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)

OPENING 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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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 opening comments on the Proposed Decision (PD) of ALJ Simon setting compliance rules for the revised Renewables Portfolio Standard (RPS) program pursuant to SBx2 (Simitian). While TURN and CUE appreciates the effort to reconcile complicated statutory provisions, the PD commits serious errors relating to the treatment of excess procurement occurring before, and after, January 1, 2011.

SBx2 contained several key compromises designed to fairly balance the interests of stakeholders. Among those compromises, the Legislature prohibited any banking of short term contracts and unbundled Renewable Energy Credits (RECs). For short term contracts, §399.13(a)(4)(B) directs the Commission to "deduct from the actual procurement quantities, the total amount of procurement associated with contracts of less than 10 years in duration." By deducting short term contracts "off the top," they cannot be banked. For RECs, the Legislature provided that "***[i]n no event*** shall [RECs] be counted as excess procurement. The PD fails to implement this emphatically unambiguous statutory direction.

In another key compromise, the Legislature allowed any retail seller that procured at least 14% of its retail sales from eligible renewable resources in 2010 to avoid any penalties for its failure to meet the 20% requirement. In exchange for allowing retail sellers to "wipe the slate clean," banking of procurement prior to January 1, 2011 was prohibited. The PD fails to implement this clear direction.

As a result, the PD would essentially nullify statutory restrictions that were the subject of intense legislative negotiations and allow retail sellers to employ creative accounting techniques to evade their impact. Moreover, the PD could inadvertently allow retail sellers to receive substantial credit towards the 33% program obligations based solely on the delayed retirement of RECs procured prior to January 1, 2011. Unless the PD is fixed, the integrity of the RPS program could be placed in jeopardy. The Commission must not adopt the PD as written.

I. PERMITTING RETAIL SELLERS TO SELECTIVELY DELAY THE RETIREMENT OF RECS WOULD OBLITERATE THE BANKING RESTRICTIONS

The PD declines to adopt the presumption that a Renewable Energy Credit (REC) procured by a retail seller should be applied to the current compliance period. Citing the 36 month deadline for retiring a REC in §399.21(a)(6), the PD concludes that the "only when the REC has been retired in WREGIS for RPS compliance does it enter into the RPS compliance system."[1] As a result, the PD would allow a retail seller to evade the statutory restrictions on excess procurement related to short-term contracts and Category 3 products through a deliberate strategy of delayed retirement.

By adopting the outcome sought by PG&E, the PD's treatment of REC retirements effectively obliterates any meaningful restrictions on banking. These restrictions were central provisions of SBx2 negotiated by key supporters with the understanding that they would be implemented in good faith by the Commission. Surprisingly, the PD appears determined to dismantle these provisions and establishes a virtual road map for any retail seller seeking to evade their impact. It is difficult to understand how the PD could reach these conclusions without considering the natural response by retail sellers seeking to circumvent banking restrictions.

[1] PD, page 48.

The PD goes even further by suggesting that RECs could be exempt from the product content limitations (and potentially banking restrictions) if "retired for compliance" in one compliance period but "not applied to its RPS compliance obligations in that compliance period."[2] The PD fails to explain how a REC can be "retired for compliance" in one period but actually applied to compliance in a subsequent period. This notion seems to contradict the prior finding that the date of retirement triggers the application of a REC towards a particular compliance obligation.

The PD posits an example in which the retail seller retires 3,000 RECs to satisfy a 2,500 REC requirement during the 2014-2016 compliance period and has 500 excess RECs that are potentially subject to banking restrictions.[3] This scenario is flawed because the retail seller would never voluntarily retire RECs not needed for compliance in the current period.[4] Although some RECs approaching their 36 month expiration date would need to be retired by the end of 2016, the retail seller may delay the retirement of other RECs (procured in 2015 or 2016) so that they can be carried forward into the 2017-2020 compliance period without limitation. Because the PD allows the retail seller to choose which RECs to apply to compliance in a given period, and provides the option of delaying the retirement of RECs that would otherwise be considered excess procurement, a retail seller approaching the end of any compliance period will engage in creative accounting to ensure that there is zero excess procurement subject to banking restrictions.

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[2] PD, page 50.
[3] PD, page 51.
[4] The PD suggests that a retail seller may retire excess RECs "because of difficulties in estimating the ultimate compliance obligation" (page 51). TURN/CUE have seen no evidence that retail sellers (particularly IOUs) experience any such difficulties in the real world. Moreover, the notion that excess RECs will be retired to satisfy the 36 month deadline ignores the fact that a retail seller will compensate by delaying the retirement of an equivalent quantity of newer RECs.

