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)

THE DIVISION OF RATEPAYER ADVOCATES' REPLY COMMENTS ON THE PROPOSED DECISION SETTING COMPLIANCE RULES FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

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I. INTRODUCTION

Pursuant to California Public Utilities Commission (Commission) Rules of Practice and Procedure 14.3, the Division of Ratepayer Advocates (DRA) respectfully submits the following reply comments on the Proposed Decision of Administrative Law Judge Simon Setting Compliance Rules for the Renewables Portfolio Standard (RPS) Program (PD). DRA responds to some of the opening comments of parties who request clarification of the PD or claim that the PD incorrectly resolved certain issues related to implementation of Senate Bill (SB) 2 (1x) (Simitian), Stats. 2011, ch. 1. SB 2 (1x) increased the RPS from 20% of retail sales of all California investor owned utilities (IOUs), electric service provides, and community choice aggregators by the end of 2010 to 33% of those retail sales by the end of 2020.

As explained below, the PD correctly resolved issues regarding: the retirement limit for Renewable Energy Credits (RECs), grandfathering provisions for contracts executed prior to June 1, 2010, enforcement of minimum limitations on procurement meeting the criteria of Section 399.16(b)(1), and excess procurement rules. However, the PD should be amended to clarify that twice-yearly Compliance Reports and Project Development Status Reports must still be filed by the retail sellers to provide transparency and information regarding RPS procurement to the public and intervenors.

II. DISCUSSION

A. The Commission should reject attempts to construe Public Utilities Code Section 399.21(a)(6),[1] which establishes a 36-month time limit on the retirement of RECs, as including an additional requirement that RECs must also be retired within the compliance period in which they are generated.

Section 399.21(a)(6) establishes a 36-month time limit on the retirement of RECs:

> A renewable energy credit shall not be eligible for compliance with a renewables portfolio standard procurement requirement unless it is retired in the tracking system established pursuant to subdivision (c) of Section 399.25 by the retail seller or local publicly owned electric utility within 36 months from the initial date of generation of the associated electricity.

[1] All statutory references in DRA's reply comments are to the Public Utilities Code.

The PD reasonably construes the Section 399.21(a)(6) 36-month shelf life as applying to all RECs,[2] and rejects the notion that RECs must be retired within the same compliance period in which they are generated. The 36-month retirement limitation is consistent with previous rules which allowed a REC to be retired within three compliance years of its generation.[3] The Utility Reform Network /California Coalition of Utility Employees (TURN/CUE),[4] the Union of Concerned Scientists,[5] the California Wind Energy Association (CalWEA)[6] and Large-scale Solar Association[7] disagree with the PD's interpretation of Section 399.21(a)(6). These parties claim instead that Section 399.13(a)(4)(B)[8] requires the Commission to construe Section 399.21(a)(6) as imposing the additional requirement that RECs must be retired within the same compliance period in which they were generated.[9] TURN/CUE claim that the PD would allow retail sellers to "evade the statutory restrictions on excess procurement related to short-term contracts and Category three products though a deliberate strategy of delayed retirement," thereby "effectively obliterate[ing] any meaningful restrictions on banking."[10] The PD recognizes this concern, and acknowledges that Section 399.13(a)(4)(B) requires that RECs

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[2] Section 399.16 (b)(1)-(3) defines three types of procurement, frequently described by parties as Categories 1, 2, and 3. Section 399.16(c) establishes minimum requirements on procurement in Category 1 and limits procurement in Category 3. See footnote 27 of these comments.

[3] D.10-03-021, p. 69.

[4] Opening Comments of The Utility Reform Network and the Coalition of California Utility Employees on the Proposed Decision of Administrative Law Judge Simon Setting Compliance Rules for the Renewables Portfolio Standard Program, May 14, 2012 (TURN/CUE Comments), p. 2.

[5] Opening Comments of the Union of Concerned Scientists on the Proposed Decision Setting Compliance Rules for the Renewables Portfolio Standard Program, May 14, 2012 (UCS Comments), pp. 3-4.

