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' OPENING 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 opening comments on the Proposed Decision of Administrative Law Judge Simon Setting Compliance Rules for the Renewables Portfolio Standard (RPS) Program (PD). DRA generally supports the PD, which would adopt rules that will result in more efficient procurement of renewables, thereby reducing the cost of compliance. DRA recommends a minor modification that will clarify the reporting requirements. DRA recommends the Commission adopt the PD with the following modification:

- The Commission should clarify that the Utilities' RPS reporting obligations will continue to include the two currently required biannual spreadsheets: the Project Development Status Reports and RPS Compliance Reports.

II. BACKGROUND

The PD would implement changes to the rules for retail sellers' compliance with the RPS program made by 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 providers, and community choice aggregators by the end of 2010 to 33% of those retail sales by the end of 2020.[1] The PD would resolve compliance issues raised by SB 2(1x) , including those arising from the transition from the requirements of the prior 20% RPS program to the new 33% RPS program. The PD would establish the parameters for retail sellers to report on their compliance with the 33% RPS program and would authorize the Director of Energy Division to develop the forms and information requirements necessary for retail sellers to submit the reports required by this decision.

While the PD addresses the most immediate compliance requirements of the new RPS program, it defers to a later decision implementation of rules for the enforcement of RPS obligations under SB 2 (1X), including details of the process for seeking reduction or waiver of

[1] The PD points out that the 33% RPS standard now applies to publicly owned utilities, but that the Commission does not regulate those entities. *See* PD, p.7.

RPS compliance obligations and the potential imposition of penalties for noncompliance with RPS obligations.

The PD draws on the extensive comments filed by parties in response to the July 12, 2011, *Administrative Law Judge's (ALJ's) Ruling Requesting Comments on Implementation of New Portfolio Content Categories for the RPS Program*, as well as comments filed in response to the July 15, 2011 *ALJ's Ruling Requesting Comments on New Procurement Targets and Certain Compliance Requirements for the Renewables Portfolio Standard Program*, and in response to the February 1, 2012 *ALJ's Ruling Requesting Supplemental Comments on Reporting and Compliance Requirements for the Renewables Portfolio Standard Program*.

III. DISCUSSION

A. The PD reasonably finds that retail sellers that do not qualify for Section 399.15(a)'s safe harbor must make up procurement deficits from the prior RPS program, and proposes a straightforward plan for doing so.

The PD considers Section 399.15(a) of the new RPS program and acknowledges that the last sentence of that section appears to require that sellers with procurement deficits from the 20% RPS program who do not qualify for the statutory safe harbor[2] to make up those deficits during the new 33% RPS program:[3]

> "In order to fulfill unmet long-term resource needs, the commission shall establish a renewables portfolio standard requiring all retail sellers to procure a minimum quantity of electricity products from eligible renewable energy resources as a specified percentage of total kilowatthours sold to their retail end-use customers each compliance period to achieve the targets established under this article. For any retail seller procuring at least 14 percent of retail sales from eligible renewable energy resources in 2010, the deficits associated with any previous renewables portfolio standard shall not be added to any procurement requirement pursuant to this article."[4]

The PD acknowledges that requiring sellers who do not achieve at least 14% of their sales from renewable resources in 2010 to make up those deficits going forward, potentially

[2] The statutory safe harbor excuses deficits of retail sellers who procure at least 14% of their retail in 2010 from eligible renewable resources.

[3] PD, p. 10.

[4] Public Utilities Code Section 399.15(a) (emphasis added). All further references to statutory sections are to the Public Utilities Code.

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conflicts with Section 399.15(b)(3)[5] and Section 399.15(b)(9).[6] However, the PD reasonably concludes that Section 399.15(a) addresses the 20% RPS program, while Sections 399.15(b)(3) and Section 399.15(b)(9) are forward looking, applying to the new 33% RPS program.

Although DRA recommended that the Commission not require past deficits from the 20% program to be made up,[7] it agrees with the PD's reasonable harmonization of Sections 399.15(a), 399.15(b)(9), and 399.15(b)(3).

