

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Continue)
Implementation and Administration of California) R.11-05-005
Renewables Portfolio Standard Program.)
_____)

**CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION
COMMENTS ON PROPOSED DECISION SETTING
COMPLIANCE RULES
FOR THE RENEWABLES PORTFOLIO STANDARDS PROGRAM**

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May 14, 2012

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SUMMARY OF CMUA'S RECOMMENDATIONS

1. Amend the text of the Proposed Decision to state that Public Utilities Code section 399.16(e) provides the Commission with the authority to increase the limit on procurement meeting the criteria of Public Utilities Code section 399.16(b)(3).

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In accordance with Rule 14.3 of the California Public Utilities Commission (Commission) Rules of Practice and Procedure, and the *Proposed Decision Setting Compliance Rules for the Renewables Portfolio Standard Program* (PD), dated April 24, 2012, the California Municipal Utilities Association (CMUA) respectfully submits these comments on behalf of its members.

I. INTRODUCTION

CMUA is a statewide organization of local public agencies in California that provide electricity and water service to California consumers. CMUA membership includes publicly-owned electric utilities (POUs) that have compliance obligations under Senate Bill (SB) 2 (1X) (2011). As the Commission has noted on several occasions, it does not have jurisdiction over POU programs for purposes of implementing or enforcing SB 2 (1X).¹ However, CMUA has participated on a limited basis throughout this rulemaking in order to help improve the decision-making process of the Commission and to develop and clarify the record.

¹ See e.g., Scoping Memo and Ruling of Assigned Commissioner (R.11-05-005), July 8, 2011, at footnote 3.

With one exception, CMUA supports the PD. Specifically, CMUA believes that the PD correctly interprets and implements California Public Utilities Code section 399.16(d),² and the statutory direction to “count in full” electricity products that meet the requirements of that subdivision.³ This is particularly true of the application of section 399.16(d) to allow the prior banked procurement in excess of a retail seller’s annual procurement target to qualify for meeting the requirements of SB 2 (1X). The PD also correctly applies section 399.16(d) to permit procurement from short-term contracts signed before June 1, 2010 to “count in full” for determining excess procurement without regard for the restrictions imposed by section 399.13(a)(4)(B).⁴ Additionally, the PD correctly rejects imposing a requirement that RECs must be retired in the same compliance period in which the REC is procured.⁵ Such a limitation is not found in statute and should not be imposed on the retail sellers. Finally, CMUA agrees with the PD’s adoption of the interpretation of section 399.13(a)(4)(B) that was proposed by the Alliance for Retail Energy Markets (“AREM”).⁶ CMUA agrees that the AREM proposal presents a balanced approach that faithfully implements the statutory language and intent of SB 2 (1X).

As discussed below, the PD incorrectly interprets the Commission’s authority under section 399.16(e). The PD’s interpretation is counter to the language and intent of this statutory section, and would unduly and unnecessarily limit the authority of the Commission.

² Unless otherwise specified, all statutory references are to the California Public Utilities Code.

³ PD at 26-27.

⁴ *Id.* at 28-31.

⁵ *Id.* at 47-48.

⁶ *Id.* at 63.

II. PRIOR BANKED PROCUREMENT IN EXCESS OF A RETAIL SELLER'S ANNUAL PROCUREMENT TARGET THAT MEETS THE REQUIREMENTS OF SECTION 399.16(d) MAY COUNT FOR COMPLIANCE AFTER JANUARY 1, 2011.

The PD correctly interprets the phrase "count in full" in section 399.16(d) to apply not only to the portfolio content category requirements found in section 399.16, but to also mean that "none of the other restrictions or conditions on procurement set by SB 2 (1X) apply to any procurement from contracts signed prior to June 1, 2010."⁷ Consistent with this interpretation of section 399.16(d), the PD includes the following discussion on the applicability of section 399.16(d) to a retail seller's prior banked procurement:

The most reasonable way to reconcile the broad language of Section 399.16(d) with the restrictions in Section 399.13(a)(4)(B) is to treat those restrictions as applying to procurement from contracts signed after June 1, 2010. As Calpine points out, there is no express prohibition on allowing banked procurement from contracts signed prior to June 1, 2010 to count for RPS compliance after January 1, 2011. Moreover, as Calpine and AREM note, the value of the "count in full" direction in Section 399.16(d) would be diminished if previously banked procurement from contracts signed prior to June 1, 2010 was stranded, unneeded for compliance in 2010 and prior years, and unable to be used in 2011 or later years. **Thus, the broad scope of Section 399.16(d) operates to preserve the value for RPS compliance of procurement from contracts signed prior to June 1, 2010. The quantity of procurement that can be carried forward will be identified in a retail seller's closing report.**⁸

CMUA fully supports the PD's application of section 399.16(d) to prior banked procurement because it prevents the unnecessary penalization of early actions. The PD's interpretation is consistent with the clear language of section 399.16(d), as well as the overall purpose of SB 2 (1X).

