BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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

COMMENTS OF THE LOS ANGELES DEPARTMENT OF WATER AND POWER TO THE ADMINISTRATIVE LAW JUDGE'S RULING REQUESTING COMMENTS ON COMPLIANCE AND ENFORCEMENT ISSUES IN THE RENEWABLES PORTFOLIO STANDARD PROGRAM

RANDY S. HOWARD
Director of Power System Planning and Development and
Chief Compliance Officer – Power System
Los Angeles Department of Water and Power
111 North Hope Street, Room 921
Los Angeles, CA, 90012
Telephone Number: (213) 367 – 0381
Email: Randy.Howard@ladwp.com

JEAN-CLAUDE BERTET, Deputy City Attorney
Los Angeles Department of Water and Power
111 North Hope Street., Suite 340
Los Angeles, CA, 90012
Telephone Number: (213) 367 – 4630
Email: Jean-Claude.Bertet@ladwp.com
Attorney for the Los Angeles Department of Water and Power

October 25, 2013

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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

COMMENTS OF THE LOS ANGELES DEPARTMENT OF WATER AND POWER TO THE ADMINISTRATIVE LAW JUDGE'S RULING REQUESTING COMMENTS ON COMPLIANCE AND ENFORCEMENT ISSUES IN THE RENEWABLES PORTFOLIO STANDARD PROGRAM

In accordance with Rule 6.2 of the Rules of Practice and Procedure of the California Public Utilities Commission (CPUC, or Commission) and the *Administrative Law Judge's Ruling Requesting Comments on Compliance And Enforcement Issues In The Renewables Portfolio Standard Program* (RFI), dated September 27, 2013, the Los Angeles Department of Water and Power (LADWP) respectfully submits these comments.

I. INTRODUCTION

The City of Los Angeles is a municipal corporation and charter city organized under the provisions set forth in the California Constitution. LADWP is a proprietary department of the City of Los Angeles, pursuant to the Los Angeles City Charter, whose governing structure includes the Mayor, the fifteen-member City Council, and a five-member Board of Water and Power Commissioners (Board). LADWP is the third largest electricity utility in the state, one of five California Balancing Authorities, and the nation's largest municipal utility, serving a population of over four million people. LADWP is a vertically integrated utility, both owning and operating the majority of its generation, transmission and distribution systems. LADWP has annual sales exceeding 23 million megawatt-hours (MWhs) and has a service territory that covers 465 square miles in the City and most of the Owens Valley. The transmission system

serving the territory totals more than 3,600 miles transporting power from the Pacific Northwest, Utah, Wyoming, Arizona, Nevada, and California to Los Angeles.

As a result of combined regulatory mandates for increased renewable energy, an emissions performance standard on fossil fuel generation, energy efficiency, solar roofs, reduction in greenhouse gas (GHG) emissions, and the elimination of once-through cooling from coastal power plants, LADWP is facing a utility-wide transformation and making billions of dollars in investments on behalf of its ratepayers over the next 17 years to replace approximately 70 percent of the resources that it has relied upon for the last 50 years.

Per the California Renewable Energy Resources Act (SB 2 [1X]), LADWP is in the process of amending its RPS Policy to incorporate an Enforcement component and has proactively acquired renewable energy resources such as wind, solar, and geothermal facilities that meet the requirements of the RPS Guidebooks established by the State of California. LADWP continues to implement renewable resources and is on track to meet the 33 percent renewables target by 2020.

II. COMMENTS

Section 399.30 (p) clearly recognizes that local governing boards have jurisdiction to enforce SB 2 (1X) on their respective Publicly Owned Electric Utilities (POU's). Therefore, the Commission does not have jurisdiction over the POU's development and enforcement of their RPS programs. Nevertheless, LADWP provides these comments to the CPUC to inform its decision making process, since discussions in this proceeding will influence the interpretations to be made by the California Energy Commission (CEC) and POU governing boards.

