)(3), should the Commission require an RPS progress report from retail sellers during the same calendar year? Please explain why or why not.
- If there should be a progress report, should it contain the same information as the annual compliance report?
  - If the information in the progress report should be different from the information in the annual report, please specify and explain your proposal.

**AReM Response:** No. In the interest of reducing the administrative burden associated with the reporting requirements, AReM recommends elimination of the current practice that requires retail sellers to submit multiple reports in a given year, namely, a preliminary compliance report in March of each year for the prior year. Instead, each calendar year a single compliance report to the CPUC should be due on August 15 of the following year.

- 3. Question 3:** In addition to the annual RPS compliance reporting requirement in Section 399.13(a)(3), should the Commission require a separate report on compliance for an entire compliance period?
- If not, please explain why not and identify how the Commission would receive information about the retail seller's attainment of the procurement requirements for a compliance period, as required by Section 399.15(b), as implemented by D.11-12-020.
  - If yes,
    - i. When should such a report be submitted? (For example, March 1 of the year following the end of the compliance period; for the first compliance period, that would be March 1, 2014.)
    - ii. How should such a report present the quantities of the retail seller's RPS procurement for the compliance period?

**AReM Response:** As AReM has noted in its response to Question 1 above, in addition to the annual reports required under Section 399.13(a)(3), the Commission should require a Compliance Period RPS Compliance Report, due on August 15 of the year after the last year of

each compliance period. The Compliance Period RPS Compliance Report should provide the details of the entity's RPS compliance procurement for the entire compliance period.

With respect to the presentation in the Compliance Period RPS Compliance Report of the quantities of each retail seller's RPS procurement for the compliance period, AReM notes that while Decision 11-12-020 has provided all retail sellers with the applicable formulae to determine the amount of procurement necessary for RPS compliance for each compliance period, the Decision does not contain new reporting templates and instructions. AReM recommends that the Commission direct the Energy Division to draft new RPS reporting templates, and host workshops to solicit stakeholder input on the design and functionality of the new, draft template(s). The workshop process will allow all retail sellers to gain familiarity with the templates, offer parties an opportunity to make suggested changes to the templates that could reduce unintended administrative burdens and will provide a platform for key personnel to interact proactively with the proposed templates which should help avoid and minimize subsequent inadvertent reporting errors.

- 4. Question 4:** Section 399.16(c) sets minimum percentages for procurement that meets the criteria of Section 399.16(b)(1) in each compliance period, as well as maximum percentages for procurement that meets the criteria of Section 399.16(b)(3) in each compliance period.
- Should the percentage requirements for procurement meeting the specified criteria be applied:
    - i. Annually?
    - ii. For each compliance period as a whole?
    - iii. Over some other time period?

**AReM Response:** Section 399.15(b)(2)(C) states: "Retail sellers shall not be required to demonstrate a specific quantity of procurement for any individual intervening year." This provision does not permit the Commission to impose annual compliance requirements of any sort, either in the percentage of renewable energy procured in the aggregate or with respect to the specific percentages associated with each product content category. Rather, the specific procurement obligation is derived from the cumulative obligation known at the end of the multi-year compliance period. AReM requests that the Commission make an affirmative statement clarifying that the percentage requirements associated with the product content categories will be applied over the entire compliance period and not applied to each of the intervening years.

5. **Question 5:** Should the Commission require a particular format or time at which a “retail seller may apply to the Commission for a reduction of a procurement content requirement of subdivision [399.16](c),” in accordance with Section 399.16(e)?
- If yes, please explain and provide a justification for the proposal.
  - If no, please explain how retail sellers would inform the Commission of a request under Section 399.16(e).

**AReM Response:** AReM appreciates that the statute has made provisions for retail sellers to seek relief from the product content categories under certain conditions. However, implementation of this provision of the statute must ensure that the terms and conditions under which a waiver is granted are applied in a fair manner, using sound judgment to weigh the facts and situation for each entity’s particular case so that the waiver process does not become a mechanism by which a retail seller can improve its competitive position vis-à-vis other retail sellers through their RPS procurement or lack thereof.

The first compliance period is unique in that RPS obligated entities made procurement decisions under at least four sets of rules and Commission policies: Pre-June 2010; Post-June 2010 to January 13, 2011<sup>2</sup>; and January 14, 2011 to December 10, 2011. Each time period has its own set of particular rules for how the procurement will count towards the RPS obligated entity’s compliance. In light of these changing policies and regulatory directives, AReM urges the Commission to view the first compliance period as a transition period for RPS obligated entities from a set of old rules to the new. With this view in mind, the waiver process and the expectations RPS obligated entities may have for the waiver process should be different than the process and expectations of the waiver process in subsequent compliance periods. In light of these shifting procurement frameworks, and the ongoing transition from the old rules to the new SB 2(1X) rules, the Commission should be prepared to incorporate the difficulty that such shifts create when it is present with waiver requests for the first compliance period. AReM recommends that the following guidelines be incorporated into the Commission’s decision in this phase of the proceeding with respect to the waiver request provisions of section 399.16(e) and the terms and conditions under which a waiver will be granted for the first compliance period (2011-2013):

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<sup>2</sup> The Commission’s “Decision Revising Rules For The Renewables Portfolio Standard Pursuant To Senate Bill 695”, D.11-01-026, was issued on January 14, 2011.

- Except as provided for in connection with the opportunity to cure a compliance deficiency (described in Section III below), waiver requests can be made no earlier than the end of the compliance period, and no later than one month before the deadline for submission of the Compliance Period RPS Compliance Report. Allowing the submission of waiver requests in this timeframe will ensure that entities have the maximum incentive to achieve full compliance throughout the compliance period. Without this structure, retail sellers may request waivers far in advance of their compliance obligation giving them the option to comply through procurement or through the provisions of the waiver request. Obviously, the intent of the law is for retail sellers to comply through RPS procurement and only if there are circumstances beyond the control of the retail seller would a waiver request be sought.
  