The following table illustrates a situation for compliance period 2 (CP2) in which a retail seller procures 155 RECs to meet a 100 REC procurement target, of which 55 RECs are associated with short-term Category 1 procurement and 50 RECs are associated with Category 3 resources.

	CP2 requirement	CP2 procurement	CP2 retirement	Excess
Category 1	65 (min)	85	65	20
Long-term contracts		*(30)*	*(10)*	(20)
Short-term contracts		*(55)*	*(55)*	0
Category 2		20	20	0
Category 3	15 (max)	50	15	35
Total	**100**	**155**	**100**	**55**

A review of this table reveals that the retail seller has, in practice, successfully managed to bank excess procurement caused entirely by the procurement of short-term contacts and unbundled RECs (category 3).[5] Although SBx2 explicitly prohibits the banking of either type of procurement (and requires short-term procurement to be taken 'off the top'), the PD allows the retail seller to evade these restrictions by immediately retiring all 55 RECs associated with Category 1 short-term contracts and delaying the retirement of 20 RECs associated with Category 1 long-term contracts and 35 RECs associated with Category 3 procurement. These creative accounting actions result in no "excess procurement" during the compliance period under the PD because all short-term category 1 procurement is applied to near-term compliance while the long-term procurement is selectively banked for use in the next compliance period (where it faces no restrictions).

[5] Since the 105 RECs associated with short-term contracts and Category 3 products exceed the 100 REC overall compliance requirement, it would seem obvious that some portion of this procurement should be considered excess in the current period.

The PD's endorsement of creative accounting treatment to circumvent the banking restrictions is particularly problematic in light of the fact that it elsewhere rejects PG&E's proposal to count unbundled RECs and short-term contracts first for purposes of determining any excess during a given compliance period. The PD denies this approach because "PG&E's proposal is not consistent with the statutory language" and fails to take "procurement from short term contracts off the top."[6] Yet by giving a retail seller the opportunity to selectively delay the retirement of RECs, the PD would permit the exact result sought by PG&E. If PG&E's proposal not to take short-term contracts "off the top" is contrary to the intent of the Legislature, then the treatment suggested by the PD (which allows the same outcome) should also be rejected because it suffers from an identical infirmity.

In comments, TURN and CUE proposed that the Commission prevent this type of abuse by adopting a presumption that all RECs are applied to the compliance period in which they are procured by a retail seller. If a retail seller procures RECs under a long-term contract providing renewable energy in 2011, 2012 and 2013, the Commission should presume that those RECs will be credited to the 2011-2013 compliance period. To the extent that this presumption leads to excess procurement, the statutory restrictions in §399.13(a)(4)(B) should be applied to determine what portion of the excess may be carried forward. The 36 month deadline for REC retirement should not be deemed to supersede the banking restrictions. This deadline still applies to the length of time a REC can be held by a generator/seller and allows a retail seller to trade RECs within the current compliance period. This approach is the only one that makes sense in light of the statutory language and intent.

[6] PD, page 62.

II. THE PD MAY ALLOW RETAIL SELLERS TO TRANSFER SUBSTANTIAL AMOUNTS OF PRE-2011 PROCUREMENT TO THE FIRST COMPLIANCE PERIOD (2011-2013) THROUGH DELAYED REC RETIREMENTS

The PD would require each retail seller to submit a "closing report" to determine any net deficit or surplus through 2010. The PD declares that "in making calculations for its closing report, a retail seller may use only procurement (whether banked or procured in that year) that complies with all RPS requirements in effect for the compliance year to which the procurement is being applied."[7] Based on the requirements in SBx2, the PD correctly finds the safe harbor threshold of 14% (that would erase any cumulative deficits) applies only to actual procurement occurring in 2010.

The PD fails to contemplate the potential interactions between the REC retirement rules, the 14% safe harbor threshold, and the closing report. Because the PD elsewhere concludes that the date of retirement for the REC should determine the timing of crediting the REC towards a particular RPS compliance obligation, TURN/CUE have serious concerns about how this rule might apply to procurement that originally occurred prior to January 1, 2011 and was intended to apply to the 20% RPS program annual targets.[8] In the event that a retail seller delayed retiring RECs associated with procurement in 2008, 2009 and 2010 until after January 1, 2011, it appears that the PD would allow the retail seller to apply these RECs to its 2011-2013 compliance period (and such RECs would "count in full").

[7] PD, page 18.
[8] PD, page 48 ("only when a REC has been retired in WREGIS for RPS compliance does it enter into the RPS compliance system.")