The LADWP appreciates the opportunity to provide comments to the Commission.

LADWP generally supports the comments being filed concurrently in this proceeding by the California Municipal Utilities Association (CMUA) and the Southern California Public Power Authority (SCPPA).

a. General Comments

The first compliance period under the SB 2 (1X) is being used as a learning period for several utilities to analyze the system impacts related to maintaining a baseline of 20% renewables, and the potential impacts associated with increased procurement of renewable resources. LADWP has already made several system modifications to meet several state mandates, including SB2 (1X). For example, LADWP is repowering the Haynes Generating Station to eliminate Once Through Cooling (OTC), which included the addition of six LMS100 natural gas units to allow LADWP's system operators to re-start 600 MW of flexible generation in ten minutes with the capability of running one of the units in synchronous condenser mode. These units were chosen because they have better load following characteristics to better accommodate the increased integration of intermittent renewable resources.

As utilities are preparing to complete the first compliance period strong, it is important for the CPUC and similar state agencies encourage flexible compliance with the RPS rather than harshly punish utilities for shortfalls on procurement. For POUs, the burden of penalties is placed directly on its ratepayers.

b. Waiver of PQR

Should the Commission specify now how it will interpret certain key terms in the statutory requirements (e.g., "all reasonable operational measures," in Section 399.15(b)(A)(ii); or "prudently managed portfolio risks," in Section 399.15(b)(B)(i))? Should the Commission make its interpretation only in the context of a waiver request made by a retail seller? Why or why not?

The Commission should not specify now how it would interpret certain key terms in the statutory requirements. As the end of 2013 draws near along with the end of the first compliance

period and a yet to be developed penalty structure, it is simply too soon to interpret what "reasonable" or "prudently managed portfolio risks" means. The Commission should, however, consider developing guidelines as it receives waiver requests while it assesses the development, interconnection, and impact of renewable energy to the grid in California as retail sellers seek to meet the targets in SB2 (1X).

How Should a Retail Seller's Waiver Request be Submitted?

The waiver should be filed and served as a separate application to the Commission or Energy Division (as the case may be) at the same time as its annual compliance report or earlier, as determined by the retail seller.

Should comment by parties to the then-current RPS proceeding be allowed on requests for waivers? Why or why not? If comments should be allowed, at what point should they be made?

Comments by parties to the then-current RPS proceeding should not be allowed on requests for waivers. The process should be streamlined with a relatively quick response time. If others are allowed to submit comments, this will slow down the application and review process considerably.

What minimum amount and type of information, if any, should be included in the waiver request? For example, should the retail seller be required to specify the condition(s) in Section 399.15(b)(5) on which it relies? Please explain the basis for the information specified.

Retail sellers should be allowed to determine the type of information the Commission needs based on facts impacting the waiver request.

What kind of showing should the Commission require in order for a retail seller to "demonstrate that any of the [listed] conditions are beyond the control" of the retail seller?

If the burden is placed on the retail seller, then the showing or standard for a waiver request should be a "preponderance of the evidence standard," also known as a "more likely than not" standard. This is a common standard in Courts of law for a wide range of causes of action

and legal issues from the "voluntariness of confessions or admissions" in criminal proceedings, under both federal and California law,[1] to whether jurisdiction of a California court in fact exists based on a waiver of a tribal sovereign immunity.[2]

The "clear and convincing" standard, and the "beyond a reasonable doubt" standard for criminal convictions are too high. Courts require waiver with a clear and convincing standard when the intent of the parties in a civil matter is based on some doubt, such as in a commercial transaction.[3] Moreover, the beyond a reasonable doubt standard is applied in the criminal context when a person may face the prospect of losing his or her freedoms or life.[4] Neither of which are the reasons here.