After concluding that Section 399.15(a) "brings forward into 2011 and later years the process of making up 'the deficits associated with any previous renewable portfolio standard,' unless the retail seller qualifies for the statutory safe harbor," the PD proposes a "uniform and transparent method" for calculating the deficits that must be made up.[8] DRA supports the PD's proposal to allow sellers to calculate and resolve deficits by allowing sellers to "net out" any Annual Procurement Target Deficits (APT)[9] for 2010 and all earlier years with the use of procurement, whether banked or procured in that year, that complies with the RPS procurement rules in effect for the compliance year to which the procurement is applied.[10]

The PD would prevent retail sellers from using the earmarking feature of the 20% RPS program[11] to make up deficits from 2010 or earlier because as the PD explains, allowing retail sellers up to three years under the earmarking feature would unnecessarily prolong the transition from the 20% RPS program to the 33% RPS program.[12] In contrast, by calculating the deficit at the end of 2010, and then allowing the use of banked procurement (or new procurement) to

[5] "The commission shall not require the procurement of eligible renewable energy resources in excess of the quantities identified in paragraph (2). A retail seller may voluntarily increase its procurement of eligible renewable energy resources beyond the renewables portfolio standard procurement requirements."

[6] "Deficits associated with the compliance period shall not be added to a future compliance period."

[7] The Division of Ratepayer Advocates Comments on Procurement Targets and Certain Compliance Requirements for the Renewable Portfolio Standard Program, August 30, 2012, p. 7.

[8] PD, p. 15.

[9] Under the 20% RPS program, retail sellers were required to meet an annual program target, which was calculated as the simmer o the retail prior year's APT plus one percent of the prior year's retail sales for each year prior to 2010. PD, pp. 12-13.

[10] PD, p. 18.

[11] The earmarking feature of the 20% RPS program allowed sellers to carry forward deficits for up to three years, which would be satisfied by procurement from earmarked contracts delivered in years later than the deficit was incurred. PD, p. 16; *see also* D.05-07-039, Ordering Paragraph 14.

[12] PD, p. 18.

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satisfy the deficit would allow the Commission to "'close the books'" on 2010 and earlier years in a more direct way.[13]

B. **The PD reasonably finds that Section 399.16 (d) requires different treatment for renewable procurement from short-term contracts originally executed prior to June 1, 2010 than for procurement from short-term contracts executed at a later date.**

Section 399.16(d) of the new RPS statutes 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 . . ."[14] The PD harmonizes this section of the SB 2(1x) with other provisions of the statute, and rejects the position that the words "count in full" only apply to the 33% RPS program's portfolio content requirements.[15] The PD correctly finds that given the absence of an explicit qualification for the procurement from short-term contracts signed prior to June 1, 2010, the new rules on short-term contracts do not apply to short-term contracts executed prior to June 1, 2010.[16] The lack of qualification in Section 399.16(d) of the new RPS statute also means that procurement from contracts executed prior to June 1, 2010 will "count in full" and is not subject to excess procurement rules.[17] Finally, the PD correctly concludes that the broad scope of Section 399.16(d) preserves the value

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[13] PD, p. 16.

[14] 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:
>
> (1) The renewable energy resource was eligible under the rules in place as of the date when the contract was executed.
>
> (2) For an electrical corporation, the contract has been approved by the commission, even if that approval occurs after June 1, 2010.
>
> (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.

[15] PD, pp. 28-29.

[16] PD, p. 29.

[17] PD, 30.

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.[18]

C. The PD reasonably finds that Section 399.13 (b)'s calculation of the minimum quantity of eligible renewable energy resources to be procured from contracts of at least ten years duration should be calculated in a manner similar to the prior requirements of Section 399.14(b), but adapted to the new three-year compliance periods.