[6] Comments of the California Wind Energy Association on Proposed Decision Setting Compliance Rules for the Renewables Portfolio Standard Program, May 14, 2012 (CalWEA Comments), pp. 5-7.

[7] Comments of the Large-Scale Solar Association on the Proposed Decision of ALJ Simon Setting Compliance Rules for the Renewables Portfolio Standard Program, May 14, 2012, pp. 2-4.

[8] Section 399.13(a)(4)(B) provides that the Commission shall adopt "rules permitting retail sellers to accumulate, beginning January 1,2011, excess procurement in one compliance period to be applied to any subsequent compliance period. The rules shall apply equally to all retail sellers. In determining the quantity of excess procurement for the applicable compliance period, the commission shall deduct from actual procurement quantities, the total amount of procurement associated with contracts of less than 10 years in duration. 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."(emphasis added).

[9] TURN/CUE comments, p. 5 ("TURN/CUE proposed that the Commission prevent this type of abuse by adopting a presumption that all RECs are applied to the compliance period in which they are procured by the retail seller").

[10] TURN/CUE comments, p. 2.

defined by Section 399.16(b)(3) may "in no event" be "counted as excess procurement"[11] However, the PD correctly explains that there is a distinction between generating a REC and using that REC for compliance:

> "Only when the REC has been retired in WREGIS for RPS compliance does it enter into the RPS compliance system. A REC that has been retired for RPS compliance is indeed subject to any applicable prohibition or limitations on being counted as "excess procurement" that can be applied to the next compliance period."[12]

The PD observes that requiring Category 3 RECs to be retired in the compliance period in which they were generated would produce RECs with variable time limits on their retirement.[13] The likely result would be market volatility for such products. In the last months of a compliance period a REC's value will likely be a fraction of its value the beginning of the period. In short, if these parties' proposal is adopted, REC prices will swing wildly in the next eight years.

The PD correctly finds that the 36-month limit on the retirement of RECs after their generation is not supported by the plain language of Section 399.21(a) (6).[14]

B. The Commission should reject arguments to undermine Section 399.16 (d)'s requirement that contracts originally executed prior to June 1, 2010 will "count in full" towards the 33% RPS procurement requirements.

Section 399.16(d) of the new RPS statute provides that procurement from all contracts or ownership agreements "originally executed prior to June 1, 2010, shall count in full towards the procurement requirements established pursuant to this article . . ."[15] The PD observes that this

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[11] PD, p. 47.

[12] PD, p. 48.

[13] PD, p. 48.

[14] While Section 399.21(a)(6) is clear on its face that RECs have a 36-month useful life, without also requiring that RECs be retired in the compliance period in which they were acquired, Southern California Edison also points out that the Legislature "specifically rejected the notion that a REC must be retired in the period in which it was generated." Southern California Edison Company's Comments on Proposed Decision Setting Compliance Rules for the Renewables Portfolio Standard Program, May 12, 2012 (SCE Comments), p. 7.

[15] Section 399.16(d) provides:

> Any contract or ownership agreement originally executed prior to June 1, 2010, shall count in full towards the procurement requirements established pursuant to this article, if all of the following conditions are met:

"sweeping direction" is limited only by the requirements described in Section 399.16 (d)(1)-(3).[16] The PD harmonizes Section 399.16(d) with other provisions of the statute and concludes that the words "count in full" apply to requirements beyond the 33% RPS program's portfolio content requirements,[17] including excess procurement that may be carried forward from one compliance period to the next[18] and procurement that was banked under the 20% RPS program that is not needed to satisfy deficits in that program.[19] The PD's interpretation would reward retail sellers who acted in good faith to meet and exceed requirements of the 20% RPS program, while the construction urged by TURN/CUE would unfairly subject retail sellers who signed contract before June 1, 2010 to rules that did not exist at the time.[20] Applying new rules retroactively is unfair to market participants who operated in good faith in the previous RPS regime and executed RPS contracts. At that time, those parties calculated a certain value to those contracts and changing that value retroactively may render previously economically-justified decisions uneconomical.