Here, the retail seller is seeking waiver of enforcement by the CPUC as authorized by the California legislature in SB2 (1X). There is no question as to the retail seller's intention and the request sought is based on conditions already identified by the legislature. Therefore, whether a retail seller satisfies the stated conditions should be determined by a preponderance of the evidence.

Should a retail seller be required to make a separate showing that one or more of the listed conditions prevented its compliance with its PQR? If yes, what kind of showing should the Commission require?

A retail seller should not be required to make a separate showing that one or more of the listed conditions prevented its compliance with the PQR. A separate showing goes beyond what the legislature stated in 399.15, which requires a "finding" by the Commission for a waiver of enforcement. The language in 399.15 that appears to entertain this question is prospective in

---

[1] *People v. Markham* (1989) 49 Cal. 3d 63, 71
[2] *Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel* (2011) 201 Cal. App. 4th 190, 217.
[3] *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.,* (1994) 30 Cal. App. 4th 54, 60
[4] See e.g., *People v. Bradford* (1997) 14 Cal. 4th 1005.

nature using the terms "will prevent compliance." A separate showing may possibly apply if a waiver is sought prospectively – for a future compliance period.

Must any required showings for a waiver be made through evidentiary hearings? Why or why not?

An evidentiary hearing should only be triggered if there is an appeal to the Commission's decision.

If such showings may be made without evidentiary hearings, what format should the Commission require?

The Commission should require affidavits of California licensed professional engineers. Statements by these licensed professionals should be sufficient to support factual findings needed by the Commission.

Should the Commission require a retail seller to apply all available excess procurement[2] to the compliance period at issue prior to seeking a waiver of PQR?

To avoid potentially large rate impacts and impacts to the market for RECs (which could take several years to develop) there should not be a requirement to use excess procurement before seeking a waiver.

c. Reduction of Procurement Content Requirement

Does the grant of a reduction in a procurement content requirement also reduce the retail seller's PQR for the compliance period? Why or why not?

It would be judicious for the CPUC to reduce a retail seller's PQR for the compliance period when it grants a reduction in a procurement content requirement.

In order to determine overall compliance with the RPS, a utility needs to look at its retail sales and ensure that it has procured sufficient electricity products to satisfy the RPS procurement quantity requirement (PQR) and procurement content requirement, which is typically completed once the compliance period has ended. In the scenario where a utility is short

in either PCC 1 RECs or RECs to meet the PQR, the utility is (as written in legislation) required to either request a reduction in PCC 1 or obtain a waiver in the PQR. According to Section 399.15(b)(9):

Deficits associated with the compliance period shall not be added to a future compliance period.

Given Section 399.15(b)(9), a rebalance of the Portfolio Content Category percentages would not be allowed, as this would require a retail seller to procure resources to satisfy a previous deficit. Further, LADWP postulates that a utility's reasoning behind a request in the procurement content requirement reduction would be similar, if not, identical to the justifications provided for a waiver. Therefore, as part of an administrative process, the CPUC could couple the processes of a request for a reduction and a grant of a waiver together.

As such, although not explicitly written in statute, LADWP urges the CPUC to reduce a retail seller's PQR for the compliance period when it grants a reduction in a procurement content requirement.

d. Penalty Amounts

Should the penalty amount for failure to meet RPS procurement requirements be kept at $50 / MWh for each MWh (i.e., REC) that the retail seller is below its PQR for the compliance period? Please provide rationales that address both legal and practical implementation perspectives.

In considering to "exercise its authority pursuant to Section 2113", there are three overall concepts the Commission may want to consider. One is applying a dollar per renewable energy credit (REC) with a ceiling value or a not to exceed value. A second one is to allow conditions that mitigate or avoid penalties based on conditions to encourage future compliance. And, a third, is to consider an Order to Show Cause hearing to assess, on a case-by-case basis, factors influencing non-performance with the state's RPS Program.

