

**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)

**COMMENTS OF THE LARGE-SCALE SOLAR ASSOCIATION
ON THE PROPOSED DECISION OF ALJ SIMON SETTING
COMPLIANCE RULES FOR THE RENEWABLES PORTFOLIO
STANDARD PROGRAM**

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May 14, 2012

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Pursuant to Rule 14.3 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure, the Large-scale Solar Association (LSA) respectfully submits these reply comments on Administrative Law Judge Simon's April 24th Proposed *Decision Setting Compliance Rules for the Renewables Portfolio Standard Program* (Proposed Decision or PD).

Generally, the Proposed Decision covers a wide range of issues, including the transition to the new Renewables Portfolio Standard (RPS) framework created by Senate Bill 2, first extraordinary session (Simitian, 2011) (SBx1 2);¹ the treatment of pre-June 1, 2010 procurement under the new framework; restrictions on short term contracts; excess procurement calculations; and the process for requesting a waiver of procurement quantity requirements at the end of a compliance period.

¹ The RPS program, as modified by SBx1 2, is codified at Public Utilities Code Sections 399.11-399.31. Unless otherwise noted, all subsequent statutory references refer to the Public Utilities Code.

LSA briefly addresses three primary concerns in these comments. First, these comments address the lack of restrictions on Category 3² renewable energy credit (REC) retirement, which are needed to achieve consistency with the statutory prohibition on banking of Category 3 products. LSA believes that the current treatment of the Category 3 REC retirement in the Proposed Decision is inconsistent with the statute, as it creates rules that effectively render one of the statutory sections (Section 399.13(a)(4)(B)) meaningless. Second, these comments address the need for clarification about the different compliance obligations under the SBx1 2 portfolio category content rules. Specifically, the comments request that PD explicitly identify the separate compliance obligations for Category 1 procurement (minimum quantity) and Category 3 (limitation), both of which are subject to enforcement. Such clarification is needed to ensure that the compliance program described in the Proposed Decision does not conflict with the portfolio content category rules and restrictions in the statute. Third, consideration of the enforcement consequences of noncompliance should be undertaken as a priority matter in the RPS proceeding.

I. The Proposed Decision's failure to place any restrictions on the retirement of Category 3 RECs is inconsistent with the statute.

The Proposed Decision's formalistic analysis of the statutory provisions regarding REC retirement and excess compliance calculations ignores the practical effect of the

² Category 3 refers to procurement meeting the criteria of Section 399.16(b)(3), while Category 1 refers to procurement meeting the criteria of Section 399.16(b)(1) and Category 2 to procurement meeting the criteria of Section 399.16(b)(2).

rules on Category 3 RECs, which permit retail sellers to carry forward RECs generated or acquired in one compliance period to the next compliance period. Without further rules or restrictions governing the use of Category 3 RECs, the statutory prohibition on counting Category 3 RECs towards excess compliance is effectively meaningless.

SBx1 2 contains two different provisions regarding the use of Category 3 procurement for compliance with the RPS program. First, Section 399.13(a)(4)(B) gives clear direction that “[i]n no event shall [Category 3] electricity products” be counted as excess procurement. The benefit of being counted as excess procurement is that such procurement in one compliance period could be applied to any subsequent compliance period. 399.13(a)(4)(B).

Second, Section 399.21 prohibits the use of a REC for compliance purposes “unless it is retired in the tracking system” by the retail seller or local publicly owned electric utility within 36 months from the initial date of generation of the associated electricity. The wording of this section indicates that it is a limitation, precluding the use of RECs that have not been retired within 36 months. However, the Proposed Decision goes a step too far in presuming that the converse of this proposition is also true - that any REC retired within 36 months should be deemed eligible for compliance.

The Proposed Decision does not fully address the tension in these two sections by viewing these sections formalistically. Essentially, the PD concludes that if a REC is not retired during a compliance period, then the limitation on excess procurement is inapposite. The PD states that only *after retirement* would the REC be “subject to any applicable prohibition or limitation on “excess procurement” that can be applied to the

next compliance period.□ Proposed Decision at 48. Thus, retail sellers can avoid the excess procurement limitation by holding excess Category 3 RECs in their WREGIS account, effectively carrying them over for use in the next compliance period. While the 36-month limitation would preclude carrying such RECs over multiple compliance periods, this ability to carry-forward Category 3 RECs does provide a level of leniency in counting these RECs toward compliance in future periods that the statute did not contemplate.

The Proposed Decision suggests that the commenters³ who raised the concern about needing additional restrictions on Category 3 RECs are conflating acquiring a REC with using a REC for compliance. Proposed Decision, p. 47. As the PD states, retail sellers may sell or transfer a REC □at any time before it is retired for RPS compliance.□ *Id.* The PD, then goes on to note that a seller may determine that a REC is □not needed for RPS compliance and sell it at any time.□ *Id.* at 48. However, this is precisely the issue of concern, that, without further restrictions, retail sellers can simply adjust the REC retirement timing to avoid the excess procurement limitation. A retail seller would have no reason to retire excess Category 3 RECs if they were not immediately needed for compliance.⁴ Thus, sellers could hold excess Category 3 RECs in their WREGIS account

³ The Proposed Decision identifies The Utility Reform Network (□TURN□), Coalition of California Utility Employees (□CUE□), and the Union of Concerned Scientists (□UCS□), supported by the California Wind Energy Association (□CalWEA□). Proposed Decision, pg. 47. In its earlier comments, LSA also supported the request of TURN/CUE. *See* Reply Comments of the California Wind Energy Association and the Large-Scale Solar Association on New Procurement Targets and Certain Compliance Requirements for the Renewables Portfolio Standard Program (Sept. 12, 2011), p. 3.

