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)

OPENING COMMENTS OF THE UNION OF CONCERNED SCIENTISTS ON THE PROPOSED DECISION SETTING COMPLIANCE RULES FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

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Pursuant to the April 24, 2012 *Proposed Decision Setting Compliance Rules for the Renewables Portfolio Standard Program* ("Proposed Decision" or "PD"), the Union of Concerned Scientists ("UCS") respectfully submits these initial comments.

a. Deficits accumulated in 2010 and prior years must be made up in future years unless a retail seller qualifies for the "safe harbor" clause.

UCS wishes to clarify its position on the issue of whether the Commission should require retail sellers to make up deficits associated with 2010 or prior years with future procurement if they fail to meet the "safe harbor" criteria because the Proposed Decision mischaracterized the comments UCS has submitted in this proceeding.

The Proposed Decision, in its discussion of whether sections 399.15(b(3) and 399.15(b)(9) of the Public Utilities Code prohibit the Commission from requiring that deficits associated with RPS procurement obligations through December 31, 2010 should be made up in future years if a retail seller fails to meet the "safe harbor" criteria in § 399.15(a). The Proposed Decision summarizes several comments from stakeholders, including UCS:

> TURN/CUE contends that because Section 399.15(b)(3) prohibits the Commission from "requir[ing] the procurement of eligible renewable energy resources in excess of the quantities identified in [Section 399.15(b)(2)]," it necessarily prohibits the Commission from requiring that procurement deficits from 2010 and earlier years be made up at any time after January 1, 2011. *According to this argument, also embraced by AReM and UCS, the Commission may take enforcement action for deficits from 2010 and prior years if a retail seller has not attained the RPS procurement safe harbor of 14% of retail sales in 2010 (discussed in Section 3.3.1.2 below), but the Commission may not require that the prior procurement deficits be made up through procurement after January 1, 2011.*[1]

UCS wishes to correct the record and clarify that its comments submitted on August 30, 2011 in response to the Commission's ruling requesting comments on certain compliance requirements for the RPS program state that UCS believes the Commission should require past

[1] Proposed Decision, pp.11-12. (emphasis added)

deficits be made up through additional procurement and the failure to do so should trigger enforcement actions:

> The phrase "shall not be added to any procurement requirement pursuant to this article" means that if a retail seller can verify that it procured and delivered 14% of its retail sales in 2010 from eligible renewable energy resources that have already generated the electricity (so excluding earmarking), then any deficit associated with the 20% program shall be eliminated and not factor into calculations to define the compliance requirements beginning Jan. 1, 2011. *If a retail seller does not meet the 14% retail sales requirement, the retail seller must satisfy its APT requirements under the 20% RPS program using the flexible compliance rules that existed under the 20% RPS program. Any deficits are subject to penalties in accordance with D.03-06-071, D.03-012-065, and D.06-10-050.*[2]

UCS has previously, and continues to agree with the Commission that it has the authority to require retail sellers to make up deficits associated with 2010 and prior years through future procurement. In addition, UCS agrees with the PD that these deficits should be made up by the end of 2013.[3]

b. Renewable Energy Credits must be retired for RPS compliance prior to submitting a closing report on APT deficits for 2010 and prior years

The Proposed Decision states that retail sellers should submit "calculations of their netted out positions (closing report) for all years in which they had an APT obligation."[4] The Commission should clarify that retail sellers must retire their RECs for RPS compliance before closing reports are submitted. Calculations to determine whether a retail seller has a net deficit associated with RPS obligations in 2010 and prior years should follow the actual retirement of RECs upon which such calculations are made.

c. Retail sellers should not apply "earmarked" future deliveries to attain "safe harbor" status

UCS agrees with the Commission that all retail seller must apply the same calculation when determining whether or not they qualify for the "safe harbor" clause in § 399.15(a) that

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[2] UCS Comments on New Procurement Targets and Certain Compliance Requirements for the RPS Program, August 30, 2011, p.5. (emphasis added)
[3] Proposed Decision, p.24.
[4] Proposed Decision, p.17.

erases all past deficits.[5] In previous comments, UCS proposed including banked procurement but excluding future "earmarked" deliveries in the 14 percent threshold calculation.[6] In these comments, UCS does not object to excluding banked procurement if such procurement can be used in the overall calculation to "net out" prior deficits, and specifically supports PD in its prohibition against applying expected future generation in the "safe harbor" calculation.[7]

d. Retail sellers should not be permitted to delay the retirement of RECs to circumvent the banking restrictions of PU Code § 399.13(a)(4)(B)