TURN/CUE recommend that the Commission reject the PD's interpretation of the Section 399.16(d), arguing "the PD inappropriately assumes that §399.16(d) applies to more than just the portfolio content restrictions" and that the PD "goes well beyond the plain text of the

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> (1) The renewable energy resource was eligible under the rules in place as of the date when the contract was executed.
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> (2) For an electrical corporation, the contract has been approved by the commission, even if that approval occurs after June 1, 2010.
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> (3) Any contract amendments or modifications occurring after June 1, 2010, do not increase the nameplate capacity or expected quantities of annual generation, or substitute a different renewable energy resource. The duration of the contract may be extended if the original contract specified a procurement commitment of 15 or more years.

[16] PD, p. 26.

[17] PD, pp. 28-29.

[18] PD, pp. 29-30.

[19] PD, pp. 30-31.

[20] SCE Comments, p. 6. (" [T]he PD ensures that customers' pre-existing investments in renewable resources are protected. Contracts signed prior to June 1, 2010 represent a large investment made by customers under the RPS program rules in effect at that time, and the value of these resources would be significantly undermined if they were subject to new restrictions or could not be banked across compliance periods.")

statute."[21] Yet the PD relies precisely on the plain text of the statute in concluding that "count in full towards the procurement requirements established pursuant to this article" (i.e. the Article 16 of the Public Utilities Code, the RPS program) means more than just the portfolio content requirements established pursuant to Section 399.16. TURN/CUE's interpretation would be more persuasive if Section 399.16(d) referred to "procurement requirements established pursuant to this [section]." Moreover, the requirements for quantitative portfolio content category procurement in Section 399.16(c) apply in terms to "contracts executed after June 1, 2010." Under TURN/CUE's interpretation, there would be no need for a separate Section 399.16(d), which applies only to contracts signed before June 1, 2010.[22] The interpretation urged by TURN/CUE would make Section 399.16(d) superfluous, a result that is inconsistent with the rules of statutory interpretation.[23]

TURN/CUE argue that allowing retail sellers to bank procurement in excess of the annual procurement targets of the 20% RPS program "is contrary to law, defies common sense, and was not shared by either the Legislative authors or the Legislative Committee reviewing the bill."[24] TURN/CUE cite a letter from the California Municipal Utilities Association and legislative history[25] in support of their interpretation. However, the words "shall count in full towards the procurement requirements established pursuant to this article" are clear and unambiguous, and the PD therefore reasonably concludes that the broad scope of Section 399.16(d) preserves the value of procurement from contacts executed before June 1, 2010 and allows previously banked excess procurement to be used for compliance in 2011 and later years.[26]

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[21] TURN/CUE Comments, p. 8.

[22] PD, p. 28.

[23] *California Mfrs. Assn. v. Public Utilities Com.*, 24 Cal. 3d 836, 844 (1979); *Conservatorship of Bryant v. Brown*, 45 Cal. App. 4th 117, 120 (1996).

[24] TURN/CUE Comments, p. 9.

[25] TURN/CUE Comments, pp. 10-11.

[26] *Kizer v. Hanna*, 48 Cal.3d 1, 8 (1989) "If there is no ambiguity in the language of the statute, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs."

C. Retails sellers that fail to meet the minimum procurement specified in Section 399.16[27] that satisfies the criteria of Section 399.16 (b)(1) should not be additionally penalized by decreasing the credit for procurement in other categories.

The PD considers requirements that are needed to implement the portfolio balance requirements of Section 399.16 beyond those established in D.11-12-052. The PD correctly concludes, based on the statutory language that focuses on the type of procurement that will be counted toward compliance, that quantitative procurement requirements apply only toward the generation that is being used for compliance in a compliance period.[28] In other words, only the RECs that have been retired in that compliance period are subject to the restrictions on long and short-term contracts, category limitations, and excess procurement rules.