⁷ *Id.* at 27.

⁸ *Id.* at 31 (emphasis added).

III. CONSISTENT WITH SECTION 399.16(d), SHORT TERM CONTRACTS SIGNED PRIOR TO JUNE 1, 2010 "COUNT IN FULL" FOR CALCULATING EXCESS PROCUREMENT WITHOUT RESTRICTION.

The PD also correctly interprets the phrase "count in full" in section 399.16(d) to avoid retroactively reducing the value of short term contracts signed prior to June 1, 2010. The PD includes the following statement on the applicability of section 399.16(d) to the restrictions on the use of short term contracts for calculating excess procurement:

With respect to restrictions on applying excess procurement to subsequent compliance periods, the Legislature similarly could have qualified the broad scope of the language of 399.16(d), but did not do so. Thus, procurement from contracts signed prior to June 1, 2010 will "count in full" and not be subject to the excess procurement rules set forth in Section 3.7, [of the PD].

CMUA fully supports the PD's application of section 399.16(d) to short term contracts signed prior to June 1, 2010 because it avoids retroactively stranding the investment in these resources, signed in good faith under the rules in place at the time. Once again, the PD's interpretation is consistent with the clear language of section 399.16(d), as well as the overall purpose of SB 2 (1X).

IV. SECTION 399.16(e) PERMITS THE COMMISSION TO NOT ONLY REDUCE A RETAIL SELLER'S PORTFOLIO CONTENT CATEGORY 1 OBLIGATION, BUT ALSO INCREASE A RETAIL SELLER'S PERMISSIBLE PROCUREMENT OF PORTFOLIO CONTENT CATEGORY 3.

Section 399.16(e) provides:

A retail seller may apply to the commission for a reduction of a procurement content requirement of subdivision (c). The commission may reduce a procurement content requirement of subdivision (c) to the extent the retail seller demonstrates that it cannot comply with that subdivision because of conditions beyond the control of the retail seller as provided in paragraph (5) of subdivision (b) of Section 399.15. The commission shall not, under any circumstance, reduce the obligation specified in paragraph (1) of subdivision (c) below 65 percent for any compliance obligation after December 31, 2016.

The PD narrowly interprets the Commission’s authority pursuant to this section, reaching the conclusion that section 399.16(e) only allows the Commission to reduce a retail seller’s portfolio content category 1 requirements, but not increase a retail seller’s permissible portfolio content category 3 procurement. This interpretation is provided in the following discussion in the PD:

As an initial matter, we note that this section addresses “reduction” of a quantitative portfolio content requirement. Although it would have been possible for the legislative language to authorize the Commission to “change” or “alter” a quantitative portfolio content requirement, it did not do so. Therefore, this section allows the Commission to lower the requirement of a minimum level of procurement meeting the criteria of Section 399.16(b)(1), with the limitation on certain reductions expressed in the last sentence of the section. It does not authorize the Commission to *increase* the limit on procurement meeting the criteria of Section 399.16(b)(3).⁹

As discussed below, this interpretation is both counter to the statutory language and would frustrate the purpose of SB 2 (1X).

A. The PD’s Interpretation of Section 399.16(e) is Counter to the Statutory Language.

The PD asserts that because section 399.16(e) uses the term “reduction” that it cannot be interpreted to allow an increase in portfolio content category 3, and instead, can only be used to decrease the percentage obligation for the procurement of portfolio content category 1 resources. However, section 399.16(e) uses the terms “reduction” and “reduce” in a very broad sense, providing: “[t]he commission may reduce a procurement content requirement of subdivision (c). . . .” The clear intent and meaning of this phrase is to allow the Commission to lessen the burden of the procurement content requirements set forth in section 399.16(c).

⁹ *Id.* at 74.

The PD's interpretation is that the term "reduction" is strictly limited to *lowering* the percentage obligations found in section 399.16(c). However, there is no percentage obligation associated with portfolio content category 2,¹⁰ so applying this language to this category of electricity product would be meaningless. Section 399.16(c)(2) provides a maximum level of procurement for portfolio content category 3,¹¹ so a reduction in this numerical amount would serve to penalize the retail sellers. This would lead to the irrational conclusion that this flexible compliance mechanism was intended to provide the Commission with the authority to make the requirements of SB 2 (1X) more burdensome. The only other possible interpretation is that the Legislature intended section 399.16(e) to only apply to portfolio content category 1.

The error of the PD's interpretation is demonstrated in the very next sentence of section 399.16(e), which provides: "The commission shall not, under any circumstance, reduce the obligation specified in paragraph (1) of subdivision (c) below 65 percent for any compliance obligation after December 31, 2016." In this case, the Legislature very clearly did intend to impose a limit specific to only portfolio content category 1. Rather than referring generally to the procurement content requirements of subdivision (c), the statute specifically references the portion of subdivision (c) that provides the portfolio content category 1 requirements, paragraph 1.¹² This demonstrates that the Legislature very clearly

¹⁰ Cal. Pub. Util. Code §399.16(c)(3) ("Any renewable energy resources contracts executed on or after June 1, 2010, not subject to the limitations of paragraph (1) or (2), shall meet the product content requirements of paragraph (2) of subdivision (b).").