The following table provides an illustration of how a retail seller could satisfy the 14% safe harbor threshold while effectively moving the remainder of 2008-2010 procurement into 2011:

	2008	2009	2010	2011
Procured *(1 = 1% of retail sales)*	17	18	19	0
Retired *(1 = 1% of retail sales)*	0	0	14	40

In this case, the retail seller waited until 2011 to retire 54 units of procurement – 14 of which were applied to 2010 in order to meet the safe harbor. The PD appears to allow the retail seller to apply the remaining 40 units to the 2011-2013 compliance period, despite the fact that this outcome is patently absurd. If the PD seeks to establish a different presumption for the procurement of RECs prior to 2011, it is not obvious how the Commission can adopt diametrically opposite rules for REC retirements associated with the same procurement contract delivering renewable energy in 2008-2010 and in 2011 and beyond. In order to remedy this discrepancy, the PD must adopt a fundamentally different rule regarding REC retirements.

The above scenario is not merely hypothetical. TURN has recently reviewed data from the major IOUs showing substantial quantities of pre-2011 renewable procurement where the RECs were actually retired in WREGIS after January 1, 2011.[9]

Under the PD, these quantities could be removed from the 2008-2010 compliance filings and credited instead towards the 2011-2013 compliance period. The fact that the PD fails to justify the serious disconnect between its REC retirement rules and the closing report for the 20% program is deeply troubling.

[9] This information is confidential with access limited to the Procurement Review Group members of each utility.

If the PD is adopted as written, many retail sellers (and POUs) will successfully transplant pre-2011 procurement into the 2011-2013 compliance period due to the timing of their REC retirements. The PD must be modified to prevent this outcome. The best way to accomplish this result is to adopt the presumption that RECs are intended to be credited to the compliance period in effect when the RECs were originally procured by the retail seller.

III. IT IS INAPPROPRIATE TO EXEMPT CONTRACTS EXECUTED PRIOR TO JUNE 1, 2010 FROM BANKING RESTRICTIONS

The PD finds that procurement associated with contracts executed prior to June 1, 2010 shall not be subject to the limitations on banking in §399.13(a)(4)(B) based on the observation that §399.16(d) applies to "procurement requirements established pursuant to this article." The PD extends this logic to reach the conclusion that short-term contracts executed prior to June 1, 2010 can also be eligible for banking despite the explicit prohibition on this treatment in §399.13(a)(4)(B).[10]

The PD inappropriately assumes that §399.16(d) applies to more than just the portfolio content requirements.[11] This assumption is unwarranted and goes well beyond the plain text of the statute. The reason that §399.16(d) and §399.16(c) both reference June 1, 2010 is merely to ensure the proper treatment of these contracts for purposes of the portfolio content restrictions.[12] Stakeholders were understandably nervous about grandfathering treatment and sought assurances that pre-June 1, 2010 contracts would not be subject to the portfolio content limits in §399.16(c).

The Legislature adopted explicit restrictions on banking that apply equally to contracts executed before, and after, June 1, 2010. These restrictions apply to unbundled RECs and short-term contracts irrespective of the date that the initial

[10] PD, page 44.
[11] PD, page 28.
[12] This is known in the Legislature as the "belt and suspenders" approach.

contract was executed. It is inappropriate to arbitrarily narrow the scope of these restrictions given the absence of any language in §399.13(a)(4)(B) suggesting that certain transactions should be exempted.

IV. ALLOWING RETAIL SELLERS TO BANK EXCESS PROCUREMENT ASSOCIATED WITH PROCUREMENT TARGETS THROUGH 2010 IS NOT CONSISTENT WITH SBx2

The PD further relies on the grandfathering provisions in §399.16(d) to justify a rule that would allow retail sellers to bank any procurement through December 31, 2010 in excess of the annual procurement targets applicable prior to the enactment of SBx2. Claiming that this treatment is essential to prevent the diminishment of previously banked procurement, the PD concludes that the Legislature intended to allow unlimited forward banking between the 20% and 33% programs. This interpretation is contrary to law, defies common sense and was not shared by either the Legislative authors or the Legislative Committees reviewing the bill.

In revamping the rules applicable to banking, SBx2 erased the authorization for any pre-2011 procurement to be carried over into the 33% program. The relevant statutory section (§399.13(a)(4)(B)) explicitly authorizes banking on a prospective basis beginning on January 1, 2011. The choice of this date was deliberate and there is no ambiguity in this language.