1. Dollar Per REC With a Ceiling

In the instance where a utility fails to obtain a waiver pursuant to PUC Section 399.15(a)(2) or a reduction pursuant to PUC Section 399.16(e), LADWP agrees that a penalty on $/REC is a workable concept, but with a ceiling value. LADWP concurs that the penalty amount for failure to meet the RPS procurement requirements should reflect the market value of the REC, but not with a penalty cost. This dollar amount, however, should be considered a preliminary ceiling value and should be coupled with additional criteria that would allow flexibility of the $/MWh penalty amount, including adjustments to reflect the varying market prices for PCC 2 and PCC 3 RECs.

Further, application of penalties should consider the following guiding concepts:

- Such that non-compliance is not considered a viable alternative to compliance;
- Penalties do not place an undue burden on utility ratepayers;
- Penalties adhere to the utility's adopted cost limitations;
- The Good Faith efforts of the utility to satisfy the requirements;
- Penalties do not exceed the costs of electricity products available in the market; and
- If there are conditions that could be developed to avoid the finding of penalties or to mitigate the penalties, to encourage a successful program to meet the targets.

The goal is to encourage compliance, not excessively punish utilities for noncompliance

2. Conditions to Mitigate or Avoid Penalties

It is also important that a process be developed for the utility to make its case to reduce a penalty amount or avert penalties altogether when a waiver is denied. Conditions can be suggested to achieve, during a time period, to reduce or avert the finding of a penalty.. If a utility is found non-compliant and failed to obtain a waiver because the CPUC/CEC believes that the utility could have done something within its control, such as acquired more PCC 1 to make-up its

shortfall for the target, then the utility should be afforded an opportunity to address the perceived deficiencies via conditions and achieve the sought after targets. In addition, the utility should be permitted to demonstrate that it made a good faith effort to achieve the targets, such as tried to procure additional PCC 1 RECs, but hit a roadblock with PCC availability in the market. In this scenario, a mechanism that would allow the utility to make its case would be noted by the CPUC in its findings and would mitigate the overall penalty amount or suggest the CPUC could impose conditions to achieve in order to more closely approach or meet the targets and avert the finding of penalties.

In one of its decisions for this rulemaking, R. 11-05-005, the CPUC discussed that it is important to "require a uniform date and method for requesting waivers."[5] It stated a need to "maintain a level playing field."[6] Though "fairness" in the waiver application process rings soundly, the concept of a level playing field among retailers for meeting electricity needs in California is as level as the state itself. There are a myriad of factors impacting electricity demand including weather, topography, migration patterns of people, tourism, seasons, and job growth, to name a few.

Unless a retail seller is able to over-procure a substantial amount of renewable energy during a compliance period, as a practical matter, it is simply not possible for a retail seller, or the Commission, to know in advance of the end of a compliance period that:

a. The retail seller has not met the procurement quantity requirement for that compliance period;

b. Whether any of the conditions set out in Section 399.15 (b)(5) actually existed that were beyond the control of the retail seller for that compliance period; and

[5] CPUC "Decision Setting Compliance Rules for the Renewables Portfolio Standard Program," Section 3.9 Enforcement, p. 81, D.12-06-038 (June 2012)
[6] Id.

c. That the retail seller has taken "all reasonable actions under its control . . . to achieve full compliance.[7]

Furthermore, it is apparent through the workshops, Commission decisions, and legislative intent that the Commission, staff, and the parties would rather focus on achieving a successful program meeting the targets than divert resources to "litigation based on a retail seller's prediction that it might fail to meet its procurement quantity requirement."[8] Having a focus on achieving a successful and robust program that takes into account the myriad of factors that could impact retail sales in different parts of the state is worthy of the Commission's efforts. Thus, it would seem to make sense that a utility could be encouraged to meet the RPS targets if it were provided conditions to achieve in order to avert the findings of penalties or to mitigate the impact of penalties on the retail seller.

