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 R.11-05-005

COMMENTS OF THE GREEN POWER INSTITUTE ON THE PROPOSED DECISION OF ALJ SIMON

May 14, 2012

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Pursuant to Rules 14.3 and 14.6 of the Commission's Rules of Practice and Procedure, in Proceeding R-11-05-005, the **Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program**, the Green Power Institute, a program of the Pacific Institute for Studies in Development, Environment, and Security (GPI), provides these *Comments of the Green Power Institute on the Proposed Decision of ALJ Simon*. This is an extremely complex Proposed Decision (PD), which makes a large number of determinations on a wide variety of topics. While the PD makes many correct determinations, it errs on one fundamental issue concerning the transition from the initial phase of the state's RPS program (pre-2011) to the new (current) phase of the program (2011-2020 and beyond). Failure to correct this error materially diminishes the chances of success for the current (post-2011) phase of the state's RPS program.

The Transition to the Post-2011 Phase of the California RPS Program

The transition between the two phases of the state's RPS program is dealt with in Section 3.3. *Treatment of Prior Procurement*, of the PD. The PD notes that California's 2011 RPS legislation, SB 2 (1X): "does not include any provisions expressly providing for a systematic transition from the RPS compliance requirements prior to January 1, 2011 to the new requirements set out in SB 2 (1X) [PD, pg. 9]." Thus, we believe that Section 3.3.1.1. *Deficits for Years Prior to 2011*, wisely begins with the observation: "In implementing Section 399.15(a), it is necessary to begin with a discussion of the RPS compliance rules for years prior to 2011 [PD, pg. 12]." The following section of the PD, §3.3.1.1.1. *Prior Compliance Process*, describes how annual APTs were determined in the pre-2011 phase of the RPS program, and how flexible compliance could be used to make-up residual procurement deficits, one result being that a final compliance determination for a given

compliance year in the pre-2011 RPS could not be made until three years following the compliance year, in order to allow all flexible-compliance tools to be used.

Unfortunately, §3.3.1.1.1. of the PD ends without discussing what would happen in the pre-2011 RPS program in the event that a retail seller had a residual deficit after all available flexible-compliance measures were exhausted for a given compliance year. This information is absolutely crucial for understanding how to interpret §399.15(a) of the new legislation. The critical information missing from the PD is as follows: In the pre-2011 phase of the RPS program, a residual (post-flexible compliance) procurement deficit is handled in two ways. First, a penalty of 5 ¢/kWh, capped at $25 million, is levied. Second, the deficit is carried forward to the following compliance period, still needing to be satisfied, in addition to that year's APT. In other words, in the pre-2011 phase of the RPS program, payment of a penalty did not cancel a procurement obligation.

The following section of the PD, §3.3.1.1.2. *Determining "Deficit Associated With any Previous Renewables Portfolio Standard*," discusses the application of §399.15(a) of the new legislation. Section 3.3.1.1.2. starts promisingly by stating: "Section 399.15(a) brings forward into 2011 and later years the process of making up 'the deficits associated with any previous renewables portfolio standard,' unless a retail seller qualifies for the statutory safe harbor [PD, pg.15]." The PD characterizes this provision of the new legislation correctly as providing a "**limited** safe harbor from the deficit make-up requirement (PD, pg. 10)" of the pre-2011 RPS program (emphasis added). Section 3.3.1.1.2. of the PD continues with the presentation of a methodology for netting-out the residual deficits remaining from the pre-2011 phase of the RPS program, rather than waiting until 2014 in order to close-out the flexible compliance period. The netting-out procedure presented in the PD produces a result that is mathematically equivalent to using the flexible-compliance rules that were in-place during the time that the program was in effect, so we endorse the use of the netting-out procedure as presented in the PD.

The Limited Safe Harbor Provision

Where the PD errs is in the next section, §3.3.1.2. *Safe Harbor of 14% of 2010 Retail Sales*. The section begins with a wholly unsubstantiated assertion: "A retail seller does not need to satisfy a prior RPS program deficit calculated as set forth above if the retail seller procures 'at least 14% of retail sales from eligible renewable energy resources in 2010' [PD, pg. 19]." This unsubstantiated assertion is mirrored by an equally unsubstantiated assertion on the following page: "Although SB2(1X) does not use the "clean slate" terminology adopted by some of the parties, attaining the safe harbor ends the obligations of a retail seller under the prior APT requirements [PD, pg. 20]."

