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 R.11-05-005

COMMENTS OF THE GREEN POWER INSTITUTE ON COMPLIANCE AND ENFORCEMENT IN THE RPS PROGRAM

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COMMENTS OF THE GREEN POWER INSTITUTE ON COMPLIANCE AND ENFORCEMENT IN THE RPS PROGRAM

Pursuant to the September 27, 2013, *Administrative Law Judge's Ruling Requesting Comments on Compliance and Enforcement Issues in the Renewables Portfolio Standard Program*, as modified by the October 18, 2013, *Ruling* by ALJ Simon granting an extension to file Comments until October 25, 2013, in Proceeding R-11-05-005, the **Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program**, the Green Power Institute (GPI), the renewable energy program of the Pacific Institute for Studies in Development, Environment, and Security, provides these *Comments of the Green Power Institute on Compliance and Enforcement in the RPS Program*.

In the opinion of the GPI, compliance and enforcement is a key component of any successful program. During the first phase of California's RPS program (2003 – 2010), when the IOUs were unable to meet their RPS procurement obligations, the lack of an effective compliance and enforcement mechanism allowed them to accumulate large procurement deficits without ever facing consequences. Moreover, as it became clear that the IOUs were losing ground on meeting their procurement obligations, they were able to repeatedly weaken the compliance rules in order to avoid a technical default, despite their failure to comply with their RPS procurement obligations. Indeed, one of the reasons that the legislators changed the compliance mechanism in SB 2 (1X) for the new phase of the RPS program was because the old compliance regime was feckless.

These *Comments* are being filed in the final quarter of 2013, near the end of the first of the three multiyear compliance periods that constitute the second phase of California's RPS program (2011 – 2020). Based on the most recent RPS Compliance Reports, which were submitted on August 1, 2013, the current outlook is for all three of the large IOUs to comfortably make their RPS procurement obligations for the 2011 – 2013 compliance

period, as well as for the 2014 – 2016 compliance period.[1] With this perspective in mind, it is easy to discount the importance of establishing a strong compliance and enforcement mechanism. That would be a mistake. As the figure below illustrates, in the initial phase of the state's RPS program (2003 – 2010) the IOUs had a surplus of RPS energy when the program went into effect. However, by 2006 the utilities were running deficits that grew steadily for the following five years.

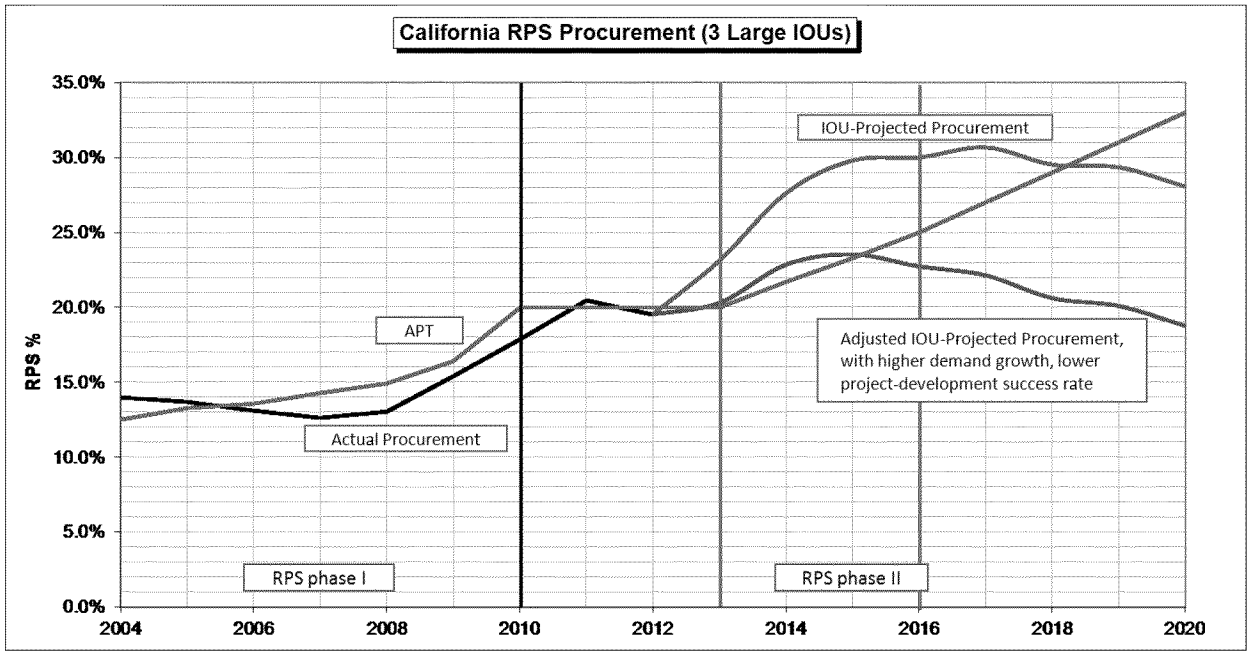

Figure adapted from *Comments of the Green Power Institute on the August 2013 IOU RPS Compliance Report*s, Sept. 18, 2013, based on data from the August 1, 2013, IOU RPS Compliance Reports.