Otherwise, with a proposed process to apply for a waiver only at the end of a compliance period and then wait for a decision sometime after a compliance period has ended will, in essence, force retail sellers to routinely apply for waivers at the end of every compliance period. Then only after a retail seller is able to account for, true-up, and verify whether it actually achieved the targets, will it seek to withdraw or amend its initial waiver application. Rather than be faced with an onslaught of waiver applications for every compliance period by most retail sellers, a process to allow for conditions or mitigations to avoid or reduce a penalty would serve the Commission and the retail sellers well as all parties seek to have a successful RPS program.

3. Order to Show Cause (OSC) Hearing With Penalty Ceiling To Encourage Compliance

---

[7] CPUC "Decision Setting Compliance Rules for the Renewables Portfolio Standard Program," Section 3.9 Enforcement, p. 81, D.12-06-038 (June 2012)
[8] Id.

For engaging in the penalty process itself, "the commission shall exercise its authority pursuant to Section 2113."[9] Public Utilities Code Section 2113 states

> "Every public utility, corporation, or person which fails to comply with any part of any order, decision, rule, regulation, direction, demand, or requirement of the commission or any commissioner is in contempt of the commission, and is punishable by the commission for contempt in the same manner and to the same extent as contempt is punished by courts of record. The remedy prescribed in this section does not bar or affect any other remedy prescribed in this part, but is cumulative and in addition thereto."

The judicial contempt process is found in California Code of Civil Procedure Section 1209 et seq. There are generally two ways a court may impose punishment for contempt. One is if the actions occur in the immediate view of the judge, while the other is if the actions do not occur in the immediate view of the judge.[10] If they do not occur in the immediate view, then there is an evidentiary hearing held to determine what happened and if there was indeed an action or actions that violated a court order or proceeding. The standard for finding contempt is a "willful" act or refusal to act.[11]

Since a violation of the RPS Program would generally not occur in the immediate view of the Commission; there should be a formal notice of "any part of any order, decision, rule, regulation, direction, demand, or requirement of the commission" of what the retail seller is

---

[9] Public Utilities Code Section 399.15(b)(8).

[10] California Code of Civil Procedure Section 1211.

[11] *R.C. Mc Farland v Superior Court of the County of Merced* (1924) 194 Cal. 407, 415; *Board of Supervisors v. Superior Court* (1995) 33 C.A.4th 1724, 1736, 39 C.R.2d 906; *Lattanzio Enterprises v PPD Corporation dba Northeast Gardens Water Co.* ; 1987 Cal. PUC LEXIS 307, 9-10 (Cal. PUC 1987) ("Essential to the charge of contempt is intent and that the conduct of the offender is willful"); *Re Facilities-based Cellular Carriers and Their Practices, Operations and Conduct in Connection with Their Siting of Towers* [D.94-11-018] (1994) 57 Cal.P.U.C.2d 176, 205

alleged to be in violation, a response by the retail seller should be permitted, and then, an evidentiary hearing to be held by the Commission.

"Served also is the legitimate police power device of "securing obedience" to the code requirements through penalties . . . that might achieve little or no compliance."[12] "[C]ivil penalties may have a punitive or deterrent aspect, [but] their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives."[13]

The important public policy objective is providing "unique benefits to California," including "displacing fossil fuel consumption," "adding new electrical generating facilities in the transmission network," and "reducing air pollution," to name a few.[14] With the Legislative goals in mind, an important task for the Commission is how to encourage compliance with the Renewables Portfolio Standard Program. With a variety of federal and state organizations already in existence just to monitor the transmission of electricity, the reliability of electricity, and development of generation, including many federal and state laws in place directly and indirectly impacting the development and operation of generation and transmission of electricity, a pure blunt penalty may not be the best approach to encourage compliance. A case-by-case assessment as to the factors influencing non-performance with the state's RPS Program may be a better approach to determine the most productive way to achieve compliance.