In fact, the statute does **not** say that a retail seller does not have to "satisfy" a deficit if it qualifies for the limited safe-harbor provision. The statute says that a retail seller that qualifies for the safe harbor does not have to carry-forward the deficit. Recall that satisfying a default in the pre-2011 system entailed two parts: paying a penalty, and carrying forward the deficit. The safe -harbor provision of §399.15(a) cancels the carry-forward part of the obligation. In no way does it cancel the obligation to pay the applicable penalty. Note that SB 2 (1X) does not use the "clean slate" terminology because it does not provide for, nor intend that the **limited** safe harbor provision in §399.15(a) entail the complete end of the retail seller's obligation.

The GPI takes particular exception to footnote no. 32 of the PD, on page 19, which references the following sentence: "First, the safe harbor in effect wipes out all prior APT deficits, no matter how large.[32]" Footnote no. 32 reads: "GPI and AReM make this point." In fact, while we do make the point that the safe harbor eliminates any carry-forward of prior deficits, our pleadings (see GPI filings in this docket dated Aug. 30, 2012, and Sep. 12, 2011) make it absolutely clear that the safe harbor most certainly does **not** excuse those deficits in their entirety.

Satisfying Prior Deficits

The first sentence of §3.3.1.3. *Satisfying Prior Deficits*, should be corrected as follows:

> The final issue to be determined about deficits for years prior to 2011 is the manner in which a retail seller whose closing report shows a net deficit at the end of 2010~~and does not attain the safe harbor of 14% of retail sales from PS-eligible procurement in 2010~~ should **satisfy** ~~make up~~ its deficit. [PD, pg. 23.]

How to do this, in view of the substitution of the netting-out rules for the flexible-compliance rules in closing out the pre-2011 phase of the RPS program, is not a trivial matter. In order to understand the situation, it is useful to consider the actual procurement performances for the three large IOUs in the pre-2011 phase of the program. Fortunately, all of the necessary data are already available in the public domain, through the annual *RPS Compliance Reports* that the IOUs have been required to submit since the inception of the RPS program. Table 1 shows reported procurement data for 2003 – 2010.

Table 1: Phase 1 RPS Procurement with Flexible Compliance

	2003	2004	2005	2006	2007	2008	2009	2010
PG&E								
retail sales	71,099	72,114	72,372	76,356	79,078	81,524	79,624	77,772
IPT (applied to following year)	711	721	724	764	791	815	796	4,007
APT	7,022	7,733	8,454	9,178	9,941	10,732	11,547	15,554
total renewables	8,686	8,660	8,706	9,118	9,043	9,817	11,493	13,760
Renewable Content		12.0%	12.0%	11.9%	11.4%	12.0%	14.4%	17.7%
Surplus / Deficit	1,664	927	252	-60	-898	-915	-54	-1,794
Banked Energy Applied				60	191	198	54	199
Earmarked Energy Applied					705	715		2,300
Bank Balance	1,664	2,591	2,843	2,783	2,592	2,394	2,340	2,141
Cummulative Earmark Deficit					705	1,420	1,420	3,015
SCE								
retail sales	70,617	72,964	74,994	78,863	79,505	80,956	78,048	75,141
IPT (applied to following year)	706	730	750	789	795	810	780	0
APT	11,254	11,960	12,690	13,440	14,228	15,023	15,833	15,028
total renewables	12,612	13,181	12,821	12,486	12,261	12,573	13,621	14,548
Renewable Content	17.9%	18.1%	17.1%	15.8%	15.4%	15.5%	17.5%	19.4%
Surplus / Deficit	1,167	1,221	132	-953	-1,967	-2,450	-2,212	-480
Banked Energy Applied				368	1,132	319	202	195
Earmarked Energy Applied				585	836	2,452	3,122	1,069
Bank Balance	1,167	2,388	2,520	2,152	1,020	701	499	304
Cummulative Earmark Deficit				585	1,421	3,551	5,559	5,844
SDG&E								
retail sales	15,044	15,812	16,001	16,847	17,056	17,410	16,994	16,283
IPT (applied to following year)	150	158	160	168	171	174	170	1,979
APT	297	447	605	765	933	1,104	1,278	3,257
total renewables	550	677	825	900	881	1,047	1,785	1,941
Renewable Content	3.7%	4.3%	5.2%	5.3%	5.2%	6.0%	10.5%	11.9%
Surplus / Deficit	253	230	220	135	-52	-57	507	-1,316
Banked Energy Applied					52	57		42
Earmarked Energy Applied								1,274
Bank Balance	253	484	704	839	787	731	1,238	1,196
Cummulative Earmark Deficit								1,274