The PD examines newly enacted Section 399.13(b) to determine the requirements for RPS procurement through short-term contracts. Section 399.13(b) provides that:

> A retail seller may enter into a combination of long- and short-term contracts for electricity and associated renewable energy credits. The commission may authorize a retail seller to enter into a contract of less than 10 years' duration with an eligible renewable energy resource, if the commission has established, for each retail seller, minimum quantities of eligible renewable energy resources to be procured through contracts of at least 10 years' duration.

The PD explains that Section 399.13(b) differs from previous Section 399.14(b) by removing contracts with "new facilities commence commercial operations on or after January 1, 2005" as a type of resource that meets the minimum quantity requirement.[19]

Under previous Section 399.14(b) the Commission in D.07-05-028 based the "minimum quantity" on contracts signed by the retail seller, rather than actual delivery of energy from the contract.[20] The PD correctly maintains this interpretation of "minimum quantity," noting that "[s]hifting the minimum quantity to count procurement used or RPS compliance, rather than procurement promised by contracts signed, would significantly change prior rules"[21] in the absence of a demonstration that such a change is warranted, given the "relatively slight alteration to the statutory language" and existing incentives to enter long-term contacts.[22]

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[18] PD, p. 30.

[19] PD, pp. 31-32.

[20] D.07-05-028, Finding of Fact 7, p. 29.

[21] PD, p. 32.

[22] PD, p. 34.

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The PD concludes that given the three-year compliance period for most other requirements of the 33% RPS, the minimum quantity requirement should similarly apply to the entire compliance period rather than to the prior annual period. The PD declines to adopt a new minimum quantity requirement, and instead adapts "the prior quantitative of signing long term contracts the promise MWh equal to at least 0.25% of the prior year's retail sales to the new multi-year compliance period. Thus, with the exception of the first compliance period,[23] the minimum quantity requirement for long-term contracts of at least 0.25% of the prior compliance period's retail sales. This is a reasonable approach to integrating the new minimum quantity requirement with the new RPS compliance periods.

Given the new three year compliance period, the PD correctly concludes that it is not necessary to allow carry-over of excess procurement from long-term contracts.[24] Finally, the PD determines that the minimum quantity requirement will cease in 2020, at the end of the final three-year compliance period. The PD correctly observes that:

> "using a date certain for the expiration of the minimum quantity requirement removes possible ambiguities. Because it is not possible to predict market conditions, or how successful retail sellers will be in meeting the 33% procurement requirement in the 2017-2020 compliance period, it is also not sensible to try now to set any requirements for the years after 2020."[25]

D. The PD reasonably finds that Section 399.21 establishes a 36-month time limit on the retirement of renewable energy credits (RECs) that does not require retirement of RECs within the compliance period in which they are generated.

Section 399.21(a)(6) requires that RECs be retired not longer than 36 months after they are generated. The PD rejects the contention that the Commission should also require that unbundled RECs (and other products described in Section 399.16(b)(3)) be retired in the compliance period in which they were procured. The rationale for the this additional limitation proposed by some parties is that otherwise, retail sellers may try to circumvent the prohibition on counting RECs (and other renewable products that fall within the category of renewable products

[23] During the first compliance period, the minimum quantity requirement from long-term contracts is 0.25% of retail sales in 2010. The PD takes this approach to account for the fact that the Decision setting the rules for the use of short term contracts is being issued half-way through the first compliance period,

[24] PD, pp. 38-39.

[25] PD, p. 40.

described by Section 399.16(b)(3)) as excess procurement that cannot be carried over to a later compliance period.

While acknowledging this concern, 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), nor should Section 399.21(a)(6)'s 36-month limit be selectively applied to RECs of particular categories.

E. The PD reasonably finds that Section 399.16's[26] portfolio balance requirements applies only to procurement credited towards each compliance period, and that failure to obtain the minimum procurement meeting the criteria of Section 399.16 (b)(1) should not decrease 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 the requirements established in D.11-12-052. The PD correctly concludes, based on the statutory language that focuses on procurement that will be counted for compliance, that quantitative procurement requirements apply only toward the generation that is being used for compliance in a compliance period.[27]

The PD also properly finds that penalizing the utilities twice for failing to achieve the minimum procurement meeting the criteria of Section 399.16(b)(1)) – once for failure to comply with the minimum and then again by disallowing procurement in other categories that exceeds the proportionate amount justified by actual procurement meeting the criteria of Section 399.16(b)(1)–would be overly punitive and is unjustified by Section 399.16.[28] Moreover, the

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[26] 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).