The Commission has visited similar language and reasoning before with prior PUC section 399.14(d), which did "not require the Commission to use its contempt powers, but rather

---

[12] *People ex rel. State Air Resources Bd. v. Wilmshurst* (1999) 68 Cal. App. 4th 1332, 1351(citations omitted.)

[13] *City and County of San Francisco v. Sainez*, (2000) 77 Cal. App. 4th 1302, 1315 citing *Kizer v. County of San Mateo* (1991) 53 Cal. 3d 139, 147-148

[14] Public Utilities Code §399.11(a) and (b).

direct[ed] the Commission to 'exercise its authority pursuant to Section 2113 to ensure compliance.'"[15] The Commission reasoned that "[b]ased on the plain language of section 2113, we reasonably concluded that we had options other than an OSC to encourage compliance with the RPS program. Further, based on consideration of comments provided by parties, we were persuaded that a process using pre-determined penalties would be more effective to encourage compliance with the RPS program than an open-ended OSC. [citations omitted]. Additionally, pre-determined penalties would provide due process by removing "the uncertainty of an open-ended order to show cause process with unspecified consequences for a utility ... The Commission's goal in setting this penalty is to create clear consequences for utility inaction and to provide further incentive to each utility to meet its APT." (D.03-06-071, pp. 50-51.)

However, there are several differences now with SB2 (1X), than with SB1078. Under SB 1078 there were annual percentage targets. Here there are multi-year compliance periods. Under SB 1078, the ultimate goal was 20%, now the goal is 33%, which is a much larger impact of intermittent and variable resources to the California grid. In addition, the portfolio content categories along with the procurement requirements is truly an exponential challenge to a utility as compared to the challenges posed by SB 1078. An Order to Show Cause hearing with a pre-determined penalty ceiling in dollars per REC, with an overall penalty cap, as discussed below, is reasoned and encouraging approach to achieve a successful RPS Program under SB2 (1X).

Therefore, LADWP recommends that the CPUC penalty amount for failure to meet the RPS procurement requirements is related to the market value of the PCC and this amount should be a preliminary ceiling value, which may be lowered or averted while considering all facts presented by the retail seller.

---

[15] Decision 03-12-065; Rulemaking 01-10-024, 2001 Cal. PUC LEXIS 1280, 21-22 (Cal. PUC 2001)

e. Overall Penalty Cap

Should the amount of the penalty cap be changed? Why or why not? Please provide rationales that address both legal and practical implementation perspectives.

LADWP believes that the penalty cap of $25 million needs to be modified to conform it to the needs of the new RPS mandate. The overall cap on yearly penalty caps needs to be readjusted on a case by case basis to take into consideration the respective size of the utility to ensure that penalties are not disproportional, especially given the wide gap on the retail sales between the largest and smallest IOU in the state, as is the case also for POUs. For example, in 2011, Pacific Gas and Electric had Retail Sales of 74,864 GWh while San Diego Gas and Electric's retail sales were 16,249.[16] The RPS penalty cap should be tied to the cost of compliance of the retail sellers.

Penalty caps should also encompass the entire compliance periods rather than being based on yearly targets. The compliance period allows utilities to carry forward excess and make up shortfalls from a previous year into the following year within the same compliance period. It also allows load serving entities to use alternative compliance mechanism as necessary within the compliance period.

[16] http://www.cpuc.ca.gov/NR/rdonlyres/53A5AE33-0954-4342-B8F2-1A04F67DFFB6/0/Section910Report.pdf

III. CONCLUSION

The LADWP appreciates the opportunity to submit these comments and looks forward to cooperating with the Commission in this proceeding.

Dated: October 25, 2013

Respectfully submitted,

By: _____

RANDY S. HOWARD
Director of Power System Planning and Development
and Chief Compliance Officer – Power System
Los Angeles Department of Water and Power
111 N. Hope St., Suite 921
Los Angeles, CA, 90012
Telephone Number: (213) 367 – 0381
Email: Randy.Howard@ladwp.com