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)

REPLY 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

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May 21, 2012

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Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, The Utility Reform Network (TURN) and the Coalition of California Utility Employees (CUE) submit these reply comments on the Proposed Decision (PD) of ALJ Simon setting compliance rules for the revised Renewables Portfolio Standard (RPS) program pursuant to SBx2 (Simitian). TURN/CUE continue to have serious concerns about the obvious methods of gaming of the proposed compliance rules relating to banking and the retirement of Renewable Energy Credits. Absent modifications to the PD, the Legislative restrictions on banking short-term contracts and category 3 products will be eviscerated.

I. THERE IS NO CONFLICT BETWEEN THE 36 MONTH SHELF LIFE FOR A REC AND THE SPECIFIC PROPOSAL MADE BY TURN/CUE

Various parties defend the PD on the grounds that it provides flexibility to the retail seller. Specifically, SCE defends the PD's finding that a REC may be retired by the retail seller at anytime within 36 months of initial creation. Claiming that "the Legislature specifically rejected the notion that a REC must be retired in the period in which it was generated," SCE points to prior language in SB 722 that would have required all RECs to be retired within the same compliance period in which the electricity was generated.[1] SCE's reference is not on target.

TURN/CUE do not argue that all RECs must be retired within the compliance period in which they are generated, but rather that a retail seller must count a REC towards the compliance period during which it is purchased. There is a significant difference

[1] SCE opening comments, page 7.

between these two approaches. Under the first (which was deleted from SB 722), all RECs must be retired in WREGIS by the end of the compliance period, leading to the potentially absurd result that would force any REC generated on December 30, 2013 to be retired within 24 hours.

Under the approach proposed by TURN/CUE, the REC must be credited towards the compliance period in which it was procured by the retail seller. This approach does not address when the REC is retired in WREGIS. Moreover, it would allow a generator or marketer to hold RECs for up to 36 months before selling them to a retail seller, even if this period extends into a subsequent compliance period. Once the retail seller procures the RECs, they are presumed to count towards the current compliance period. This approach preserves both the 36 month maximum shelf-life for RECs and the banking prohibitions contained in SBx2. Only this approach gives meaning to the Legislature's emphatic and unambiguous provision that "[i]n no event shall [RECs] be counted as excess procurement."[2]

II. THERE IS NO BASIS FOR CHANGING THE TREATMENT OF PRE-JUNE 1, 2010 CONTRACTS

Shell asks the Commission to clarify that contracts executed prior to June 1, 2010 may be used by a retail seller "to satisfy its procurement obligation in any portfolio content category under P.U. Code Section 399.16(d)."[3] This request flies in the face of explicit statutory language which states that the portfolio content obligations apply exclusively to contracts executed after June 1, 2010.[4] Shell fails to reference the relevant statutory language and does not explain how to reconcile its position with the opposite conclusions reached by the Commission in D.11-12-052. The relief sought by Shell would essentially destroy the impact of the entire product content category structure created by SBx2 by allowing every pre-June 1, 2010 contract to

[2] Cal. Pub. Util. Code §399.13(a)(4)(B).
[3] Shell opening comments, page 4.
[4] Cal. Pub. Util. Code §399.16(c).

apply to obligations tied to incremental procurement occurring after June 1, 2010. The Commission should therefore reject Shell's effort to radically revise the entire portfolio content category structure.