DRA agrees[29] that it is inappropriate to penalize the utilities twice for failing to achieve the procurement meeting the criteria of Section 399.16(b)(1) – once for failure to comply with the minimum Category 1 requirement and then again by disallowing procurement in other categories that, in sum, exceeds the proportionate amount justified by actual procurement meeting the criteria of Section 399.16(b)(1). Such an approach would be overly punitive and is unjustified by Section 399.16.[30] Moreover, failure to comply with minimum procurement meeting the criteria of Section 399.16(b)(1) is still subject to enforcement action.[31]

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[27] Section 399.16(c) provides that:

In order to achieve a balanced portfolio, all retail sellers shall meet the following requirements for all procurement credited towards each compliance period:

(1) Not less than 50 percent for the compliance period ending December 31, 2013, 65 percent for the compliance period ending December 31, 2016, and 75 percent thereafter of the eligible renewable energy resource electricity products associated with contracts executed after June 1, 2010, shall meet the product content requirements of paragraph (1) of subdivision (b).

(2) Not more than 25 percent for the compliance period ending December 31, 2013, 15 percent for the compliance period ending December 31, 2016, and 10 percent thereafter of the eligible renewable energy resource electricity products associated with contracts executed after June 1, 2010, shall meet the product content requirements of paragraph (3) of subdivision (b).

[28] PD, p. 50, citing Section 399.16's provision that the requirements apply "for all procurement credited towards each compliance period.

[29] Pacific Gas and Electric Company's Opening Comments on the Proposed Decision Setting Compliance Rules for the Renewables Portfolio Standard Program, May 14, 2012 (PG&E Comments), p. 10.

[30] PD, p. 56.

[31] PD, p. 56.

D. The PD reasonably finds that Section 399.16 does not allow RECs from short-term contracts to be counted *towards* excess RPS procurement, and that RECs associated with procurement from Section 399.16(b)(3) cannot be counted *as* excess procurement.

CalWEA asserts that RECs meeting the requirements of Section 399.16(b)(3) should be treated in the same way as RECs associated with short-term contracts in the calculation of excess procurement.[32] However, this contention ignores the fact that the legislation does not direct the Commission to treat those two types of RECs in the same way, but instead provides in Section 399.13(a)(4)(B) that RECs associated with short-term contracts be "deduct[ed] from actual procurement quantities," while RECs associated with Section 399.16(b)(3) cannot "be counted as excess procurement."

Section 399.16(c), which provides a declining limit on the amount of unbundled RECs that retail sellers can use for compliance, as well as the banking rules of Section 399.13(a)(4)(B), already make procurement from Categories 2 and 3 less attractive to retail sellers. In addition, failure to comply with Section 399.16(c)'s procurement limits is subject to enforcement action. The Commission need not create additional disincentives that appear unnecessary and unjustified by the statute. The PD strikes a fair balance in this regard.

E. The Commission should revise the PD to allow submission of compliance reports July 1 or later, and to clarify that the Project Development Status Reports and RPS Compliance Reports will continue to be required as part of the utilities' reporting obligations.

The PD requires that retail sellers submit annual compliance reports by June 1 of each year.[33] Several parties point out that this date may not be feasible, depending on the availability of closing data from WREGIS.[34] DRA therefore supports a date of July 1 or later. DRA reiterates its recommendation that the Commission clarify that the current biannual spreadsheets the retail utilities file--the Project Development Status Reports and RPS Compliance Reports--will continue to be required as part of the utilities' reporting obligations. The information provided in these spreadsheets allows DRA and other parties to gain valuable data about the RPS

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[32] CalWea Comments, pp. 6-7; *see also* TURN/CUE comments, p. 1.

[33] PD, p. 70.

[34] Comments of San Diego Gas & Electric Company on the Proposed Decision Setting Compliance Rules for the Renewables Portfolio Standard Program, May 14, 2012 (SDG&E Comments), pp. 8-9; PG&E Comments, p. 7; SCE Comments, p. 11.

program, including procurement progress, cost trends, and detailed contract-by-contract information. DRA has been able to use that information to publish information about the RPS program intended to help legislators and members of the public better understand the RPS program.[35]

F. The Commission should revise the PD to correctly state the requirements of Section 399.16(d) and to clarify the status of contracts that are amended.