⁴ With the possible exception of retiring additional Category 3 RECs to ensure that the overall RPS target is met (for instance, due to a shortfall in another product category) or retiring those RECs due to the expiration of the 36 month shelf life. These comments address the former situation from a compliance perspective in Section II.

until the subsequent compliance period, rendering the excess procurement limitation essentially meaningless.

To avoid such a situation, LSA agrees with the position of TURN/CUE in their August 30, 2011 joint comments⁵ that "the Commission must prevent gaming through REC reshuffling strategies." Specifically, the Proposed Decision should be amended to ensure both that RECs are retired in the same compliance period they are procured, and that in no event may RECs be retired after 36 months from their generation date. To this end, LSA has a proposed conclusion of law (included in Appendix A) to address this issue.

II. The Proposed Decision Needs to Provide Further Clarification on the Different Compliance Obligations Associated with the Portfolio Content Category Requirements.

The Proposed Decision discusses the maximum limitation for Category 3 procurement, but does not state that the Category 3 limitation is a separate compliance obligation, subject to enforcement by the Commission. Proposed Decision, p. 52. LSA believes that the Category 3 limitation is intended to be a separate compliance obligation and asks that this be explicitly stated in the Decision.

The statute sets forth procurement category requirements in Section 399.16(c). In particular, Section 399.16(c)(2) requires that "[n]ot more than 25 percent for the compliance period ending December 31, 2013, 15 percent for the compliance period

⁵ TURN/CUE Joint Comments, pg. 6.

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 [Category 3] requirements. The PD discusses this limitation on page 52, but does not explicitly identify the Category 3 limitation as a separate compliance obligation, subject to enforcement. Given the different paths to address Category 1 versus Category 3 noncompliance, the PD should clearly affirm that Category 3 is indeed a separate obligation that cannot be remedied through the statutory waiver offered for the Category 1 obligation in Section 399.16(e).

III. The Proposed Decision Defers Consideration of the Enforcement Consequences of the Failure to Meet the Portfolio Content Category Requirements.

The Commission should provide clear guidance on the enforcement consequences for retail sellers who fail to meet their portfolio content category obligations as a next step in this proceeding. While the Proposed Decision would resolve many of the outstanding issues regarding compliance, it defers consideration of enforcement consequences. Developing clear, stringent enforcement consequences is critical to constructing a complete compliance and enforcement framework.

LSA notes the rationale provided for deferring consideration of the enforcement consequences of portfolio content category noncompliance is limited to Category 1 procurement; the PD finds that more input is needed on the process of applying for and

the standards for evaluating a waiver of Category 1 obligations under Section 399.16(e).⁶ This same rationale does not apply to Category 3 noncompliance. Regardless, these enforcement rules and consequences are an important piece of the overall compliance and enforcement framework and should be addressed in an expeditious manner.

CONCLUSION

LSA is generally supportive of the Proposed Decision. However, we believe the Proposed Decision should be amended to address the issues raised in these comments and provide a clear interpretation of the statute that is consistent with the statutory language.

Dated: May 14, 2012

Respectfully Submitted,

/s/ Kristin Burford

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⁶ The Proposed Decision provides an illustrative example of a situation where a retail seller falls short of its Category 1 requirement. Proposed Decision, p. 57. In the example, the seller is short 200 Category 1 RECs, but happens to have excess Category 2 RECs such that the seller meets the overall RPS procurement quantity requirement. The PD concludes that the □Retail Seller is out of compliance with minimum Portfolio Balance requirements (399.16(c)(1)) and subject to enforcement by the Commission. □ Proposed Decision, p. 57 (Table 5, Row 11). However, the PD concludes that is appropriate to defer consideration of enforcement consequences for sellers that fail to meet the Category 1 requirement, as further work is required to specify the process for making and standards for evaluating a waiver request. Proposed Decision, p. 58. The PD does not mention or address enforcement consequences for Category 3 noncompliance.

APPENDIX A
PROPOSED CONCLUSION OF LAW

LSA recommends that the following changes be made to the Conclusions of Law in the Proposed Decision of ALJ Simon in R.11-05-005 on April 24, 2012. Added Language is indicated by underline; removed language is identified in ~~strike-through~~.

Proposed Conclusion of Law

(from pg. 81 of the PD)

18. Retail sellers should be allowed to count for RPS compliance only renewable energy credits that have been retired for RPS compliance not more than 36 months from the original date of the generation with which the REC is associated. To ensure the intent of Section 399.13(a)(4)(B) is achieved, Category 3 RECs must be retired for RPS compliance by a retail seller in the compliance period they are procured by the seller.

Note - similar language should be included in ordering paragraph 17 on page 89.

VERIFICATION

I, Kristin Burford, am the Policy Director of the Large-scale Solar Association. I am authorized to make this Verification on its behalf. I declare that the statements in the foregoing copy of *Comments of the Large-scale Solar Association on the Proposed Decision of ALJ Simon Setting Compliance Rules for the Renewables Portfolio Standard Program* are true of my own knowledge, except as to the matters which are therein 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 14, 2012 at San Rafael, California.

/s/ Kristin Burford

Kristin Burford

Policy Director, Large-scale Solar
Association