It is encouraging that the IOUs appear to be in a surplus position at this time with respect to their RPS requirements, but the fact is that after four years during which the RPS target remained constant at 20 percent (2010 – 2013), and a depressed economy with weak demand for electricity that made the renewable content several points higher than it otherwise would have been, the required RPS percentage will be ramping up steadily over the next seven years, reaching 33 percent in 2020. It is certainly our hope that enforcement

[1] See *Comments of the Green Power Institute on the August 2013 IOU RPS Compliance Reports*, filed Sept. 18, 2013, in R.11-05-005.

actions and penalties for RPS non-compliance never have to be given a second thought during the current phase of the California RPS program. However, we note that a weak enforcement mechanism that was increasingly weakened as the IOUs fell further and further behind their procurement obligations allowed the utilities to shirk their RPS mandates in the first phase of the RPS program, and it could happen again if an effective enforcement and penalty system is not crafted here.

Compliance Reports

The GPI strongly supports requiring the formal filing in the RPS docket of the RPS Compliance Reports for the final year of a compliance period. If and when these Compliance Reports require updating, the updates should be filed and served, as well. At the most basic level, having these reports filed in the RPS docket has the benefit of ensuring that the valuable information they contain is placed into the formal record of the proceeding, thus making it available to decision makers at the Commission who must make determinations that are crucial to the future of the state's popular RPS program. In addition, the reports provide the Commission and the public with sufficient information in a single place to provide a reasonable overview of the progress of the utilities in complying with their RPS obligations, and increasing the renewable content of their energy mix. The reports already have to be served to the service list of the RPS proceeding. The additional step of having to file them is trivial in the digital age.

While the questions in the Ruling address whether to require the filing of RPS Compliance Reports specifically in the final year of a compliance period, the fact is that Compliance Reports already must be prepared and submitted to the Commission and the service list annually, and we urge the Commission to require the filing of all annual RPS Compliance Reports, regardless of whether they report on the final year of a compliance period, or on an intermediate year. The reports from the intermediate years of each compliance period provide important information concerning both the short term and the long-term outlook for RPS procurement in California, and it would benefit the Commission and the parties to have this information entered into the record on an annual basis, rather than having a gap of

as much as four years between filed reports. As stated above, the additional step of filing is a trivial matter that does not add to anybody's workload.

The GPI strongly believes that parties should be encouraged to comment on the RPS Compliance Reports filed by retail sellers, and we have expressed that sentiment in the current, as well as previous RPS proceedings. Indeed in the absence of such a mandate, four times during the past five years the GPI has filed a *Motion for Leave to File Comments* on the RPS Compliance Reports (3/30/9, 4/12/10,4/28/11, in R.08-08-009, and 9/18/13 in R.11-05-005), and four times the Commission has acted favorably on our Motions, in the process allowing us to file the *Comments on the RPS Compliance Reports* that we proffered.[2] Based on the feedback we have received from a variety of parties, including Commission staffers, our Comments have been well received, and have provided valuable perspective to the Commission, the parties, and the public on the state of the RPS program in California. Indeed, when we failed to provide comments on the Compliance Reports in 2012, several parties, including Commission staffers, expressed their disappointment to us.

In fact, we have recently been alerted by a utility representative that some of the historical numbers in our Sept. 18, 2013, *Comments on the 2013 IOU RPS Compliance Reports* are slightly out-of-date, a result, we believe, of the fact that we failed to update our database with information available from the RPS Closing Reports that the utilities submitted following the end of the first phase of the RPS program. We pledge to make the necessary updates to the historical portion of our database before the date on which the Commission determines that Comments are due on the August, 2014, RPS Compliance Reports.