The Proposed Decision selectively interprets the banking restrictions in 399.13(a)(4)(B) and the 36-month retirement deadline for RECs in § 399.21(a) in a way that will make it very easy for retail sellers to purchase RPS products that are explicitly prohibited from being banked forward as long as retail sellers do not retire these purchases in WREGIS for RPS compliance.[8] Allowing retail sellers to choose the types of procurement that should apply to a given compliance period to circumvent the very clear restrictions on banking in the statute will render the banking restrictions meaningless. Section 399.13(a)(4)(B) requires the Commission to "deduct from actual procurement quantities, the total amount of procurement for the applicable compliance period, the total amount of procurement associated with contracts of less than 10 years in duration." In addition, the section explicitly states that "In no event shall electricity products meeting the portfolio content of paragraph (3) of subdivision (b) of Section 399.16 be counted as excess procurement." There is no reason to "harmonize" these two statutory exclusions as the PD suggests.[9] The Commission should interpret the plain meaning of § 399.13(a)(4)(B), which excludes any short-term contracts and unbundled REC purchases that have been made by a retail seller for purposes of its RPS program. Inexplicably, the PD incorrectly allows a retail seller to bank forward purchases that are expressly prohibited by the statute from being banked as long as the retail seller does not retire the procurement in WREGIS for RPS compliance.[10] The phrase "in no event", on its face, means that under no circumstances shall a retail seller be allowed to bank procurement meeting the portfolio content category

[5] Proposed Decision, pp.20-21
[6] UCS Comments on New Procurement Targets and Certain Compliance Requirements for the RPS Program, August 30, 2011, p.4.
[7] Proposed Decision, pp.20-21.
[8] Proposed Decision, p.48.
[9] Proposed Decision, p.65.
[10] Proposed Decision, p.65.

established by § 399.16(b)(3) from one compliance period to another. The Commission justifies the current interpretation on REC banking by stating that "Section 399.21(a)(6) imposes an absolute limit on the retirement of RECs, measured in months from the initial date of the associated generation."[11] It may be that 36 months from the date of generation is the absolute limit by which a REC must be retired for RPS compliance, but that section of the statute does not justify ignoring the clear and absolute restrictions on banking placed on certain types of procurement by § 399.13(a)(4)(B). If the Legislature had wanted to allow RPS products that were procured, but not retired in a WREGIS for RPS compliance, to be outside of the banking restrictions, it would have written that exception directly into the statute.

e. Retail sellers should not be allowed to delay the retirement of RECs to circumvent the portfolio content category limitations of PU Code § 399.16(c)

Furthermore, the PD appears to allow retail sellers to also use the same creative accounting to circumvent the portfolio content category restrictions in any compliance period: "RECs that are retired for RPS compliance by a retail seller in a particular compliance period, but are not applied to its RPS compliance obligations in that compliance period, are outside the quantitative portfolio balance requirements."[12] UCS firmly believes that there is nothing in the statute that would allow for a scenario in which a retail seller procures electricity products for its RPS program, declines to retire them in WREGIS for a specific compliance period, and thefore the electricity products are suddenly "outside the quantitative portfolio balance requirements" in future compliance periods.

f. Retail sellers should be prohibited from meeting long-term contracting requirements with unbundled REC purchases.

In this PD, the Commission fails to prohibit retail sellers from satisfying minimum long-term contracting requirements with long-term unbundled REC purchases because UCS did not advance any reason to exclude long-term unbundled REC purchases in its comments.[13] In Decision 07-05-028, the Commission adopted a long-term contracting requirement for the RPS program. Decision 07-05-028 contained several sentences in its "Findings of Fact" and

[11] Proposed Decision, p.48.
[12] Proposed Decision, p.50.
[13] Proposed Decision, p.36.