SCE and PG&E point out clarifications needed to correctly state the requirements for contracts executed by June 1, 2010 to qualify for grandfathering.[36] One of those requirements is that:

> "Any contracts or modifications occurring after June 1, 2010, do not increase the nameplate capacity or expected quantities of annual generation, or substitute a different renewable energy resource. The duration of the contract may be extended if the original contract specified a procurement commitment of 15 or more years."[37]

SCE explains that this means that:

> "a contract or ownership agreement signed prior to June 1, 2010 maintains its status as a contract that shall count in full toward RPS procurement requirements unless an amendment to the contract executed after June 1, 2010 increases the nameplate capacity, increases the expected quantities of annual generation, or changes the renewable energy resource. Moreover, a pre-June 1, 2010 contract retains its status even if the duration of the contract is extended, so long as the original contract has a term of 15 years or more."[38]

Ordering Paragraph 10 contains language that suggests that the conditions of amending and modifying a contract executed prior to June 1, 2010 only apply to contracts with an original duration of less then 15 years. This is incorrect. Moreover, Ordering Paragraph 10 should clearly state that the duration of a contract that is signed prior to June 1, 2010 may be extended without eliminating its status as a pre-June 1, 2010 contract, if the contract had a duration of

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[35] *See e.g.,* Green Rush report at http://www.dra.ca.gov/general.aspx?id=243and The Renewable Jungle report at http://www.dra.ca.gov/uploadedFiles/Content/Energy/Renewable_JungleRevisedJan31FINAL.pdf.

[36] SCE Comments, pp. 11-14; PG&E Comments, pp. 8-10.

[37] Section 399.16(d)(3).

[38] SCE Comments, p. 12.

15 years or more.[39] The Commission should amend the PD to reflect these limitations on the use of contracts executed before June 1, 2010 to meet the new 33% RPS program requirements.

The Commission should also clarify what happens if an amendment to a contract that would otherwise qualify for grandfathering merely increases the nameplate capacity or expected quantities of annual generation. DRA agrees that in that scenario, only the incremental increase in nameplate capacity or expected annual generation should lose its ability to count in full toward RPS procurement requirements.[40]

III. CONCLUSION

DRA supports the PD, and recommends that the Commission adopt the PD, consistent with DRA's recommendations in its opening and reply comments

- The Commission should reject attempts to construe Section 399.21(a)(6), which establishes a 36-month time limit on the retirement of RECs, as including an additional requirement that RECs must also be retired within the compliance period in which they are generated.
- The Commission should reject arguments to undermine Section 399.16(d)'s requirement that contracts originally executed prior to June 1, 2010 will "count in full" towards the 33% RPS procurement requirements.
- Retails sellers that fail to meet the minimum procurement specified in Section 399.16 that satisfies the criteria of Section 399.16 (b)(1) should not be additionally penalized by decreasing the credit for procurement in other categories.
- The PD reasonably finds that Section 399.16 does not allow RECs from short-term contracts to be counted *towards* excess RPS procurement, and that RECs associated with procurement from Section 399.16(b)(3) cannot be counted *as* excess procurement.
- The Commission should revise the PD to allow submission of compliance reports July 1 or later, and to clarify that the Project Development Status Reports and RPS Compliance Reports will continue to be required as part of the utilities' reporting obligations.
- The Commission should revise the PD to correctly state the requirements of Section 399.16(d) and to clarify the status of contracts that are amended.

[39] SCE Comments, p. 12; PG&E Comments, p. 9.

[40] SCE Comments, p. 13

Respectfully submitted,

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VERIFICATION

I, Diana L Lee, am counsel of record for the Division of Ratepayer Advocates in proceeding R.11-05-005, and am authorized to make this verification on the organization's behalf. I have read the

"THE DIVISION OF RATEPAYER ADVOCATES' REPLY COMMENTS ON THE PROPOSED DECISION SETTING COMPLIANCE RULES FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM,

filed on May 21, 2012. I am informed and believe, and on that ground allege, that the matters stated in this document are true.

I declare under penalty of perjury that the foregoing are true and correct.

Executed on May 21, 2012 at San Francisco, California.

/s/ DIANA L. LEE
Diana L. Lee
Staff Counsel