

BEFORE THE  
PUBLIC UTILITIES COMMISSION  
OF THE  
STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue  
Implementation and Administration of  
California Renewables Portfolio Standard  
Program.

R.11-05-005

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**JOINT MOTION OF SHELL ENERGY  
NORTH AMERICA (US), L.P. AND THE  
DIRECT ACCESS CUSTOMER COALITION  
FOR RECONSIDERATION OF ASSIGNED  
COMMISSIONER'S APRIL 5, 2012 RULING**

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Date: April 17, 2012

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In accordance with Rule 11.1 of the Commission's Rules, Shell Energy North America (US), L.P. ("Shell Energy") and the Direct Access Customer Coalition ("DACC")<sup>1</sup> file this joint motion requesting reconsideration of the "Assigned Commissioner's Ruling" ("ACR")<sup>2</sup> that was issued in this proceeding on April 5, 2012. Shell Energy and DACC request reconsideration of the Assigned Commissioner's determination to require energy service providers ("ESPs") to file RPS procurement plans. This requirement is inconsistent with newly enacted P.U. Code Section 399.13(a)(1), which provides that the Commission shall direct each "electrical corporation" to prepare an annual RPS procurement plan. The RPS procurement plan requirement does not apply to ESPs.

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<sup>1</sup> The Direct Access Customer Coalition is a regulatory alliance of educational, commercial and industrial customers that utilize direct access for all or a portion of their electrical demand.

<sup>2</sup> R.11-05-005, "Assigned Commissioner's Ruling Identifying Issues and Schedule of Review for 2012 Renewables Portfolio Standard Procurement Plans Pursuant to Public Utilities Code Section 399.11 et seq. and Requesting Comments on New Proposals" (issued April 5, 2012).

## I.

### INTRODUCTION

In D.11-01-026 (January 13, 2011), the Commission reversed previous Commission precedent and determined that ESPs should be required to submit annual RPS procurement plans. See Decision at p. 16. The Commission’s determination was based on the enactment of SB 695 in October 2009, and in particular the language of P.U. Code Section 365.1(c)(1). The Commission’s decision preceded the enactment of SBX1 2, however. In SBX1 2, which was enacted in April 2011, the legislature modified the statutory language that applies to RPS procurement plans. Whether or not to impose an RPS procurement plan obligation on ESPs must be based on the language of SBX1 2.

The ACR properly notes that SBX1 2 “modified or changed many details of the RPS program.” ACR at p. 4. In fact, the ACR acknowledges that SBX1 2 “modified certain requirements applied to the RPS Procurement Plans.” Id. The ACR points out that SBX1 2 imposes particularized requirements on multi-jurisdictional utilities (P.U. Code Section 399.17) and small utilities (P.U. Code Section 399.18) with respect to RPS procurement plans. See ACR at pp. 6-7. The ACR fails to acknowledge, however, that the obligation to file an annual RPS procurement plan under P.U. Code Section 399.13(a)(1) applies exclusively to “electrical corporations.” Nowhere does the RPS statute impose on ESPs an obligation to file an RPS procurement plan.

The language of SBX1 2, which was enacted after SB 695, and after D.11-01-026, evidences the legislature’s intent to apply some provisions of P.U. Code Section 399.13 to all “retail sellers,” and some provisions to “electrical corporations.” The obligation to prepare an annual RPS procurement plan under P.U. Code Section 399.13(a)(1) applies exclusively to “electrical corporations.”

Without discussing the impact of SBX1 2, the ACR improperly relies on D.11-01-026 to impose an RPS procurement plan obligation on ESPs. D.11-01-026 has been overtaken by SBX1 2, however. The Commission must address the RPS procurement plan obligation based on the new RPS statute, not based on the previous RPS statute as implemented by the

Commission in decisions such as D.11-01-026.<sup>3</sup> The more recent, specific language of SBX1 2 controls over the earlier, general language of SB 695.

## II.

### **SBX1 2 EXCLUDES ESPs FROM THE RPS PROCUREMENT PLAN OBLIGATION**

In adopting P.U. Code Section 399.13, the legislature was very clear about which requirements are imposed on all retail sellers, and which requirements are imposed exclusively on electrical corporations. For example, Section 399.13(a)(1) provides that each “electrical corporation” shall prepare an annual RPS procurement plan. Section 399.13(a)(2) provides that each “electrical corporation” that owns electrical transmission facilities must file an annual report identifying necessary transmission facility upgrades. Section 399.13(a)(3), however, states that each “retail seller” must submit an annual RPS compliance report. Nevertheless, if the retail seller is an “electrical corporation,” Section 399.13(a)(3)(B) imposes an additional obligation to state the current status and progress regarding construction of and upgrades to transmission and distribution facilities necessary to interconnect RPS resources. This obligation is not imposed on ESPs.

