BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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

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

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In accordance with Rule 14.3 of the California Public Utilities Commission's ("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 reply comments on behalf of its members.

I. INTRODUCTION

On May 14, 2012, a number of parties provided comments on the PD. These comments reflect a general consensus of support for the PD, however, some parties raised concerns with the PD. The comments filed jointly by The Utility Reform Network and the Coalition of California Utility Employees ("Joint Commenters") objected to the PD's interpretation of California Public Utilities Code section 399.16(d).[1] Specifically, the Joint Commenters reject the PD's determination that section 399.16(d) permits a retail seller to use its prior banked procurement in excess of its annual procurement target for compliance after January 1, 2011. CMUA disagrees with those objections and files these reply

[1] Unless otherwise specified, all statutory references are to the California Public Utilities Code.

comments to respond to the Joint Commenters' erroneous assertions regarding the interpretation of this section.

II. RESPONSE TO JOINT COMMENTERS

A. The Joint Commenters' Interpretation of Section 399.16(d) Would Have Significant Negative Consequences.

The Joint Commenters err in their interpretation of section 399.16(d), and fail to provide any discussion of the policy consequences of the interpretation they advocate. Instead, the Joint Commenters claim only that the PD's conclusion "is contrary to law, defies common sense and was not shared by either the Legislative authors or the Legislative Committees reviewing the bill."[2] However, the PD's interpretation is not only consistent with SB 2 (1X), it is also the only practical manner in which costly assets, paid for by California electricity customers, are not left stranded.

The interpretation advocated by the Joint Commenters would have a very real and direct consequence: investments in renewable power by retail sellers that were made in full compliance with the statutory and regulatory rules in place at the time would lose all ratepayer value. The loss of this value would be a cost borne directly by the retail sellers and a loss to their ratepayers. The costs of achieving a 33 percent renewable portfolio standard ("RPS") are going to be substantial. Additionally, there are many costs that are still unknown, including the costs of integrating large amounts of intermittent generating resources into California's grid. Deducting millions of dollars in ratepayer value simply adds to ratepayer costs and does nothing to promote long-term, sustainable levels of renewable procurement. Any such additional costs must be justified by a substantial

[2] Joint Commenters at 9.

corresponding benefit. The Joint Commenters have articulated no benefit associated with punishing ratepayers for a retail seller's procurement of excess renewable generation.

The most significant consequence of the Joint Commenters' interpretation would be a chilling of the renewable market because utilities could not make long-term planning decisions in reliance on existing law and policy. If retail sellers were to lose the value associated with prior banked procurement, it would send a signal to entities with an RPS compliance obligation that they should procure the absolute minimum amounts of RPS resources, because any excess value could be lost by additional regulatory or statutory changes. This would discourage long-term investments in renewable power because of the fear that the legislature (or the Commission) could once again change counting conventions and strand future investments. Such a result is not only contrary to sound public policy, but also clearly at odds with the intent and purpose of the RPS.

B. The Rules of Statutory Construction Support the PD's Interpretation.

A key canon of statutory construction is that statutes are presumed to not retroactively affect the "rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute."[3] The California Supreme Court has expressed this rule as follows: "*a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.*"[4] The court noted that "[t]his rule has been repeated and followed in innumerable decisions."[5]

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[3] Aetna Cas. & Sur. Co. v. Indus. Acc. Comm'n , 30 Cal. 2d 388, 391 (1947).
[4] Evangelatos v. Superior Court, 44 Cal. 3d 1188, 1206-07 (1988) (quoting *United States v. Security Industrial Bank,* 459 U.S. 70, 79"80 (1982)).
[5] *Id.*

The Joint Commenters correctly note that, of the seven legislative analyses of SB 2 (1X), two did in fact discuss this issue. However, a decision of this magnitude that has substantial financial consequences must be based on an "unequivocal" and "manifest" expression of intent by the legislature. Indeed, the legislature routinely states its intent for legislation to apply retroactively in statutory language.[6] No such clear manifestation of intent was made in SB 2 (1X), and the PD correctly finds none.

A second key rule of statutory construction is that statutes "should be sensibly interpreted, and that general terms in statutes will not be construed to lead to unjust or oppressive results."[7] This rule of statutory construction was interpreted in *Citizens Utilities Company of California v. Superior Court of Santa Cruz County*.[8] In *Citizens Utilities,* the court was interpreting Code of Civil Procedure section 1249, which sets the date for determining value in an eminent domain proceeding as the date of the summons.[9] However, the court refused to interpret this section to preclude compensation for upgrades made by a water utility after the date of summons that were made pursuant to the utility's statutory obligations.[10] The court held that compensating the utility for its investments was consistent with the rule of statutory construction to not construe statutes "to lead to unjust or oppressive results."[11] Applying this rule of statutory construction to section 399.16(d), it is clear that the PD correctly interprets this statutory provision in a way that avoids unjustly denying ratepayers the value of the their lawful investments.