The banking and earmarking rows in the table model the flexible-compliance options that were available to the IOUs during the initial phase of the RPS. Note that the data show no procurement defaults on the part of any of the IOUs for the entire period 2003 – 2010, assuming that the residual earmark deficits shown in the table are made up by 2013, as planned by the utilities. It is for this reason that enforcement actions have never been pursued, despite a string of five straight years of running up very large operating-year procurement deficits by both PG&E and SCE.

Table 2 shows the same procurement data, but substituting the netting-out technique described in §3.3.1.1.2. of the PD for determining residual 2010 deficits, for the then-in-force flexible-compliance regime modeled in Table 1. Note that the Cumulative Net Deficits for 2010 in the netted-out spread sheet (Table 2) are the approximately the same (within rounding error) as the Cumulative Earmark deficit, less the remaining Bank Balance, shown in Table 1 for 2010. For example, for PG&E, the Cumulative Net Deficit of 878 GWh shown in Table 2 is approximately equal to 3,015 minus 2,141 (see Table 1). This demonstrates the mathematical equivalency between the two techniques. The data show that all three of the IOUs have residual net procurement deficits at the end of 2010. Two of the IOUs, PG&E and SCE, qualify for the limited safe-harbor provision of §399.15(a) by virtue of having exceeded 14-percent renewables procurement in 2010 (note that SCE entered the RPS program in 2003 at a level well above the safe harbor qualification point, and PG&E at a level just slightly below, meaning that their having qualified for the safe harbor did not require very much effort on either of their parts). SDG&E does not qualify for the safe harbor.

Table 2: Phase 1 RPS Procurement Using the Netting Out Approach

	2003	2004	2005	2006	2007	2008	2009	2010
PG&E								
retail sales	71,099	72,114	72,372	76,356	79,078	81,524	79,624	77,772
IPT (applied to following year)	711	721	724	764	791	815	796	4,007
APT	7,022	7,733	8,454	9,178	9,941	10,732	11,547	15,554
total renewables	8,686	8,660	8,706	9,118	9,043	9,817	11,493	13,760
Renewable Content	12.2%	12.0%	12.0%	11.9%	11.4%	12.0%	14.4%	17.7%
Surplus / Deficit	1,664	927	252	-60	-898	-915	-54	-1,794
Banked Energy Applied				60	898	915	54	916
Residual Deficit								878
Bank Balance	1,664	2,591	2,843	2,783	1,885	970	916	0
Cummulative Net Deficit								878
SCE								
retail sales	70,617	72,964	74,994	78,863	79,505	80,956	78,048	75,141
IPT (applied to following year)	706	730	750	789	795	810	780	0
APT	11,254	11,960	12,690	13,440	14,228	15,023	15,833	15,028
total renewables	12,612	13,181	12,821	12,486	12,261	12,573	13,621	14,548
Renewable Content	17.9%	18.1%	17.1%	15.8%	15.4%	15.5%	17.5%	19.4%
Surplus / Deficit	1,167	1,221	132	-953	-1,967	-2,450	-2,212	-480
Banked Energy Applied				953	1,566	0	0	0
Residual Deficit					401	2,450	2,212	480
Bank Balance	1,167	2,388	2,520	1,566	0	0	0	0
Cummulative Net Deficit								5,543
SDG&E								
retail sales	15,044	15,812	16,001	16,847	17,056	17,410	16,994	16,283
IPT (applied to following year)	150	158	160	168	171	174	170	1,979
APT	297	447	605	765	933	1,104	1,278	3,257
total renewables	550	677	825	900	881	1,047	1,785	1,941
Renewable Content	3.7%	4.3%	5.2%	5.3%	5.2%	6.0%	10.5%	11.9%
Surplus / Deficit	253	230	220	135	-52	-57	507	-1,316
Banked Energy Applied				0	52	57	0	1,238
Residual Deficit								78
Bank Balance	253	484	704	839	787	731	1,238	0
Cummulative Net Deficit								78