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

[28] PD, p.56.

singular failure to comply with minimum procurement meeting the criteria of Section 399.16(b)(1) is still subject to enforcement action.[29]

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

The PD correctly finds that RECs associated with short-term contracts cannot be counted *towards* excess procurement and RECs associated with Section 399.16(b)(3) contracts cannot be counted *as* excess procurement.[30] Parties who have suggested that all Section 399.16(b)(3) RECs must fall out of the excess procurement calculation prior to even accounting for RECs actually being used toward obligations would burden ratepayers with excessive costs. In that scenario, in any compliance period in which a utility has *any* Category 3 RECs and also *any* excess procurement, ratepayers will have to bear the costs of RECs purchased and entirely unused. Given that utilities will realistically have some excess procurement in each compliance period to avoid the risk of penalty, the other parties' interpretation will impose costs of unused RECs on ratepayers in each compliance period. This is not a reasonable outcome and is not intended by the legislation.

DRA also agrees with the PD that the portfolio content category designation of a REC should "travel" with it into the next Compliance Period if it is being banked and used toward compliance requirements in the next Compliance Period.[31]

G. The PD reasonably finds that the annual report required by Section 399.13(a) should be submitted June 1, but the Commission should clarify that the Project Development Status Reports and RPS Compliance Reports remain requirements for all retail sellers.

Although DRA would prefer that the annual RPS report be due on either March 1 or August 1 to coincide with the retail sellers' biannual RPS Compliance Reports, it does not object to the June 1 proposal in the PD.[32] DRA recommends that the Commission clarify that the

[29] PD, p.56.

[30] PD, p.64.

[31] PD, pp.66-67.

[32] PD, p.70.

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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.

H. The PD reasonably finds that Section 399.15(b)(5) allows retail sellers to seek a waiver from enforcement at the end of the compliance period.

The PD's requirement that a waiver of enforcement and reduction of portfolio balance requirements be applied for at the end of a compliance period[33] appears reasonable. At that time, the Commission would have sufficient information to evaluate the request and consider whether to grant the requested waiver.

IV. CONCLUSION

DRA supports the PD, and recommends that the Commission adopt the PD with the following limited clarification:

- the retail sellers' RPS reporting obligations will continue to include the two currently required biannual spreadsheets: the Project Development Status Reports and RPS Compliance Reports.

Respectfully submitted,

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[33] PD, pp.71-73.

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' OPENING COMMENTS ON THE PROPOSED DECISION SETTING COMPLIANCE RULES FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM,"

filed on May 14, 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 14, 2012 at San Francisco, California.

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

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APPENDIX A

DRA's Recommended Changes to the Proposed Decision

(Proposed additions are included with underlines.)

Conclusion of Law

28.The annual report submitted by a retail seller by June 1 of the year following the last year of a compliance period should include a separate section providing all the information required to determine compliance with all obligations for that compliance period, including portfolio balance requirements for any excess procurement applied from an earlier compliance period, as well to determine the amount, if any, of excess procurement in that compliance period that may be applied to a later compliance period. The retail sellers' RPS reporting obligations shall continue to include the two currently required biannual spreadsheets: the Project Development Status Reports and RPS Compliance Reports

Ordering Paragraph

27. The annual report submitted by a retail seller by June 1 of the year following the last year of a compliance period must include a separate section providing all the information required to determine compliance with all obligations for that compliance period, as well to determine the amount, if any, of excess procurement in that compliance period that may be applied to a later compliance period. The retail sellers' RPS reporting obligations shall continue to include the two currently required biannual spreadsheets: the Project Development Status Reports and RPS Compliance Reports