In adopting P.U. Code Section 399.13, the legislature was attentive to the requirements imposed on all retail sellers, on the one hand, and the obligations imposed exclusively on electrical corporations, on the other hand. For example, P.U. Code Section 399.13(a)(4)(B) states that the Commission shall adopt rules permitting “retail sellers” to accumulate “excess procurement in one compliance period to be applied to any subsequent compliance period.” This statutory provision states that “[t]he rules shall apply equally to all retail sellers.” Clearly, the legislature understood when it made RPS-related rules applicable to “all retail sellers.”

Section 399.13(a)(5) provides that the RPS procurement plan “submitted by an electrical corporation” shall include the specific information set forth in subsections (A) through (F). The

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<sup>3</sup> Shell Energy and DACC do not file a petition for modification of D.11-01-026 because D.11-01-026 applied to the RPS statute as it was written before the enactment of SBX1 2. The Commission’s new requirements respecting the submission of RPS procurement plans must be with reference to (and consistent with) SBX1 2.

statute says nothing about an RPS procurement plan to be submitted by an ESP. In fact, even the ACR acknowledges that “many of the new requirements of [Section] 399.13(a)(5) do not reasonably apply to ESPs.” ACR at p. 8 (emphasis added).

The ACR presumes that ESPs are required to submit RPS procurement plans under SBX1 2 because the Commission decided, in D.11-01-026, that ESPs must submit RPS procurement plans. The ACR fails to acknowledge that SBX1 2 significantly changed the RPS requirements, however, including the requirements applicable to RPS procurement plans. Because the legislature imposed the requirement for an RPS procurement plan under Section 399.13(a)(1) exclusively on electrical corporations, reconsideration of the ACR should be granted to exclude ESPs from the requirement to submit RPS procurement plans.

### III.

#### **ENACTMENT OF SBX1 2 AFTER ENACTMENT OF SB 695 DEMONSTRATES THE LEGISLATIVE INTENT TO EXCLUDE ESPs FROM THE RPS PROCUREMENT PLAN**

In D.11-01-026, the Commission reversed its previous determinations, in D.05-11-025 (November 18, 2005) and D.06-10-019 (October 5, 2006), as to whether ESPs should be required to submit RPS procurement plans. In its previous decisions, the Commission decided that ESPs should not be required to submit annual RPS procurement plans. See D.06-10-019 at pp. 13-14. In D.11-01-026, however, the Commission concluded that based on new statutory language enacted in SB 695 (P.U. Code Section 365.1(c)(1)), ESPs should be required to submit RPS procurement plans. See Decision at p. 13.

P.U. Code Section 365.1(c)(1), which was enacted in 2009, provides that the Commission shall “ensure that other providers are subject to the same requirements that are applicable to the state’s three largest electrical corporations [under the RA, RPS and GHG (ARB) programs], notwithstanding any prior decision of the commission to the contrary.” The Commission stated, in D.11-01-026, that it would be “illogical for the Commission to act as though this last sentence of [Section] 365.1 were meaningless.” Decision at p. 10. The

Commission continued: “It is more logical to conclude that the Legislature meant this language to be a direction to the Commission to do something different from what it has done.” *Id.*

SBX1 2, including the revised provisions of Section 399.13(a), was enacted after SB 695. The Commission cannot presume that the legislature did not understand the distinction between “electrical corporations” and “retail sellers” when it enacted SBX1 2. In fact, SBX1 2 includes the definition of “retail seller” in P.U. Code Section 399.12(j). As the Commission stated in D.11-01-026, it would be “illogical” for the Commission to act as though the distinctions in P.U. Code Section 399.13(a) were “meaningless.”

The post-SB 695 revisions to the RPS statute (and in particular, the RPS procurement plan provisions) cannot be ignored by the Commission. Under California law, a later, more specific statute controls over an earlier, general statute.<sup>4</sup> The more recent, specific language of P.U. Code Section 399.13(a)(1) controls over the earlier, general language of P.U. Code Section 365.1(c)(1).

According to PG&E,<sup>5</sup> “[w]hen the Legislature passes a statute, ‘every word and phrase used is presumed to have meaning and perform a useful function. A construction rendering some words in the statute useless or redundant is to be avoided.’”<sup>6</sup> PG&E also made the point that “under well-established California law, statutes are not to be interpreted to be idle acts or superfluous.”<sup>7</sup>

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<sup>4</sup> *Woods v. Young* (1991) 53 Cal.3d 315, 324.