Procurement Performance in the Pre-2011 RPS Program

We believe that it is useful to consider the procurement performance of the three IOUs during the pre-2011 phase of the RPS program. Giving credit for "early action," PG&E and SCE began the RPS program (see data for 2003 in the table above) with renewable contents of greater than 10 percent, while SDG&E began the program with a renewable content of less than 4 percent. On the other hand, through the course of the initial phase of the program (2003 – 2010), SDG&E was in or near compliance with their APT for every compliance year prior to the big APT jump in 2010, and managed to increase their renewable content by 8.2 points during this period (from 3.7% to 11.9%). In contrast, PG&E and SCE both racked up a string of serious procurement deficits for the last five years of the program (2007 – 2010), and only managed to increase their renewable content

by 5.5 points (PG&E) and 1.5 points (SCE) during the initial phase of the program (2003 – 2010). Although the two larger IOUs had the advantage in terms of early-action positioning, the GPI believes that SDG&E delivered a far superior performance during the course of the first phase of the RPS program in terms of meeting their annual procurement obligations.

Cleaning Up Pre-2011 Net Deficits

This leaves us with two questions: (1) how to deal with assessing penalties for 2010 net deficits, which all three of the IOUs have, and which are not subject to the safe-harbor provision of §399.15(a); and (2) net-deficit carry-over, which is subject to the safe-harbor provision. The second question is fairly easy to deal with: PG&E and SCE qualify for the safe harbor, and therefore do not need to carry forward their net deficits into the 2011 – 2013 compliance period of the current phase of the RPS program. SDG&E does not qualify for the safe harbor, and therefore does need to carry forward its net deficit of approximately 78 GWh into the 2011 – 2013 compliance period.

The issue of how to deal with the assessment of penalties is more difficult to resolve. Had the old rules remained in effect, all three IOUs would have had until the end of 2013 to make-up their deficits, and thereby satisfy their procurement obligations and not be subject to penalties,. In fact, this is exactly what each one proposed to do in their 2011 *RPS Compliance Reports*. To change the rules now in a way that subjects them to penalties without an opportunity to retire their deficits would obviously be unfair. On the other hand, to simply excuse the deficits without any kind of satisfaction would be equally unfair to ratepayers, who were promised a great deal more renewable electricity than they received.

We propose the following solution to this dilemma. For PG&E and SCE there is no deficit carry-forward to the 2011 – 2013 compliance period, but there are large net deficits (PG&E: ~875 GWh; SCE: ~5,540 GWh) that need to be resolved for the pre-2011 phase of the RPS program. The old program's rules would have allowed for the retirement of those

deficits using qualified RPS deliveries during 2011 – 2013, and we believe that the utilities should be given that same option here. Of course, double counting cannot be permitted, so any energy that is used to satisfy the old net deficits cannot also be credited towards compliance for the 2011 – 2013 compliance period. If the net deficits from the pre-2011 phase of the program are not resolved by the end of 2013, then they should be subject to the penalty provisions that were previously in place.

For SDG&E, net deficit carry-forward is required. In the old system, as long as the deficit was satisfied within three years, there was no need for a penalty. The equivalent here would be that as long as SDG&E meets its 2011 – 2013 compliance obligation, which consists of 20 percent of that period's aggregate retail sales **plus** the carry-forward of the net deficit, there would be no need for a penalty relating to the pre-2011 phase of the program. Should they fail to meet their 2011 – 2013 compliance-period obligation, they would presumably be subject to enforcement of some kind for the current phase of the program, as well as for the previous phase. Even with the passage of this PD, the enforcement provisions for the current phase of the program will not have been determined. It is our opinion that the PD should be amended with a notation to the effect that as future deliberations in this Proceeding consider enforcement provisions for the current (post-2011) RPS program, in the case of SDG&E during the first compliance period only, a default would not only have to be dealt with in the context of the current program, it would also have implications for their compliance status with the pre-2011 phase of the program. This should be resolved in a future Decision in this Proceeding.