- Except in cases where the retail seller was making procurement purchases under the law and the rules in place at the time of the procurement, the terms and conditions imposed on any retail seller that is granted a waiver may need to include the imposition of a payments requirement that reflects what the entity would have had to pay to achieve full RPS compliance. This is important because Section 399.15(b)(9) X states: “Deficits associated with the compliance period shall not be added to a future compliance period.” Therefore, unless the Commission imposes some kind of payment requirement from an entity that is granted a waiver, the entity that gets a waiver will potentially enjoy a competitive advantage vis-a-vis other entities who paid market price to achieve full compliance. In short, this guideline will ensure that there are no perverse outcomes in which retail sellers who comply with the requirements are put at a competitive disadvantage to entities that failed to achieve compliance.
  
- Waiver requests should be submitted via an advice letter that is served on all parties to this proceeding. The retail seller may seek and reasonably expect confidential treatment of transaction-specific information and information that would reveal the quantity of procurement relief that the retail seller is seeking for waiver requests in the first compliance period.
  
- The Energy Division disposition of a waiver request should occur within 30 days.



- The retail seller may appeal the Energy Division disposition on the waiver request to the full Commission.

Waiver requests made in compliance periods after the first may not need the same level of confidential treatment that should be applicable for the first compliance period's waiver request since the RPS obligation entities will then have years of RPS procurement experience undertaken under the new RPS program rules and policies.

- 6. Question 6:** How should the relationship between the minimum percentage requirement for procurement meeting the criteria of Section 399.16(c)(1) and the procurement quantity requirements for a compliance period be interpreted? Please discuss at least the following example:

*A retail seller meets the RPS procurement quantity requirement of an average of 20 percent of its retail sales for the compliance period 2011-2013. During that compliance period, an average of 45 percent of the retail seller's RPS procurement associated with contracts executed after June 1, 2010, is from procurement meeting the criteria of Section 399.16(c)(1).*

**AReM Response:** In the example provided in this question, the entity's Compliance Period RPS Compliance Report shows over-procurement of Product 2 or Product 3, or some combination of the two, and an under-procurement of Product 1.

How this should be interpreted from a compliance standpoint is difficult to answer simply, especially in light of the various rules that were in place prior to and during the first compliance period as each set of rules has distinct impacts on whether the RPS obligated entity is compliant or *intended* to be compliant at the time the procurement was undertaken. While the RPS obligated entity met the 20% RPS compliance threshold, only the Commission may determine if the RPS obligated entity operated in good faith, under the rules and policies in place at the time the RPS procurement was undertaken, to ascertain whether a penalty for failure to meet the particular product category percentages is appropriate or whether a waiver of a certain percentage obligation to a particular content category is warranted. The Commission will need to focus on the intent of the RPS obligated entity to ensure fair treatment. Generally, however, unless the RPS obligated entity has secured a waiver, as discussed in Question 5, the entity in this example would not be in full compliance with all of the RPS requirements. Given that the entity attempted to comply with the 20 percent obligation for the first compliance period, the Commission should acknowledge that the issues arise during the transition period from one

RPS set of rules and policies to a new set. Accordingly, the Commission will need to weigh the entity's particular situation in light of the totality of the circumstances to determine the appropriate level of penalty or if a waiver is warranted.

7. **Question 7:** In D.11-12-052, the Commission noted that “some rules for the use of unbundled RECs set forth in D.10-03-021, as modified by D.11-01-025, are not affected by new § 399.16 and continue in force.” (D.11-12-052 at 55). Two of the rules prohibit the unbundling of RECs from contracts that have been “earmarked” to apply to a shortfall in a retail seller’s annual procurement target.
- How, if at all, should the prohibition on unbundling RECs from earmarked contracts now be applied to contracts for RPS procurement:
    - i. that were executed prior to June 1, 2010?
    - ii. that were executed prior to January 1, 2011?
  - How should the compliance reports required by Section 399.13(a)(3) account for the unbundling of RECs from previously earmarked contracts?

**AReM Response:** At this time, AReM cannot comment in detail because the Commission has not yet ruled on how it intends to address the value of RPS compliance instruments banked under the pre-SB 2(1X) regime. AReM reserves the right to address this issue in subsequent comments.

### III. COMPLIANCE CURE PERIOD

Should the Energy Division staff determine that the Compliance Period RPS Compliance Report submitted by a retail seller is deficient after its review and the RPS obligated entity has not petitioned the Commission for a waiver, the Director of the Energy Division should notify the retail seller of the exact deficiency(ies), and the retail seller should have 30 days to respond to the Director with at least one of three possible replies: (i) the RPS obligated entity disagrees with the Energy Division’s determination that a deficiency exists and offers corrective data, (ii) informs the Energy Division that the RPS obligated entity will seek a waiver from the Commission or, (iii) will not dispute the deficiency(ies), but will demonstrate that the deficiency(ies) was either inadvertent, a ministerial error or otherwise unintentionally created by the retail seller for reasons outside the retail sellers control and unknown to the retail seller. In

this third case the retail seller should have a ninety day cure period during which time the retail seller can demonstrate acquisition of the necessary purchases needed to achieve full compliance as determined by the Commission.

Respectfully submitted,



February 10, 2012

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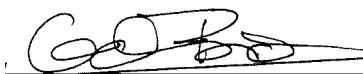
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## VERIFICATION

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 foregoing is true and correct.

Executed on February 10, 2012 at Sacramento, California.

A handwritten signature in black ink, appearing to read "A. B. Brown", is written over a horizontal line.

Andrew B. Brown  
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