<sup>5</sup> R.08-08-009, “Pacific Gas and Electric Company’s Reply Brief Regarding Implementation of Public Utilities Code § 365.1(c)(1) with Respect to the Renewables Portfolio Standard,” p. 3 (filed May 13, 2010).

<sup>6</sup> *Citing People v. Kennedy*, 168 Cal.App.4th 1233, 1239 (2008), and *Wolski v. Fremont Investment & Loa*, 127 Cal.App.4th 347, 352 (2005).

<sup>7</sup> R.08-08-009, “PG&E Reply Brief,” *supra*, at p. 3, *citing Tesco Controls, Inc. v. Monterey Mechanical Co.*, 124 Cal.App.4th 780, 792 (2004).

Similarly, according to SCE,<sup>8</sup> “the most basic principle of statutory construction requires the Commission to give effect to statutes according to their plain meaning.” SCE also stated that “the law is clear that ‘[t]he legislature is presumed to be aware of’ judicial decisions already in existence, and to have enacted or amended a statute in light thereof.”<sup>9</sup> In this case, the legislature is presumed to be aware of D.11-01-026. And, recognizing the language of D.11-01-026 and SB 695, the legislature nevertheless made clear distinctions in SBX1 2 between the obligations of “all retail sellers” and the obligations of “electrical corporations.”

The Commission must honor the legislature’s intention, in SBX1 2, to distinguish the RPS obligations imposed on all retail sellers, and the RPS obligations imposed exclusively on electrical corporations. For all the reasons stated by the Commission in D.05-11-025 and D.06-10-019, ESPs should not be required to file RPS procurement plans. The legislature could have imposed an RPS procurement plan obligation on “all retail sellers.” It did not do so. The Commission must respect the most recent pronouncement by the legislature on this issue. As noted by SCE, the Commission must presume that the legislature was aware of the Commission’s determination in D.11-01-026, and that the language of P.U. Code Section 399.13(a)(1) is intended to reverse that Commission determination.

#### IV.

### CONCLUSION

The ACR improperly presumes that the ESP obligation to file an RPS procurement plan, which was imposed by the Commission in D.11-01-026, applies as well under SBX1 2. SBX1 2 (Section 399.13(a)(1)) states clearly, however, that only “electrical corporations” are required to submit RPS procurement plans. In enacting SBX1 2, the legislature understood the difference between an “electrical corporation” and a “retail seller.” The legislature decided to impose the

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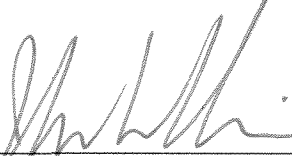
<sup>8</sup> R.08-08-009, “Reply of Southern California Edison Company to Various Parties’ Briefs on Revising Requirements of the Renewables Portfolio Standard Program Pursuant to Senate Bill 695,” p. 4 (filed May 13, 2010).

<sup>9</sup> *Id.*, citing *People v. Giordano*, 42 Cal. 4th 644, 659 (2007) (internal citation omitted); see also *People v. Yartz*, 37 Cal. 4th 529, 538 (2005).

RPS procurement plan obligation exclusively on electrical corporations. Regardless of the general language of SB 695, the more recent, specific language of SBX1 2 controls.

Reconsideration of the ACR should be granted to exclude ESPs from the requirement to submit an RPS procurement plan.

Respectfully submitted,



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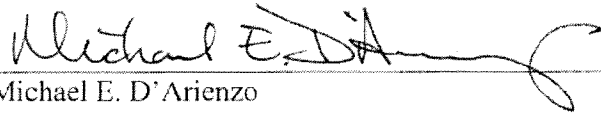


## VERIFICATION

I am an officer of Shell Energy North America (US), L.P. 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 or 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 April 16, 2012, at Spokane, Washington.



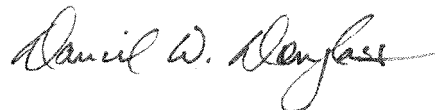
Michael E. D'Arienzo  
Vice President – Commercial, Industrial & Aggregators  
Shell Energy North America (US), L.P.

101232443.1

**VERIFICATION**

I, Daniel Douglass, am counsel for the Direct Access Customer Coalition and am authorized to make this Verification on its behalf. I declare under penalty of perjury that the statements in the foregoing copy of Motion of Shell Energy North America (US), L.P. and the Direct Access Customer Coalition for Reconsideration of Assigned Commissioner's April 5, 2012 Ruling, filed in R.11-05-005, are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

Executed on April 17, 2012, at Woodland Hills, California.



Daniel W. Douglass  
DOUGLASS & LIDDELL

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DIRECT ACCESS CUSTOMER COALITION