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[6] *See e.g.,* Cal. Pub. Util. Code "21681(b) ("Matching funds" means money that is provided by the public entity and does not consist of funds previously received from state or federal agencies or public entity funds previously used to match federal or state funds. **This definition shall be retroactive to July 1, 1967.**" (emphasis added)).

[7] Citizens Utilities Co. of Cal. v. Superior Court of Santa Cruz County, 59 Cal. 2d 805, 811 (1963).

[8] *Id.*

[9] *Id.* at 808.

[10] *Id.* at 811-812.

[11] *Id.*

C. Letters To Legislative Committees Are Irrelevant for Statutory Interpretation.

As support for the Joint Commenters' assertion that the legislature intended to retroactively diminish the rights of retail sellers, the Joint Commenters cite a letter sent by CMUA to the Senate Committee on Energy, Utilities, and Communications. In the letter, CMUA advocates for an amendment *clarifying* that excess procurement above 20 percent prior to December 31, 2010, to be carried forward for compliance after January 1, 2011. First, the letter of one interest group provides virtually no interpretive value for construing a statute. Indeed, courts have consistently ruled that even a letter by the sponsor of a bill is not relevant to statutory interpretation.[12] Second, CMUA's letter was intended as support for amendments to clarify or remove any ambiguity that the statute may be interpreted to strand publicly owned electric utility ("POU") RPS investments. The letter was not intended as an expression of CMUA's legal position on the statutory interpretation of SB2 (1X).

However, even if CMUA's letter is relevant, it is important to note this is a substantially distinct issue for POUs. Unlike the retail sellers, which had clear and firm statutorily imposed RPS targets under the previous RPS structure, the POUs were given broad authority to adopt their own RPS programs.[13] This lack of strict requirements created a significant complication when transitioning into SB 2 (1X): what baseline would a POU use for carrying procurement forward into the new compliance structure? It would clearly be unfair for a POU to set a very low RPS and then assert that any procurement above that

[12] Med. Bd. of California v. Superior Court, 111 Cal. App. 4th 163, 181 (2003) ("In *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 128 Cal.Rptr. 427, 546 P.2d 1371, the Supreme Court made clear that "[i]n construing a statute we do not consider the motives or understandings of individual legislators who cast their votes in favor of it. [Citations.] Nor do we carve an exception to this principle simply because the legislator whose motives are proferred [sic] actually authored the bill in controversy." (*Id.* at p. 589, 128 Cal.Rptr. 427, 546 P.2d 1371.)").

[13] Cal. Pub. Util. §387 (repealed 2011).

amount could be carried forward into the first compliance period. CMUA advocated at the time that one reasonable interpretation of SB 2 (1X) is that only POU RPS procurement in excess of 20 percent can be carried forward into the first compliance period. This interpretation is a reasonable compromise and is consistent with the state's historical and current RPS law.

The issue addressed by the PD is wholly distinct from the issue raised by CMUA. The retail sellers had clear RPS requirements to establish a baseline for transitioning into the current RPS program. The arguments of the Joint Commenters should be disregarded.

D. Unpassed Bills Are Irrelevant for Purposes of Statutory Interpretation.

The Joint Commenters rely heavily on legislative history from two unpassed bills, SB 23 (2011) and AB 1868 (2012).[14] The courts have repeatedly and unequivocally ruled that these types of resources do not provide evidence of legislative intent. In *People v. Baniqued*, the Third Appellate District provided clear direction on this issue: "As evidence of legislative intent, unpassed bills are of little value . . . and arguably irrelevant."[15] The court went on to point out that a bill "may have failed for any number of reasons unrelated to the legislative intent."[16] *Sacramento Newspaper Guild* sheds additional light on this rule of statutory construction:

> "The unpassed bills of later legislative sessions evoke conflicting inferences. Some legislators might propose them to replace an existing prohibition; others to clarify an existing permission. A third group of legislators might oppose them to preserve an existing prohibition, and a fourth because there was no need to clarify an existing permission. The light shed by such unadopted proposals is too dim to pierce statutory obscurities. As evidences of legislative intent they have little value."[17]

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[14] Joint Commenters at 10-12.
[15] People v. Baniqued, 85 Cal. App. 4th 13, 28 (2000) (emphasis added).
[16] *Id.*
[17] Sacramento Newspaper Guild v. Sacramento County Bd. of Sup'rs, 263 Cal. App. 2d 41, 58 (1968).

Accordingly, the Commission should disregard the Joint Commenter's misplaced reliance on SB 32 and AB 1868 because these documents do not provide evidence of legislative intent.

III. CONCLUSION

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

Dated: May 21, 2012

Respectfully submitted,

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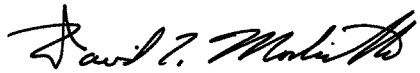
VERIFICATION

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 21, 2012 at Sacramento, California.



Dave Modisette
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