The PD cannot justify its preferred outcome based on the §399.16(d) reference to "procurement requirements pursuant to this article" because the revised Article 16 of the Public Utilities Code (as amended by SBx2) no longer contains any language describing pre-2011 renewable procurement obligations. It is illogical to conclude that §399.16(d) was intended to require banking of excesses associated with prior program targets that are no longer described in this Article of the Code. Had the

Legislature intended for §399.16(d) to allow banking of excesses associated with the prior program, it would have referred to the legacy procurement requirements.

In considering SBx2, the Legislature believed that explicitly allowing retail sellers to accumulate excess procurement "beginning January 1, 2011" was clear on its face. The policy committee analyses demonstrate that the prohibition on banking any procurement occurring prior January 1, 2011 was well understood. In response to objections raised by the California Municipal Utilities Association (CMUA) on this exact point, both policy committees offered the following summary of the restriction:

> "This bill does allow for banking but only but it is limited to generation between compliance periods and does not permit banking of generation earned prior to January 1, 2011."
> *Senate Energy, Utilities and Communications Committee Analysis of SBx2, February 15, 2011*

> "This bill does not permit banking of generation earned prior to January 1, 2011."
> *Assembly Utilities and Commerce Committee Analysis of SBx2, March 3, 2011*

A letter sent to the Senate Committee by CMUA is attached to this filing.[13] It indicates that organization's desire to modify SBx2 in order to allow banking of pre-2011 procurement. Had the PD's interpretation been correct, there would have been no reason for CMUA to ask for such a change. Since no amendments were made to SBx2 (and therefore no language was changed), the concerns raised by CMUA were not addressed prior to final passage.

After the enactment of SBx2, Senator Simitian amended a separate bill (SB 23) to allow the banking of excess procurement associated with targets in effect through

[13] See Attachment A.

2010 for Publicly Owned Utilities.[14] A series of Legislative analyses of SB 23 noted that the bill would, in contrast to current law, allow POUs to bank procurement in excess of targets applicable through 2010.[15] SB 23 failed to gain passage at the end of the 2011 legislative session.

In early 2012, AB 1868 (Pan) was introduced for the purpose of allowing all retail sellers and Publicly Owned Utilities to bank excess procurement associated with the 20% program. The Legislative Counsel Digest states the rationale for AB 1868 as follows:

> This bill would recast the requirement that the PUC adopt banking rules and would expand the banking rules to authorize excess procurement accumulated through December 31, 2010, to be applied to subsequent compliance periods if specified conditions are met. The bill would require the governing board of a local publicly owned electric utility to adopt rules for banking in the same manner as the recast and expanded rules adopted by the PUC for retail sellers.
> *Legislative Counsel Digest for AB 1868 (Pan, 2012)* [emphasis added]

There is no indication that the Legislature has ever shared the interpretation reached by the PD. The Legislative History subsequent to the enactment of SBx2

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[14] SB 23 (Amended on September 2, 2011) included the following proposed amendment to §399.30(c)(3):

> (3) A local publicly owned electric utility shall adopt procurement requirements consistent with Section 399.16.
> (d) The governing board of a local publicly owned electric utility may adopt the following measures:
> (1) Rules permitting the utility to apply excess procurement ~~in~~ *of eligible renewable energy resources accumulated through December 31, 2010, or from* one compliance period to subsequent compliance periods, in the same manner as allowed for retail ~~sellers pursuant to Section 399.13.~~ *sellers. Those rules shall ensure that excess procurement accumulated through December 31, 2010, is calculated based on annual eligible renewable energy resource procurement targets in effect since 2006, provided that the procurement targets, as amended, specified the achievement of not less than a 20 percent renewables portfolio standard by no later than December 31, 2010, and included increasing procurement targets for each intervening year.*

[15] Assembly Floor Analysis of SB 23, September 2, 2011; Senate Floor Analysis of SB 23, September 9, 2011 ("Specifically, this bill…permits local publically owned utilities that have met the 20% requirement by 2010 to bank its excess procurement.")

demonstrates that Legislators, Committee Staff, the Legislative Counsel and a wide array of stakeholder interests all believed the opposite to be true. The PD commits a reversible error by concluding that §399.16(d) was intended to trump the prohibition on banking any procurement occurring prior to January 1, 2011. It must be modified to conform to the obvious and unambiguous legislative intent.

Respectfully submitted,

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Dated: May 14, 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 14, 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 14, 2012, at South San Francisco, California.

_____/s/_____
Marc D. Joseph
Attorney for the Coalition
of California Utility Employees

ATTACHMENT A

CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION

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DAVID L. MODISETTE, EXECUTIVE DIRECTOR

The Honorable Alex Padilla
Chair, Senate Committee on Energy, Utilities and Communications
State Capitol, Room 5046
Sacramento, CA 95814

Re: SBX1 2 (Simitian) – As Introduced - SUPPORT IF AMENDED

Dear Chairman Padilla:

On behalf of our consumers, the California Municipal Utilities Association (CMUA) has taken a SUPPORT IF AMENDED position on SBX1 2 (Simitian).