¹¹ *Id.* §399.16(c)(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).").

¹² *Id.* §399.16(c)(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).").

knew how to limit section 399.16(e) to portfolio content category 1. If the Legislature had intended section 399.16(e) to be read as the PD interprets it, it would have been written as follows:

A retail seller may apply to the commission for a reduction of a procurement content ~~requirement~~obligation specified in paragraph (1) of subdivision (c). The commission may reduce a procurement content ~~requirement~~obligation specified in paragraph (1) of subdivision (c) to the extent the retail seller demonstrates that it cannot comply with that subdivision because of conditions beyond the control of the retail seller as provided in paragraph (5) of subdivision (b) of Section 399.15. The commission shall not, under any circumstance, reduce the obligation specified in paragraph (1) of subdivision (c) below 65 percent for any compliance obligation after December 31, 2016.

The Legislature very clearly and deliberately used different statutory language than what is provided above. The clear meaning of the statutory language is that the Commission is empowered to reduce the burden of section 399.16(c). Pursuant to this clear meaning, the Commission has the authority to increase the allowable procurement of portfolio content category 3 electricity products.

B. The PD's Interpretation of Section 399.16(e) Would Lead to Less Procurement of Renewable Resources and Therefore Defeat the General Purpose of the Statute

There is a clear and broadly used rule of statutory construction, which provides that courts:

must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.¹³

In determining the Legislature's intent in adopting section 399.16(e), it is important to look at the context of that section. Key to understanding section 399.16(e) is section 399.15(b)(5), which gives the Commission the authority to waive enforcement of the RPS

¹³ See *Torres v. Parkhouse Tire Serv., Inc.*, 26 Cal. 4th 995, 1003 (2001).

requirements if a retail seller demonstrates that one of various conditions prevented it from complying and was beyond its control. These conditions include: (1) inadequate transmission capacity; (2) permitting, interconnection, or other problems resulting in delay; (3) lack of adequate supply of eligible RPS resources; or (4) unanticipated curtailment by a balancing authority. This flexible compliance mechanism allows the Commission to *completely excuse* a retail seller from its compliance obligations if it met one of these requirements. Section 399.16(e) is directly related to this limitation because relief under section 399.16(e) is only available to a retail seller to the extent that one of the conditions in section 399.15(b)(5), highlighted above, prevented the retail seller from complying with section 399.16(c).

It is in this context that the purpose of section 399.16(e) is clear. This section serves as an intermediate flexible compliance mechanism for a retail seller that meets one of the conditions of section 399.15(b)(5) but where the retail seller wishes to comply to the extent possible, rather than simply seeking a full exemption. Unlike section 399.15(b)(5), section 399.16(e) still requires the retail seller to fully comply with the procurement quantity requirements of SB 2 (1X). It is clear then that any significant limitation on the Commission's ability to accommodate a retail seller in this situation will only result in the retail seller fully relying on section 399.15(b)(5) and, therefore, being excused from any enforcement for noncompliance.

Therefore, this is not a matter of increasing portfolio content category 3 procurement at the expense of the other two categories, but rather increasing portfolio content category 3 procurement rather than fully waiving enforcement of the compliance requirements. The result of this interpretation could very well mean less procurement of renewable energy, a result clearly at odds with the intent of SB 2 (1X). The PD should be

corrected to clarify that the Commission has the authority to increase a retail seller's permissible portfolio content category 3 procurement pursuant to section 399.16(e).¹⁴

V. CONCLUSION

CMUA appreciates the opportunity to submit these opening comments on the PD.

Dated: May 14, 2012

Respectfully submitted,



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¹⁴ CMUA recommends that following changes be made to page 74 of the PD:

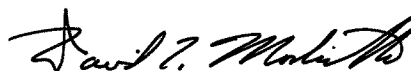
~~As an initial matter, we note that this section addresses a reduction of a quantitative portfolio content requirement. Although it would have been possible for the legislative language to authorize the Commission to change or alter a quantitative portfolio content requirement, it did not do so. Therefore, t~~ This section allows the Commission to lower the requirement of a minimum level of procurement meeting the criteria of Section 399.16(b)(1), with the limitation on certain reductions expressed in the last sentence of the section. It ~~does not~~ also authorizes the Commission to *increase* the limit on procurement meeting the criteria of Section 399.16(b)(3).

VERIFICATION

I am an officer of the California Municipal Utilities Association, 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 May 14, 2012 at Sacramento, California.

A handwritten signature in black ink, appearing to read "Dave Modisette". The signature is written in a cursive style with a large initial "D".

Dave Modisette
Executive Director