III. THE 14% SAFE HARBOR THRESHOLD APPLIES TO ACTUAL 2010 PROCUREMENT

SDG&E and Calpine Power America seek to modify the PD to allow banked procurement to count towards determining whether a retail seller met the 14% safe harbor trigger in 2010.[5] SDG&E asserts that the Commission offers no statutory support for the PD's conclusion and argues that any reference to "eligible renewable energy resources" necessarily incorporates banked (and perhaps even earmarked) quantities. SDG&E further claims that all the banking and borrowing rules applicable to achievement of the 20% obligation should be applied to the 14% trigger and that "there exists no ambiguity" with respect to this conclusion.[6]

The proposals of SDG&E and Calpine Power America should be rejected because they run directly counter to the clear and unambiguous language in SBx2 which refers to "14 percent of retail sales from eligible renewable energy resources in 2010."[7] There is no basis for assuming that the 14 percent trigger includes banked procurement – indeed, the reason the Legislature chose this figure is because SDG&E assured the author of SBx2 that it would exceed this benchmark with actual 2010 procurement. SDG&E ultimately came up short relative to its own predictions and now seeks to gut a requirement it once proposed. The PD correctly concludes that procurement "in 2010" means actual procurement in 2010. This conclusion is unremarkable, consistent with the Legislative goal of providing a safe harbor based on actual 2010 procurement, and should not be disturbed.

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[5] Calpine Power America opening comments, pages 2-3; SDG&E opening comments, pages 2-5.
[6] SDG&E opening comments, page 4.
[7] Cal. Pub. Util. Code §399.15(a).

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IV. THE COMMISSION SHOULD REJECT EFFORTS TO USE SHORT-TERM CONTRACTS TO SATISFY THE LONG-TERM CONTRACT REQUIREMENT

Noble proposes that the Commission allow retail sellers to satisfy the long-term contracting requirement without any associated annual delivery obligation.[8] In support of their request, Noble cites the "intermittent nature of wind or sun" but fails to acknowledge that every PPA executed by an investor-owned utility with a wind or solar generator includes required minimum annual production guarantees.[9] Granting this request would open the door to systematic gaming of the long-term contracting requirement. Under Noble's proposal, a retail seller can execute a contract calling for the delivery of 100 MWh over a 10-year period but take full delivery of the 100 MWh in the first two years of the contract. This approach creates the appearance of a long-term contract while actually functioning as a short-term arrangement. Adopting Noble's proposed conclusion of law would effectively eliminate the entire long-term contract requirement and should therefore be rejected.

PG&E makes a request similar to Noble by seeking to allow the combined terms of all contracts between a retail seller and a single counterparty to be added together for purposes of determining whether a contract satisfies the definition of "long-term" under SBx2.[10] Under this approach, a retail seller could show a "long-term" contract by demonstrating ongoing annual power purchases with entities such as Powerex, Shell or Goldman Sachs that date back over a decade. Doing business with an entity through a series of short-term contracts should not satisfy the 10-year contract standard. Granting the change sought by PG&E would open the door to claims of long-term contracting by various retail sellers (particularly ESPs) that could show a large number of short-term deals executed with certain counterparties over a 10-year

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[8] Noble opening comments, page 4.

[9] These minimum guarantees are set at less than 100% of expected average annual production to account for the exact variations mentioned by Noble.

[10] PG&E opening comments, page 5.

period. This approach does not resemble a true long-term contract in any substantive respect. It also fails to achieve the purpose behind requiring long-term contracts – providing the basis for financing construction of new renewable generation.

Respectfully submitted,

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Attorneys for CUE

Dated: May 21, 2012

VERIFICATION

I, Matthew Freedman, am an attorney of record for THE UTILITY REFORM NETWORK in this proceeding and am authorized to make this verification on the organization's behalf. The statements in the foregoing document are true of my own knowledge, except for those matters which are stated on information and belief, and as to those matters, I believe them to be true.

I am making this verification on TURN's behalf because, as the lead attorney in the proceeding, I have unique personal knowledge of certain facts stated in the foregoing document.

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

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

__________/s/____________

Matthew Freedman
Staff Attorney

VERIFICATION

I, Marc D. Joseph, am an attorney of record for the Coalition of California Utility Employees in this proceeding. No officer of CUE is located in this County where I have my office. I am authorized to make this verification on the organization's behalf. I have read this document. The statements in this document are true of my own 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 21, 2012, at South San Francisco, California.

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