In the cases of the two larger IOUs, the deficits they are being allowed to walk away from, if this part of the PD is not corrected, are very large indeed: For PG&E, it is ~870 GWh, which, if penalized all in a single year, would incur a penalty capped at the annual maximum of $25 million (for PG&E, as shown in Table 2, banked energy would have forestalled any defaults until 2010 even without earmarking, so any penalties would have been subject to the annual maximum in one bunch). For SCE the net deficit is much larger, ~5,540 GWh, and, in the absence of earmarking, it would have been spread over several compliance years (see Table 2). Based on the fact that, had SCE in the old system not

satisfied their lingering earmarking obligations, their enforcement would likely have covered all three of the compliance years 2008 – 2010, we believe that the applicable penalty cap for SCE, should they fail to satisfy their net deficit from the pre-2011 phase of the program from 2011 – 2013 procurement, should be three-years worth, or $75 million. Note that, uncapped, the liability for a 5,540 GWh deficit @ 5 ¢/kWh would be $277 million.

The Importance of Properly Closing out RPS Phase 1

Why is it critically important that the pre-2011 phase of the RPS program be properly closed out, including enforcement, if net deficits are not fully resolved by the end of 2013? The answer to this question is already in the PD, albeit in a slightly different context: "AReM, DRA, and GPI properly point out that, to be meaningful, these requirements must be enforceable [PD, pg. 56]." Without enforcement, there is no RPS program.

The history of the RPS program in this regard from its inception until the present has not been promising. The original rules for the program (D.03-06-071) provided the utilities with reasonable flexible-compliance rules, and starting baselines that had them beginning the program in 2003 with surplus procurement (see Table 1). When the IOUs began to lag on their RPS procurement obligations the Commission eased the rules, first by adjusting the baselines, later by instituting earmarking. Earmarking was first authorized for individual contracts, later for collections of contracts. Earmarking of contract portfolios is a technique that essentially allowed the utilities a three-year rollover of their APTs, an allowance that D.03-06-071 expressly stated it would not permit.

This PD is now proposing to excuse the utilities entirely from any unfulfilled obligations under the pre-2011 phase of the RPS program, with the exception of the carry-forward of SDG&E's net deficit. Nowhere in SB 2 (1X) does the legislation provide for this, or imply that it is what it intends to happen. What kind of a message would effectively negating the first phase of the RPS program send to the IOUs? In our opinion, it is a clear signal that failure to comply with RPS procurement obligations can always be corrected by loosening

the rules, and that actual compliance will never be required. The utilities are rational, profit-making corporations. How could they interpret the signals that the Commission is sending them any differently?

Conclusion

Time constraints prevent us from commenting on the remainder of the PD in any kind of detail, but the GPI does not see any other areas of comparable concern to the error relating to the transition from phase 1 to phase 2 that we have analyzed in these *Comments*. We urge the Commission to decline to pass this Decision until the problem we have identified with the misinterpretation of §399.15(a) of the statute has been corrected. Failure to do so would not only create rules that are contrary to the letter and the intent of SB 2 (1X), it would jeopardize the chances that California will be able to achieve its RPS and greenhouse-gas goals for 2020.

Dated May 14, 2012
Respectfully Submitted,

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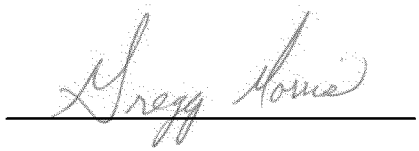
VERIFICATION

I, Gregory Morris, am Director of the Green Power Institute, and a Research Affiliate of the Pacific Institute for Studies in Development, Environment, and Security. I am authorized to make this Verification on its behalf. I declare under penalty of perjury that the statements in the foregoing copy of *Comments of the Green Power Institute on the Proposed Decision of ALJ Simon*, 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 May 14, 2012, at Berkeley, California.



Gregory Morris