Waiver of Portfolio Quantity Requirements

While SB 2 (1X) clearly intends for the Commission to install a new compliance system with effective enforcement provisions into the RPS program, like any reasonable system there has to be a mechanism for forgiveness for extraordinary circumstances that are clearly

[2] See, for example, *Administrative Law Judge's Ruling Granting Motion of Green Power Institute for Leave to File Comments on IOU RPS Compliance Reports*, Oct. 18, 2013, in R.11-05-005.

beyond the control of the regulated entities. Section 399.15(b)(5) of the state's Public Utility Code, the waiver provisions for the second phase of the RPS program, provides, in effect, the "act-of-God' clause that can be used by the Commission for the granting of a waiver of portfolio quantity requirements to a regulated retail seller. There are three subsections to §399.15(b)(5) that enumerate valid causes for granting a waiver:

A. Inadequate transmission infrastructure
B. Delays in the development of new renewable generating infrastructure
C. Unexpected curtailment ordered by a balancing authority

Note that the waiver provisions under §399.15(b)(5) of the statute do not include the circumstance in which the costs of compliance with an RPS obligation are excessive. Cost control is a separate matter, which is subject to a different section of the Code, and is being handled concurrently in a separate track of this proceeding. Waiver of portfolio quantity requirements, as considered here under §399.15(b)(5), is based on extraordinary circumstances beyond the reasonable control of a retail provider of electricity, not on the cost of RPS power.

It is clear from the text of the statute that the enumerated rationales for waivers can be invoked only after the retail seller has taken all reasonable precautions to manage the known risks of infrastructure development and deployment, including contracting for an amount of RPS-qualifying capacity that builds-in a reasonable margin for expected project delays and cancellations, and that allows for below-average-production years for resources whose output varies on an annual basis, like wind, solar, and hydro, as well as occasional curtailments that might be ordered by a balancing authority. In other words, the criteria for a waiver are "act-of-God" worthy circumstances, not a showing that ten or even thirty percent of the contracts for RPS projects-under-development failed to reach operational status. That outcome is expected based on historical experience, and should be planned for in the normal course of utility-resource-planning activities.

We believe that the Commission has fairly broad discretion under §399.15(b)(5) to grant waivers for major disasters that may not fit comfortably under the three bullet points

enumerated above (subsections (A), (B), and (C) to §399.15(b)(5)). We can imagine circumstances, such as major earthquakes or fires, that might legitimately lead to the invocation of this privilege. However, we believe that the threshold for invoking a waiver should be very high, indeed.

In the opinion of the GPI, waiver requests should be judged on the particulars of the specific circumstances that have led to, or appear to be leading to, a default of an RPS program obligation. It is not necessary to attempt to foretell all possible circumstances that might qualify as legitimate reasons for granting a waiver. Waiver requests should be formally filed with the Commission by the petitioner, as tangible Commission action is being requested. Comments by the parties on a retail seller's waiver application should be allowed, in accordance with normal Commission practice and procedure.

In answer to the final question in this section of the *Ruling*, the Commission most certainly **should** require a retail seller to apply all available procurement to the compliance period at issue prior to seeking a waiver of the portfolio quantity requirement. This is important because RECs are bankable forward, and a retail seller seeking a waiver should not be able to bank RECs that could have been applied to the compliance-period obligation for which a waiver is being sought. The waiver should only excuse the portion of the obligation that the regulated entity is unable to meet. There should not be any reward to a retail seller seeking a waiver-of-obligation under the RPS program.

Reduction of Procurement Content Requirement

In addition to setting overall RPS procurement requirements for retail sellers, SB 2 (1X) also creates three categories of RECs, and sets limits on the fraction of the RECs that can be used for compliance during each compliance period from the two categories of RECs that are considered to be of lesser value to California ratepayers, categories 2 and 3. In the option of the GPI, these content-category limitations are subordinate to the overall procurement requirements in the legislation, and this interpretation is reinforced by prior

Commission Decisions in the RPS proceeding (see, for example, D.11-12-052, and D.12-06-038).

The GPI believes that the threshold for what constitutes a valid reason for granting a reduction in a procurement-content requirement should be lower than what is required for a waiver of the overall portfolio-quantity requirement. Nevertheless, the process of applying for a reduction in a procurement-content requirement should be the same as the process of applying for a waiver, including filing as well as serving of the application for reduction, and providing the opportunity for parties to comment on the application.