CMUA supports a 33% by 2020 Renewables Portfolio Standard (RPS); many of the governing boards of our publicly owned utilities (POUs) have already adopted such a requirement. However, we are concerned with other provisions in the bill and have narrowed those concerns to the issues below.

Existing law has allowed the governing boards of POUs to set individual target dates, which has led to varying dates and targets that do not conform to the compliance periods set forth in the bill. Flexibility is needed as we transition to bring our local programs into alignment with a statewide policy.

More specifically, we are concerned with language in the bill requiring an "average" of 20% renewables for the first compliance period, which for quite a few smaller POUs means the need to procure *more* than 20% each year during that period. We also ask that the first compliance period for POUs be set using the same dates as in the adopted CARB renewable energy standard regulations, which is January 1, 2012 through December 31, 2014. Although these dates will require significant acceleration of target dates and renewable resource procurement by quite a few smaller POUs, we are willing to do that. Our utilities are poised to meet the 20% by the end of 2014 and need flexibility during the first phase of implementation.

Lack of achieving those targets may lead to significant penalties set by the CARB. As non-profit consumer-owned utilities, penalties will come directly from ratepayers, unlike the IOUs where penalties are absorbed by shareholders.

Conversely, some POUs that have taken early action to meet California's 20% RPS goal in 2010 and may be significantly impacted financially, including stranded investment, by the bill's change to the RPS banking and carryover rules. Excess renewable generation from existing RPS programs should be allowed to be fairly carried over into future years.

We look forward to working with the Legislature on this important legislation. Attached you will find CMUA's proposed amendments. Thank you for your consideration of our position and requested amendments.

Sincerely,

Alicia Priego

Alicia Priego
Director for Energy

Cc: The Honorable Joe Simitian
Members, Senate Committee on Energy, Utilities and Communications
Gareth Elliot, Office of the Governor

California Municipal Utilities Association

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CMUA PROPOSED AMENDMENTS TO SBX1 2 (SIMITIAN) - 33% RPS

Amendment 1 – For publicly-owned utilities, change the first compliance period to be the same as in the adopted CARB regulations, and delete the averaging requirement (page 56, beginning with line 26):

b) The governing board shall implement procurement targets for a local publicly owned electric utility that require the utility to procure a minimum quantity of eligible renewable energy resources for each of the following compliance periods:
(1) January 1, ~~2011~~ **2012**, to December 31, ~~2013~~ **2014**, inclusive.
(2) January 1, ~~2014~~ **2015** to December 31, 2016, inclusive.
(3) January 1, 2017, to December 31, 2020, inclusive.
(c) The governing board of a local publicly owned electric utility shall ensure all of the following:
(1) The quantities of eligible renewable energy resources to be procured ~~for the compliance period from January 1, 2011, to~~ **by** December 31, ~~2013~~ **2014**, ~~inclusive, are equal to an average of~~ **shall not be less than** 20 percent of retail sales.

Amendment 2 – Banking and Carryover Provision (page 28, beginning with line 28).

(B) Rules permitting retail sellers to accumulate, beginning January 1, 2011, excess procurement in one compliance period to be applied to any subsequent compliance period. **The rules shall also allow excess procurement above 20 percent achieved by December 31, 2010 to be applied to subsequent compliance periods.** The rules shall apply equally to all retail sellers. In determining the quantity of excess procurement for the applicable compliance period, the commission shall deduct from actual procurement quantities, the total amount of procurement associated with contracts of less than ~~10~~ **5** years in duration. In no event shall electricity products meeting the portfolio content of paragraph (3) of subdivision (b) of Section 399.16 be counted as excess procurement.

Amendment 3 – Technical clarification to grandfather eligible resources as provided in existing PU Code section 399.12.5 (page 22, beginning with line 22).

C) A facility approved by the governing board of a local publicly owned electric utility prior to June 1, 2010, for procurement to satisfy renewable energy procurement obligations adopted pursuant to former Section 387, shall be **deemed** certified as an eligible renewable energy resource by the Energy Commission pursuant to this article, if the facility is a "renewable electric generation facility" as defined in Section 25741 of the Public Resources Code, **or is an incremental increase in the amount of electricity generated, as a result of efficiency improvements at the facility, pursuant to Section 399.12.5, without regard to the date the improvement project was initiated.**