"Conclusions of Law" that built the record in support of a minimum long-term contracting requirement because of the influence that long-term contracts have on the development of new renewable energy resources: "New sources of RPS-eligible generation will be necessary to meet the goal of 20% of retail sales from eligible renewable energy resources by December 31, 2010;"[14] "Long-term contracts are an important tool in developing new RPS-eligible generation;"[15] and "Section 399.14(b) gives this Commission discretion to shape conditions and incentives to encourage all RPS-obligated LSEs to contribute to the development of new RPS-eligible generation."[16]

Since retail sellers were prohibited from purchasing unbundled RECs when D.07-05-028 was adopted, the Commission justified its long-term contracting requirement based on the influence that *bundled* long-term contracts have on the development of new renewable energy resources. The fact that retail sellers have only been allowed to procure unbundled RECs since the adoption of Decision 10-03-021 is not a compelling reason to allow retail sellers to satisfy long-term contracting requirements with unbundled REC purchases. A report released by the National Renewable Energy Laboratory in June 2011, titled *The Role of Renewable Energy Certificates in Developing New Renewable Energy Projects*, confirms the importance of *at least* signing a contract for the energy generated by a prospective project: "Developers often seek long-term contracts for both energy and RECs, but in some cases, developers may be able to proceed with a project by securing a long-term contract for energy only. *Long-term contracts are needed for at least the larger revenue stream, which is usually energy.*"[17] The Commission's decision to allow retail sellers to satisfy long-term contracting requirement with unbundled REC purchases would undermine the very reason for the policy. In addition, the Commission's current proposal would allow retail sellers to satisfy long-term contracting requirements by purchasing long-term REC strips from a REC aggregator, who has combined RECs of varying lengths and from multiple facilities into a single long-term contract. In this situation, a retail seller's purchase could fail to provide a long-term source of revenue for a single renewable energy facility. For this reason, the Commission should prohibit retail sellers from purchasing unbundled RECs to satisfy long-term contracting requirements.

[14] D.07-05-028, Findings of Fact #1
[15] D.07-05-028, Findings of Fact #2
[16] D.07-05-028, Conclusions of Law #2.
[17] Holt, E., Sumner, J., Bird, L., *The Role of Renewable Energy Credits in Developing New Renewable Energy Projects*, National Renewable Electricity Laboratory, June 2011, NREL/TP-6A20-51904, p.13.

g. The Commission should adopt a minimum quantity of eligible renewable energy resources procured through long-term contracts equivalent to at least 25% of a retail seller's compliance obligation in each RPS compliance period.

In the previous RPS program, retail sellers were required to ensure that 25% of the contracts signed to meet an incremental procurement obligation (which was 1% of the prior year's retail sales) were in the form of long-term contracts. This PD, which addresses a minimum long-term contracting requirement for multi-year compliance obligations, drastically reduces the actual number of contracted MWh that would be delivered through long-term contracts for the 2014-2016 and 2017-2020 compliance periods. The PD offers no explanation for why such a meager long-term contracting requirement for the 2014-2016 and 2017-2020 compliance periods would have any noticeable impact on promoting the development of renewable energy through long-term contracts, which the Commission has previously identified in D.07-05-028 as important to the development of new renewable energy resources. In addition, the Commission justifies its extremely small long-term contracting requirement by referring to the new banking rules in the RPS code, which prohibit banking short-term contracts from one compliance period to another. As UCS points out in comments above, the Commission's interpretation of the banking restrictions in § 399.13(a)(4)(B) allows retail sellers to selectively account for REC purchases and bank them in a way to circumvent the new banking restrictions. The Commission should adopt a minimum long-term contracting requirement that is similar to the requirements in the old program, which correspond to 25% of the procurement obligation associated with a compliance period. This would mean the long-term contracting requirement for the 2014-2016 and 2017-2020 compliance periods would be 20% of total retail sales for those periods.

h. Retail sellers should submit requests to reduce portfolio balance requirements at the end of a compliance period

UCS agrees with the PD that retail sellers should only request reductions in portfolio balance requirements at the end of a compliance period, as opposed to any time throughout a compliance period.[18] The PD correctly states that a request for such a reduction is similar to that

[18] Proposed Decision, p.75.

of a waiver of compliance requirements, and neither request can be adequately assessed until a compliance period has ended.

II. Conclusion

UCS appreciates this opportunity to submit initial comments on the Proposed Decision.

Respectfully submitted,

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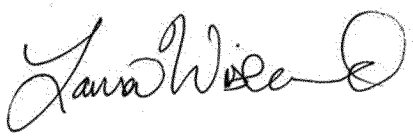
VERIFICATION

I, Laura Wisland, am a representative of the Union of Concerned Scientists and am authorized to make this verification on the organization's behalf. The statements in the foregoing document are true to the best of my knowledge, except for those matters which are 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 May 14, 2012 in Berkeley, California.



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