As we noted in our Sept. 18, 2013, *Comments* on the recent RPS Compliance Reports in this proceeding, due to the grandfathering of pre-SB 2 (1X) contracts, it is highly unlikely that there will be a violation of a procurement-content category restriction during the current phase of the RPS program:

> The IOUs project their 2013 – 2020 procurement by content category in the RPS Compliance Reports. While the intentions behind creating these content categories might be laudable, the fact that so many RECs are permanently grandfathered effectively negates whatever policy goals this section of the legislation was designed to achieve. The two largest IOUs project that they will use only grandfathered and category 1 RECs through 2020. SDG&E reports some category 3 RECs in 2012, and may be projecting continuing use of category 3 RECs through 2016, although that is not clear due to the fact that they have blacked out these years in their Compliance Report. Nevertheless, it is clear that SDG&E expects to use only grandfathered and category 1 RECs during 2017 – 2020, for which they do present data. Even in 2020 the proportion of RECs that are classified as grandfathered are 62 percent of the total RECs that are projected to be used for compliance. Thus, the restrictions in the legislation on the use of RECs in content categories 2 and 3 will have no effect at all in the real-world marketplace. [GPI *Comments*, 9/18/13, pgs. 15-16.]

Penalties

Although the penalty provisions adopted for the first phase (2003 – 2010) of the state's RPS program[3] were never tested, they probably were sound for the time and context in which they were adopted. We believe that the Commission should adopt a presumptive penalty amount of $50 /REC for the current phase of the RPS program, but adjustments

[3] The penalty mechanism was established in D.03-06-07. The penalty amount was set at $50/MWh, and capped at $25 million annually for all obligated entities.

need to be made in how the penalty and the penalty caps are applied, particularly in the context of the multiyear compliance periods that are employed in this phase of the program.

In addition to having provisions for penalties in the first phase of the RPS program, the penalty mechanism also employed an annual cap on the amount of penalties that could be assessed to a retail seller. The maximum penalty amount for all retail sellers was set at $25 million per year, regardless of the size of the retail seller. This kind of penalty-cap structure strongly favors the largest retail sellers, and in the opinion of the GPI it should not be employed in the current phase of the RPS program. If the phase-1 RPS program had not had the generous flexible-compliance provisions that allowed the IOUs to essentially rollover their RPS program obligations, and had the penalty provisions been invoked based on their actual procurement performance each year, the cap would have saved both PG&E and SCE many millions of dollars during most of the years for which they ran deficits. In some cases the penalty that would have been assessed would have been reduced by more than 75 percent compared to what it would have been without a cap. In our opinion, the $25 million annual cap on the penalty amount for the largest IOUs was not high enough.

We believe that the penalty unit amount ($/REC) should not vary based on the number of years in a particular compliance period, although at some point in the future it might be appropriate to adjust it for inflation, or adjust it based on market signals if and when a mature market for RECs emerges. The unit penalty amount also should not vary based on the volume of retail sales for a given retail seller. On the other hand, the amount of the penalty cap, if a cap is employed at all, should indeed be adjusted based on the number of years in a given compliance period, **and** on the size of the retail seller.

In our opinion, the annual penalty cap should be no lower than $50 million annually for the two largest IOUs, PG&E and SCE. The penalty cap for SDG&E should be set at $10 million annually, in order to provide for reasonable equivalence in value. Equivalently scaled-down caps should be established for smaller retail sellers. For multiyear compliance periods the penalty cap should be calculated as the annual cap amount times the number of

years in the compliance period. There should be no discount for a multiyear compliance period.

As discussed previously under the topics of Waiver of Portfolio Quantity Requirements, and Reduction of Procurement Content Requirement, the GPI believes that the portfolio balance requirements (PBR) standards are subordinate to the procurement quantity requirements (PQR) standards, and we believe that prior Commission Decisions have reinforced this hierarchy. This being the case, in our opinion the penalties for a violation of a retail seller's PBR standards should be less than the penalties for a violation of a retail seller's PQR standards. We support the retention of the $50 per REC penalty level for shortfalls in meeting a PQR standard. We believe that a $25 per REC penalty level would be appropriate for shortfalls in meeting a PBR standard. We further believe that the annual penalty cap for shortfalls in meeting a PBR standard should be set a level that is 50 percent of the cap for shortfalls in meeting a PQR standard.

Finally, if a retail seller has a deficiency of both the PQR and the PBR in the same compliance period, we believe that penalties should be imposed for each violation, with the exception that if a PQR violation can be shown to be causing the PBR violation, then only the PQR violation need be penalized.

Alternative Compliance Mechanisms

On a policy level, the GPI strongly favors compliance and penalty provisions that use whatever monies that are generated for purposes of promoting renewable energy development, rather than having it deposited in the state's general fund, which is our understanding of what would have happened had there been penalties assessed in the first phase of the state's RPS program (2003 – 2010).

The discussion in the *Ruling Requesting Comments* considers using alternative compliance mechanisms in two distinctly different applications, first as a voluntary alternative available for use by the LSEs to the actual procurement of renewable energy, and second as a result of the imposition of a penalty for noncompliance. In our opinion it is absolutely

imperative that any funds that might be collected in the first category, that is as a voluntary alternative to RPS procurement, be used for purposes of facilitating the development of renewables. These are funds that presumably would have been used for purposes of acquiring renewable energy, had there been any available at up to the cost of the alternative-compliance payment. The funds should be used for purposes of facilitating renewable energy production, if not directly through the purchase of renewable energy, then indirectly, through the alternative-compliance payment being used for purposes of renewable energy development.

The GPI is not in favor of adopting a program that is based on offering an alternative-compliance payment as an option available to be used by an LSE in meeting its compliance obligations. In our opinion that kind of system is not consistent with California's RPS statutes, and would require a complete overhaul of the program in order to be implemented effectively. Considering the fact that we are still in the process of overhauling the program in response to SB 2 (1X), it would not only be a colossal waste of resources to go back and start the overhaul again, it would harm the ongoing RPS program itself, which seems to be performing reasonably well at this point in time, and benefits from having a reasonably predictable future.

While we oppose the adoption of a program that allows LSEs to voluntarily make alternative compliance payments in lieu of procuring the mandated quantity of renewable energy, we are supportive of the use of penalty assessments for purposes of facilitating renewable energy development in California, if it is possible to do so within the confines of the law. As non-lawyers we do not address the legal aspects of the matter, but we believe that the policy imperative for using penalty funds on behalf of renewables, should penalties have to be imposed, is obvious. The only question that remains to be addressed is that of the legality.

RPS Citation Program

The RPS citation program, as established in 2009 by Resolution E-4257, is designed specifically to enforce the reporting-requirements component of the Commission's RPS program. While there have been major changes in the RPS program in the intervening years, the fact is that there are still annual reporting requirements, and the need to enforce these requirements is unchanged. We believe that the citation program established by Res. E-4257 is an appropriate basis for designing a new citation program for the second phase of the state's RPS program. Indeed, we see no reason why the existing Resolution, which pertains to the reporting requirements for the RPS program, cannot be carried through essentially intact into the current phase of the program.

The *Ruling Requesting Comments* asks whether additional areas outside of enforcing the mandatory reporting requirements could, or should, be made subject to the RPS citation program. We have no nominations to make at this point in time, but reserve the right to do so in response to other parties' *Comments*.

Compliance Reporting

The GPI has been involved with the Commission's process for developing and updating the RPS compliance spreadsheet, and we believe that the process should continue to be used going forward. The process is open and public, and, in our opinion, has produced a very useful product.

In the opinion of the GPI, PUC §399.13(a)(3) more than adequately spells out the elements that need to be addressed in the narrative portion of an LSE's RPS Compliance Report. We do not believe that it is necessary to overly prescribe how to write this section of the report, other than requiring that the entirety of §399.13(a)(3) be satisfied. It might be useful to conduct a public discourse about expectations for this section of the report at the next meeting of the advisory group for the updating of the reporting spreadsheet.

Because the narrative portion of the RPS Compliance Reports is clearly a reporting matter, it makes perfect sense to enforce it using the mechanism of the RPS citation program. As discussed in detail in Res. E-4257, reporting entities are encouraged to work with Commission staff in the development of their reports, and if they have questions as to whether they have fulfilled their obligations, they are encouraged to address their concerns with staff prior to submitting their reports.

Conclusion

The GPI strongly encourages the Commission to adopt a strong and effective compliance and enforcement system for the current phase of the RPS program. Equally important, once the system is designed and enacted, we strongly urge the Commission to resist future changes to the system that might be initiated by obligated entities who find themselves at risk of noncompliance. Compliance and enforcement mechanisms need teeth in order to be effective. We would hate to see repeat of the first phase of the program, which began with a Decision, D.03-06-071, which declared that RPS rules would not permit a three-year rollover of a retail seller's RPS-procurement requirements, and ended by allowing exactly that rollover, and more.

Dated October 25, 2013

Respectfully Submitted,

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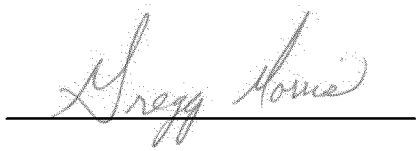
VERIFICATION

I, Gregory Morris, am Director of the Green Power Institute, and a Research Affiliate of the Pacific Institute for Studies in Development, Environment, and Security. I am authorized to make this Verification on its behalf. I declare under penalty of perjury that the statements in the foregoing copy of *Comments of the Green Power Institute on Compliance and Enforcement in the RPS Program*, filed in R.11-05-005, 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.

Executed on October 25, 2013, at Berkeley, California.



Gregory Morris